

CONSTITUTIONAL PROVISIONS ON UNION RIGHTS IN TURKEY: A COMPARATIVE REVIEW

Nilgün Ongan

Istanbul University, Faculty of Economics,
Department of Labour Economics and Industrial Relations
34126, Beyazıt, Turkey
Telephone (90) 212 440 00 00 / 11 535
E- mail: nilgun.ongan@istanbul.edu.tr

Received on 27 March, 2012; accepted on 14 July, 2012

***Abstract.** In Turkey, the development of a labour movement under relatively independent circumstances was not allowed historically, and supervision via legislation has regulated the union rights within narrow patterns. For this reason, in order to assess the development of the labour movement in Turkey, the essential characteristics of the political culture must be taken into consideration in addition to the objective conditions of the economy and the efforts to be articulated to international capitalism. Yet, the regulations in force are far behind the international norms which, in fact, do not threaten global capitalism. Constitutional regulations neglect the political function of trade unions and restrict the right to establish trade unions by a series of abstract security concerns. Public officials are excluded from the right to strike and the strikes are limited by the conflict of interests. Furthermore, the Government authority on strike postponement is reduced to a ban on strikes by means of mandatory arbitration regulations which are under Constitutional guarantee.*

***Keywords:** union rights, Turkey, right to strike, political culture.*

Introduction

Turkey encounters a series of criticisms regarding the standards of union rights in the international area. It was included in the agenda of the ILO Application Committee, ever and anon in the special paragraph, and omissions pertaining to the union rights have been emphasized in many of the Progress Reports issued by the EU. Hence, The Progress Report of 2011 indicates that the current legal framework is also not conformable with the EU norms and ILO Conventions. The legal progress achieved was considered limited and attention was called to the disproportionate force applied by law enforcement bodies in order to preclude the actions related to the union rights.

However, almost all of the legal regulations done in Turkey are based on the aim of conformity with the EU and ILO norms. As the regulations on union rights of the Constitutional amendment of 2012, the justification of the draft law on labour relations has also been prepared with the same approach. Within this framework, the regulations required in the field of union rights are indicated as one of the prerequisite criteria for the negotiations of “social policy and employment” chapter and the aim of harmonization of incompatible norms are stressed.

As for harmonization discussions, different interpretations and approaches come into prominence. For instance, the Government precludes a series of remedial regulation related to the right to strike for the reason that these are not binding harmonization criteria while a significant part of the worker unions bases their claims on ILO norms and the EU *Acquis Communautaire*. Therefore, the interpretation issue is important to put forward to what extent the union rights are binding in the presence of the EU and ILO as well as the harmonization responsibilities of the candidate countries. The discussions related to this topic are usually resolved and clarified through the European Court of Human Rights (ECHR) decrees.

Discussing the union rights within the working dynamics of capitalism rather than the context of the international standards, suggests a different approach in terms of the resource of the claims. Such an approach is very important with respect to address the class results of the EU Candidatship. It is based on the class analysis of the social policy and comes up for discussion to what extend the international norms can contradict with the cyclical needs of global capitalism. According to this, a system characterized by capital domination inevitably renders the corrosion of democratic rights for the non-capital social stratum.

Within this framework, Müftüoğlu brings into question the unionisation ever weakening in the EU countries. Through the report of the International Confederation of Free Trade Unions (ICFTU)¹ on the labour standards in the EU (2004), he indicates that in some EU Member States the right to organize and strike is precluded while in some other there are severe problems in exercising such right.² Similar determinations are reflected in the report of 2009 as well. Notwithstanding, the ILO Fundamental Conventions regarding the union rights have been ratified by the entire EU Member

1 ICFTU, annulled itself with the establishment of ITUC in 2006.

2 Müftüoğlu, Ö. AB'ye Üyelik Sürecinin İktisadi ve Toplumsal Boyutları. *Türkiye Sosyalist İktisat Kongresi*. İstanbul, 2005.

States, inadequacies regarding the prevention of anti-union discrimination and the right to strike are expressed, particularly in the new Member States. Nevertheless, in some old Member States as Belgium, France, Greece and UK increase in the attempts to limit the right to strike is remarked. As for the proportionality assessment of ECJ in cross-border situations within the EU is indicated to weaken the principle of legality of the collective actions and is against to the freedom of association.³

Akkaya suggests that the integration process narrows the social policy field actually within the EU, particularly with respect to social security and laws on labour relations. He indicates that even the Governments established by the social democratic parties sometimes corrode the social rights in order to accelerate the capital accumulation. From his viewpoint, membership would not bring the advanced regulations for Turkey, expected in the field of social rights and social policy. Furthermore, he points out that the ILO norms are at the EU standards and argues for the inessentiality of the EU Membership in terms of putting the regulations at this standard into practice.⁴

On the contrary, Çelik suggests that Turkey is far behind the EU standards in the field of social policy and the union rights, and indicates that the harmonization process contains significant opportunities as regards to the social rights. Emphasizing that the EU process is not a magic wand, he points out the difference between Anglo-American capitalism and European capitalism and argues that such a difference cannot be neglected in terms of the working rules of capitalist laws.⁵

As for this study, social policy has a limited potential for class acquisition due to being a field pertinent to capitalism. Therefore, the international institutes, organizations and norms are not considered as assurance for working class. However, the essential aim of the study is to research to what extent the constitutional regulations on union rights conform to the requirements of those international standards. This is because; both the ruling party and the opposition in the Parliament have focused on this issue as well as the public opposition who has made claims upon particularly within this context.

From this view point, following the first chapter putting forward the outlines of the historical development of the Turkish union legislation and the impact of the political culture on this process, the question of harmonization with the international standards is reviewed in regard to constitutional regulations.

1. Development of Labour Union Legislation: Historical Background

Labour unions in Turkey have not developed as a result of labour movement, as in the West, but turned into an institution within the framework considered necessary by the political authority. Initialized by the approval of the political power, labour unions were

3 ITUC(2009): Internationally Recognised Core Labour Standarts In The European Union [interactive]. [accessed on 02-17-2011]. <http://www.ituc-csi.org/IMG/pdf/FINAL_EU_CLS_2009_report_1_.pdf>.

4 Akkaya, Y. Yetiş Ya Avrupa Birliği, 2004 [interactive]. [accessed on 02-17-2011]. <http://www.sendika.org/yazi.php?yazi_no=895>.

5 Çelik, A. *AB Emeğe Zararlı mı?* Birikim, 2004, p. 187.

developed and limited by state. From this point of view, labour unions that criticized for evolving into bureaucratic organizations in the West have already been emerged in this form in Turkey.⁶

The limited number of legal regulations of the Ottoman Period which are authoritarian in nature have been extended to the Republic Period and continued to determine the labour relations.⁷ With the introduction of Ottoman Strike Act (Tatil-i Eşgal Kanunu, 1909) unionization in public services was banned and severe restrictions were brought to strike. Where, The Law on the Maintenance of Order (Takrir-i Sükun Kanunu, 1925) abrogated the right of association and interdicted any sort of professional or political organization.

In 1936, The Labour Act No. 3008 addressed the labour relations integrally for the very first time and both individual and collective labour relations were regulated together with assigning a determinative weight to the State with respect to collective labour relations. This law institutionalized representation of the workers without mentioning the labour unions, banned both strike and lockout and regulated mandatory arbitration system for the resolution of disputes in collective labour relations.⁸

Introduction of the Law of Association (Cemiyetler Kanunu, 1938) has prohibited the establishment of association on class base and this prohibition has lasted until the adoption of the new Law on Associations (1946). With the removal of the ban many unions were established and became operational.⁹ After all, the first Trade Unions Law of the Republican Period was adopted in 1947, but the ban to strike continued until the 1960's.

Late industrialization and the limited share of the wage earners are considered the principals of the insufficient development of unionization. Nevertheless, the modernization process of Turkey, the nature of the dominant political culture and the characteristics of the social structure are also the factors not to be neglected for either the development process or the current situation of union movement.

The political process has been designed by the single- party government and its populism ideology until 1946. Holding on the basis of a sociological perspective against conflict, the populism ideology has considered the society as an organic whole made up various profession groups and has rejected the presence of the social classes and class diversity of interests.¹⁰ The institutional structure of the regime has been protected even transforming into a multi-party system in 1946. The constitutional regulations about the fundamental rights and freedoms deprived the social opposition of supervising the government. A judicial review as well was not regulated for government actions. Within this context, the Government changed with the first general elections in a multi-

6 Koray, M. *Değişen Koşullarda Sendikacılık*. TÜSES, İstanbul, 1994.

7 Makal, A. Cumhuriyet'ten 21. Yüzyıla Türkiye'de Çalışma İlişkileri. *Cahit Talas Anısına Güncel Sosyal Politika Tartışmaları*. Ankara Üniversitesi Siyasal Bilgiler Fakültesi, Yayın No: 595, Ankara, 2007.

8 *Ibid.*, p. 517.

9 Özkiraz, A.; Nuray, T. Sendikaların Doğuşu; Türkiye ve Batı Avrupa Ülkeleri Karşılaştırması. *Sosyal Bilimler Araştırmaları Dergisi*. 2008, 2: 120.

10 Makal, A., *supra* note 7, p. 516, 517.

party environment in 1950. However, a majority approach has dominated instead of a democratic settlement.¹¹ As of the 1960's, Turkish political life has periodically encountered military interventions.

According to Öztürk, the insufficient development of Turkish labour unions is a result of the ideological approach of the State towards the organized society as well as the traditional cultural codes particularly including the prohibitive solidarity practices. Stating that the political culture inheres “*solidarist, paternalist, populist, elitist, congregational and patrimonial elements simultaneously,*” she points out the anti-conflict perspective raised and mentions that this is why unionization could not be able to work within its own dynamics.¹²

As for Urhan and Çelik, the “national security” perception of the regime has critical impact for addressing the historical circumstances in which the union movement has emerged and developed in Turkey. They indicate that such perception has an autonomous effect on the labour union movement.¹³

Hence, during the legislature discussions of the Trade Unions Law adopted in 1947, the importance of the state regulation was defended with respect to prevent the risk of the labour unions heading towards “dangerous” trends via politization, in line with the ideological ambience of the period. It was clearly mentioned that these newly emerging associations should be structured through the notion of nationalism and statism.¹⁴

From this point of view, Akkaya and Güngör emphasize that during the period of 1947-50 the State attempted to prevent the potential oppositions via integrating the labour unions with the system. According to this, the working class and their unions became the main actors that the State benefits from, in terms of nationalism principle of the official ideology. Yet, in addition to forming the group to be nationalized, the unions are significant in terms of socialization of this ideology as an organized group.¹⁵

After transition to a multi-party system, the 1960's is the period in which the national characteristic of global capitalism reveals itself. The target of expanding the domestic market led to proliferation of welfare policies all around the world, and collective bargaining became widespread in the field of labour relations. In the same period, Turkish economy entered into the planned stage of capitalist accumulation through the adjustment process provided by a military coup. After the military coup of 1960, the Constitution prepared in 1961 regulated the right to establish trade unions together with collective bargaining and the right to strike. Following that, Trade Unions Law No. 274 and Law on Collective Bargaining, Strike and Lockout No. 275 were adopted in 1963.

Since the Constitution did not limit the union right with the workers, it was possible also for public servants to exercise this right. In 1965, the Law on Trade Unions for

11 Karadağ, A.; Zafer, A. Kurumsal Güvencelerin İşlevsizlik Kavşağındaki Demokrasi: Türkiye, Mustafa Kemal Üniversitesi. *Sosyal Bilimler Enstitüsü Dergisi*. 2009, 6(11): 164, 165.

12 Öztürk, A. Siyasal Kültür Bağlamında Türkiye’de Devlet- Sivil Toplum İlişkisi: Sendikacılık Örneği. *Bilgi*. 2007, 1(14).

13 Urhan, B.; Seydi, Ç. Türkiye’de Sistemin “Milli Güvenlik” Algısı ve Bunun İşçi Hareketleri ve Sendikacılık Faaliyeti Üzerindeki Etkisi. *Çalışma ve Toplum*. 2010, 2(25): 111.

14 TBMM Tutanak Dergisi, 8. Dönem, C: 4, 47. Birleşim, 1947, p. 297, p. 301.

15 Akkaya, Y.; Fatih, G. Düzen ve Kalkınma Arayışları İçinde Türkiye’de Sendikacılık ve Milliyetçilik. Tarih ve Milliyetçilik, 1. *Ulusal Tarih Kongresi Bildiriler, Mersin Üniversitesi (30 Nisan- 2 Mayıs), 1997.*

Public Officials No. 624 was adopted. However, with the constitutional amendment following the military memorandum in 1971, the right unionize was limited with solely the workers.¹⁶ Also during period in which the Constitution enables the association of the public officials, the right to strike and collective bargaining were limited with only the workers. Moreover in this period, the strike prohibitions were regulated in Law No. 275 and “strike postponement” has been included in the labour legislation (art. 21).

“National security” has been regulated as one of the grounds for strike postponement. However, this concept has not been recognized at the legal or constitutional level. Regulating such an abstract notion as a base for the limitation of a right has often been criticized in the doctrine and attention was drawn to the fact that it should be *narrowly* interpreted.¹⁷ The scope and borders of the “national security” notion were rather determined by the adjudications and in its decree no 1974/ 13 the Constitutional Court has considered that the notions “national security” and “public order” are the general terms that are convenient to subjective interpretation, can be expanded according to the individual perception and can lead to various practices, even arbitrariness.¹⁸

In another provision of Law No. 27, the workers in the workplaces operated by the Ministry of National Defence, Interior Ministry and Gendarmerie General Command, in exercising their right to strike were tied up to the condition of determination by the High Board of Arbitration (YHK) of the fact that the working and wage conditions are against the workers (art. 20/ 11). In the continuation of this regulation, in case the same conditions are determined to be against the employer by YHK both situations are going to be realized upon the request of the parties and may result even in a lockout decree. With this provision, a lockout in the military workplaces has lost its character to be a *reaction right against strike* and was disciplined independent from the strike status.

The 1980’s reflect the integration stage of Turkish economy with international capitalism. Again, in the transition period, a military coup is observed. After the military coup on 12th September 1980, with the memorandum of the National Security Council (MGK) the ongoing strikes were terminated and strike was prohibited.¹⁹ The activities of many confederations and their affiliated unions were ceased, their assets were confiscated and the directors of certain confederations were arrested. Among the confederations the activities of which were ceased, Hak-İs Trade Unions Confederation (Hak-İs) inclined to Islam after 6 months and Confederation of Nationalist Trade Unions (MİSK) came into activity again after 4 years. However, the Confederation of Revolutionary Trade Unions (DİSK) was shut-down and was put on trial in the military court until 1991. In 1991, the Military Court of Cassation revoked the decision on the shut-down of DİSK, the directors were acquitted, but the assets of DİSK and affiliated unions were not returned. In the same year, DİSK had a meeting of the general assembly and restarted its activities. The return of assets was realized in 1992.²⁰

16 Makal, A., *supra* note 7, p. 526.

17 Kutal, M. Bakanlar Kurulu Tarafından Ertelenen Grevler. *İktisat ve Maliye Dergisi*. 1997, 13(12): 506 & Çelik, N. İş Hukuku Dersleri. *Beta Yayınevi*. İstanbul, 1998, p. 556.

18 Çelik, A. Milli Güvenlik Gerekçeli Grev Ertelemeleri. *Çalışma ve Toplum*. İstanbul, 2008, 3(18): 91.

19 Özveri, M. Sendikal Hak ve Özgürlüklerde 2010 Anayasa Değişikliği. *İş'te Çalışanlar*. 2010, 4: 28.

20 Çetik, M.; Akkaya, Y. Türkiye’de Endüstri İlişkileri. *Türkiye Ekonomik ve Toplumsal Tarih Vakfı*. İstanbul, 1999, p. 124.

After the enforcement of the new Constitution in 1982, Trade Unions Law No. 2821 and the Law on Collective Bargaining, Strike and Lockout No. 2822 were adopted in 1983. Through these new regulations, on the ground of “establishing strong labour unions,” the freedom of establishing trade unions was limited within the sector level, the federations were prohibited and it was adjudicated that the workers could not members of more than one union at the same time. Trade unions, in order to obtain the authority for collective bargaining, were conditioned to double threshold trial (*double criteria*) in levels of representation.²¹ Furthermore, the strike bans were increased, strike postponement was converted into a constitutional provision and constitutional regulations are still in force, which envisage the resolution of disputes to last after the postponement period to be solved by the mandatory arbitration were introduced.

International labour law admits the requirement of positive action of the State in order to exercise the union rights. In the contrary, the state policies in Turkey have chosen the way of prohibition and restriction historically. The repressive mindset that emerged before the Republic continued in the Republican period and except for some certain regulations from 1960 reached today without losing their influence.²² The constitution of 1982 is still in force and has many amendments until today. However, many regulations limiting the union rights are still valid. These regulations are elaborated in details in the further chapters of the study.

2. International Legal Basis for the Indivisibility of Union Rights

The main goal of the unionization is to prevent the employer to determine the working conditions unilaterally using his power coming from the capital. For this reason, the power and claim of the unions in preserving the rights of their members essentially originates from the power of collective bargaining process. To which extent the parties may be effective in such bargaining is shaped according to the capacity of forcing the other side. Hence, the right to strike is the assurance of the collective agreement system for the workers.

The dominant perception in the doctrine is that the coercive character of the right to strike should not be comprehended as a threatening element, but should be considered in the context of *integrity of the right*. The legal basis for such perception is available in certain international document, in the approaches put forward by international supervision bodies and the ECHR decisions that refer to these.

For example, in article 6 of European Social Charter (revised) the right to strike is regulated clearly within the scope of the right to collective bargaining. And in article 28 of EU Fundamental Rights Charter (2000) it is stated that “...in cases of conflicts of interest, to take collective action to defend their interests, including strike action.”

21 In order to obtain the power of making collective agreement at workplace or enterprise level for a worker's union, it has to represent at least 10% of the workers in the sector it is established as well as one more than half of the workers employed in the workplace or enterprise level.

22 Özveri, M., *supra* note 19, p. 28.

As for ILO, the approach pertaining to right to strike is shaped essentially through the decisions of the supervisory bodies. According to Gülmez, they have a function similar to ECHR although they are not judicial bodies. Hence, provision of legal conformity to the Conventions requires the performance of supervision through the supervisory bodies.²³

ILO supervisory bodies admit the right to strike is assured within the scope of some certain articles in Convention No. 87 as an integral part of the right to unionize. Despite there is no clear provision, the supervisory bodies advocate that any general restriction to be introduced to the right to strike will breach the rights and opportunities envisaged by the concerned Convention.²⁴

According to ILO Committee on Freedom of Association and committee of Experts, strike is defined as a fundamental right in terms of employees and their unions. The approach that the employee categories deprived of this right should be narrowed. Besides, the right to strike cannot be the subject of any prejudiced punishment and such an approach is considered discriminating attitude towards the unions.²⁵

On the other hand, ECHR has systematically changed the narrow and strict positivist approach on the substance of the union right and adopted that there is an organic bond between the freedom of association right and both collective bargaining and the right to strike. This approach dominating its decisions about Turkey between 2006-2009, asserts the legal assurance of the approach on indivisibility of union rights. Besides, its references to the supervisory bodies as a method of interpretation in its decisions on the union rights, is regarded as providing the views of the supervisory bodies with the characteristic of “adjudication.”²⁶

Nevertheless, the “binding aspect” of the union rights at EU level is still under debate either in academic or political environments and article 137 of Amsterdam Treaty is at the focus of these debates. According to the paragraph 6 of the concerned article, right to organize and right to strike are excluded from the scope of the area about which the Community can take decisions. For this reason, Gülmez approach stating that “*the union rights are the stepchild of the harmonization process*” is still under debate actually in terms of the integration process in addition to his emphasis with respect to Turkey’s harmonization process.²⁷

On the contrary, Çelik proposes that the provision in article 137 should be considered as exception and interpreted narrowly. According to him, the union rights

-
- 23 Gülmez, M. Sendikal Haklara İlişkin Sözleşmelerin İç Hukuka Üstünlüğü ve Yasalarımızdaki Aykırılıklar. *Çalışma ve Toplum*. İstanbul, 2005, 1(4): 44.
- 24 Erdayı, U. Türk Mevzuatının Sendika Özgürlüğüne İlişkin 87 Sayılı Uluslararası Çalışma Örgütü Sözleşmesi’ne Uyum Sorunu. *Süleyman Demirel Üniversitesi İktisadi ve İdari Bilimler Dergisi*. 2009, 13(3): 220, 221.
- 25 Gernigon, B.; Odero, A.; Guido, H. ILO Principles Concerning the Right to Strike [interactive]. 2000 [accessed on 10-29-2010]. <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087987.pdf>.
- 26 Gülmez, M. Sendikal Hakların Bölünmezliği: Toplu Sözleşmesiz ve Grevsiz Sendika Hakkı, Özünden Yoksundur. *Çalışma ve Toplum*. İstanbul, 2010, 3(26): 9, 40, 41.
- 27 Gülmez, M. Uyum Düzenlemelerinin Üvey Evladı: Sendikal Haklar. *Anayasa ve Uyum Yasaları*. Ankara: Türkiye Barolar Birliği Yayını, 2002.

are assured at the contractual level as political criterion. Thus, it stands for more superior assurance than the directives foreseen by the concerned article. The EU, in not having the power to prepare a directive on union rights, does not liberate the Member States and candidate countries from the responsibility of assuring these rights either by legislation or in practice.²⁸

Moreover, according to the Court of the Justice, the Community Law protects fundamental rights. Thus, the ILO Conventions no 87, 98 and 151 are included in the Community acquisition. Besides, regarding the ILO norms and the reports of the supervisory bodies for the preparation of the Progress Reports, The European Commission has a tacit adoption of this approach.²⁹

3. Legal Basis for Union Rights in Turkey

1982 Constitution which has been the final shape by the National Security Council after the military coup in 1980 is still in force. The Constitution was amended for many times until today and ultimately with the Law no 5982 in 2010. The scope of the Law no 5982 comprises regulations related to the union rights as well and the aforementioned amendments have entered into force after the referendum. In this part of the study the provisions used to exist before the amendment are examined, followed by the evaluation of the scope of the Law no 5982 and successive changes.

3.1. Constitutional Provisions Regulating Union Rights

There are provisions in the Constitution about the right to establish trade unions (art. 51), the right to collective agreement (art. 53) and the right to strike (art.54). In particular, detailed regulations took place about the *right to strike* and the exercising of it has been limited either by direct prohibitions or by a series of restricting provisions. According to Özveri, the regulations in article 54 are the most evident ones that demonstrate the pro- coup mindset is to collective rights. He mentions that this article is written “*in an approach to limit and preclude the practice of these rights*” rather than assuring the right to strike. Therewithal, another characteristic of article 54 is the fact that it has not been changed until the recent amendment of the Constitution and conserved its provisions since the coup period until today.³⁰

The regulations brought in 1982 (art. 54) limited the implementation of strikes with only the conflicts that arise during the bargaining process and did not allow to strikes for conflicts resulted from the implementation of collective agreement. The collective actions as strike with political grounds, solidarity strike, general strike and occupation of workplace together with slowdown of work and performance reduction were directly prohibited. Furthermore, the situations of prohibition and postponement

28 Çelik, A. Avrupa Birliği Sosyal Politikası: Gelişimi, Kapsamı ve Türkiye'nin Uyum Süreci-1, 2004 [interactive]. [accessed on 19-10-2011]. <http://www.kristalis.org.tr/aa_dokuman/absosyalpolitikasi1.pdf>.

29 Gülmez, M., *supra* note 23, p. 46.

30 Özveri, M., *supra* note 19, p. 29.

of the strike were adjudicated to be disciplined by Law. Detailed regulations have been done in the postponement and it was adjudicated that disputes remained at the end of the postponement should be resolved by the High Board of Arbitration (YHK). The relevant article arranges that the decisions of YHK have the force of collective agreement and definitive judgement.

Article 54 rendered the workers and the union liable for the material damage occurred in the workplace during the strike due to the misconduct and intentional behaviour. Another provision is that the right to strike cannot be exercised in contrary to bona fides, in the public nuisance and in the manner to destroying the national wealth.

Kutal draws the attention to the difficulty in determining the borders of the notions as “breach”, “nuisance” and “destroy” in a collective bargaining process based on mutual conflicts and emphasizes severe concerns about the right to strike.³¹

As for public officials, the political environment in which the Constitution was prepared did not tolerate unionization, nor had a provision to directly prohibit this. From this point of view, it was defended that there is no constitutional obstacle against the unionization of the public officials, particularly in the scientific ambience. After the ratification of ILO Conventions No. 87 and 151, in 1993 many public official unions were established.³² In 1995, the right to establish trade unions and superior organizations for public officials was regulated in Constitution (art. 53). However, these unions were out of the scope of the collective agreement and right to strike. It was governed as these organizations could make *collective negotiation* with the management but regardless of reaching an agreement or not the consequence should be left to the discretion of the Council of Ministers. Kutal states that “*it is even not possible to understand properly whether the right to organize has been granted to the public officials or not.*”³³

Apart from the provisions about public officials, the regulations on the right to establish trade unions (art. 51) are also under debate. According to the relevant article, establishing unions, becoming member and dropping out does not require permission. However, the right to establish trade unions is limited with the scope of protection and improvement of the economic and social rights only within the labour relations.

In this regard, neglecting the characteristic of trade unions as a pressure group and their political function, the Constitution adopts a unionization approach based on the “wage conscious”. Such an approach is the reflection of the concerns against the collective rights and freedoms and aims to minimize the political activities of the working mass.³⁴

Besides, the relevant article mentions that the right to establish trade union can be limited by law on the grounds of preserving national security, public order, prevention of crime, social health and morality, as well as the rights and freedoms of the others.

31 Kutal, M. Uluslararası Çalışma Normları Karşısında 1982 T.C. Anayasası'nın Grev Hakkına İlişkin Hükümleri. *Osman Güven Çankaya'ya Armağan*. Ankara: Kamu İşverenleri Sendikası, 2010, p. 327.

32 Kutal, M. Uluslararası Çalışma Normları Karşısında Kamu Görevlilerinin Sendikal Örgütlenme Haklarına İlişkin Bazı Gözlemler. *Kamu- İş Dergisi*. 2002, 6(4).

33 Kutal, M., *supra* note 32.

34 Işıklı, A. *İş Hukuku, İmaj Yayıncılık*. Ankara, 1996 & Tanör, B. *İki Anayasa, Beta Yayınevi*. İstanbul, 1994. Cited in Aydın, M. Anayasa Mahkemesi Kararlarında Sendika Özgürlüğü. *TÜHİS*. 2006, 20(1-2).

“The legislations, management and functioning of the trade unions and the superior organizations cannot be contradictory to the fundamental characteristics of the Republic and the basis of democracy” is stated. Moreover, in this article the provision often criticised by ILO *“one cannot be member of more than one trade union at the same time and in the same industry simultaneously”* is also regulated.

3.2. Scope of Law No 5982

The sole change introduced regarding the right to establish trade unions was the removal of the provision *“one cannot be member of more than one trade union at the same time in the same industry simultaneously”* from the Constitution (art. 51/4).

On the other hand, the most important amendment is the addition of the provision *“the officials and the public servant have the right to make collective agreement”* (art. 53). According to this, the conciliation or dispute situation reached at the end of the negotiations is excluded from discretion of the Council of Ministers. In case of conciliation, collective agreement is going to be signed and implemented. On the contrary, in case of disputes the parties could apply to the “Arbitration Council of Public Officials” The decisions of the Council have the force of collective agreement and definitive judgement. Another regulation executed in the field of collective agreement is the removal of the provision *“more than one collective labour agreement cannot be signed and implemented in the same workplace for the same period”* (art. 53) from the Constitution.

As for the right to strike, two provisions have been removed from the Constitution (art. 54). The first one is that which renders the union liable for material damage that occurred in the workplace due to the intention and misconduct of the workers participating in the strike (art. 54/3). And the other is the one that prohibits the collective actions as strike with political grounds, solidarity strike, general strike, occupation of workplace, slowdown of work and performance reduction (art. 54/7).

4. Compliance of Constitutional Regulations with the International Standards

4.1. Constitutional Regulations on Freedom of Association

Turkey has been discussed in the agenda of the ILO Application Committee mostly in terms of the Convention No. 98. Similarly, in the Reports of the Experts’ Committee the most criticisms were in context of the Conventions No. 87 and 98, too. Furthermore, the criticisms of the Experts’ Committee on the union rights of the public officials are also based on the same conventions.³⁵ Considering the constitutional regulations with

35 Dereli, T. Uluslar arası Çalışma Normları, Sendika Özgürlükleri ve Türkiye: ILO Eleştirileri Açısından Yeni Yasa Taslağının Değerlendirilmesi. *AB-Türkiye & Endüstri İlişkileri*. Hekimler, A.; Yayınevi, B. (eds.). İstanbul, 2004, p. 168.

respect to these, the amendments done appear to be insufficient. Nevertheless, it is worth mentioning that some certain expectations of ILO about the freedom of association are debatable in the doctrine.

For instance, the amendment that enables the workers to be members of more than one trade union simultaneously was welcomed by ILO. However, it receives various criticisms in the doctrine. In this context severe challenges about potency would be encountered together with the question of “which way to follow” in case of contradiction among the collective agreements under the condition of multi representation. On the other hand, all these complicated processes have some risks of eradicating association and fortifying the yellow unions. However, this amendment can be turned into an advantage for the workers who are working in more than one workplace belong to different industries within a flexible employment relation.³⁶

At this juncture, the limitation on grass roots—not mentioned in any constitutional regulation—is also criticized by ILO in the same vein. However, there are different opinions about this subject in the doctrine. For instance, Erdayı argues that it is necessary to consider the subjective conditions of one country as much as the notional advantages related to the type of unionization and asserts that industrial unions is an appropriate regulation in terms of the historical and social circumstances of Turkey.³⁷ On the contrary Çetik and Akkaya remind us that nearly all of the industrial unions today have been formed as a result of the structural transformation of the trade unions established at workplace level in the past.³⁸ Hence, prohibition of workplace unionism has preventive effect actually on the development of industrial unionism.³⁹

Going back to the Constitutional amendment, the unionism approach to neglect the political function of the trade unions still continues. The provisions limiting the right to establish trade union by notions as “national security” and “public order” were retained in the Constitution (art. 51). However, Aydın upholds that such limitations are conformable to the European Convention on Human Rights (ECONHR)⁴⁰ where the provision “*the legislations, management and functioning of the trade unions and the superior organizations cannot be contradictory to the fundamental characteristics of the Republic and the basis of democracy*” is not.⁴¹

36 Güzel, K. E. Anayasa Değişikliği ve Sendikal Haklar, 2010 [interactive]. [accessed on 10-12-2010]. <http://www.sendika.org/yazi.php?yazi_no=31895>.

37 Erdayı, U., *supra* note 24.

38 Çetik, M.; Akkaya, Y., *supra* note 20.

39 Işıklı, A. 1960-1986 Döneminde Türkiye’de İşçi Hakları. *Türkiye’de İşçi Hakları (Osmanlı Döneminden 1986 Ya)*. Ankara: Türkiye Yol- İş Sendikası, 1986 & Işıklı, A. cited in Çetik, M.; Akkaya, Y., *supra* note 20, p. 122.

40 In order to avoid confusion with The European Court of Human Rights (ECHR), The European Convention on Human Rights is abbreviated as ECONHR within this text.

41 Aydın, M., *supra* note 34.

4.2. Constitutional Regulations About Public Officers and ECHR Decisions

The right to collective agreement granted to public officers is incomplete, since it does not cover the right to strike and has a characteristic far from meeting the international judicial decisions. Yet, Turkey has been condemned many times by the ECHR for the limitations on the union rights of public officials and the ban of strike. Moreover, the decisions of the Court on *the public officers participating in the strike* initialized new debates in the doctrine.

Satılmış and Others v. Turkey case (No. 74611/01, 26876/02, 27628/02; Judgement of 17-07-2007) is related to the public officers employed in the toll collection units of the Bosphorus Bridge. They left the toll booths and stopped working in order to protest the working conditions in direction of the decision of their union and were condemned. However, ECHR judged that the sanctions applied to the applicants were not required in a democratic society and article 11 of ECONHR has been violated.

According to Candoğan, this decision should be interpreted as “the assurance of the right to strike of public officers.”⁴² But Balcı, on the other hand, points out that the Court has used the expression of “collective action” instead of “strike” in its decision and whether each kind of work stoppage can be considered as strike or not is debateable. According to her, the permanent case law of ECHR protects the right to unionize but not collective agreement and strike within the scope of article 11 of ECONHR.⁴³ Similarly, considering *Gustafsson/Sweden* (App. No. 15573/89) decision, Sur also criticises ECHR for not addressing the union rights in context of indivisibility principle.⁴⁴

As for *Urcan v. Turkey* case (No. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04, 23676/04; Judgement of 17. 07. 2008), ECHR considered the punishment received by public officers—for stopping work for 1 day through the decision of their union—as intervention to the right of freedom of the union. Concluding that the sanctions applied to the applicants were not required in a democratic society, ECHR judged that article 11 of ECONHR has been violated. Even so, certain jurists have criticised also this decision with respect to the complete assurance of right to strike.

For instance, according to Gülmez, this decision shows that ECHR has considered the right to strike within the context of union rights assured in article 11 of ECONHR. But he still criticises the decision for not making references to European Social Charter (revised) and Convention no 87 to secure the right to strike substantially.⁴⁵

The decision of ECHR in *Enerji Yapı-Yol Sen/Turkey* case (No. 68959/01; Judgement of 21-04-2009), after all, concludes discussions on the assurance of right to

42 Candoğan, G. Memura Grev Hakkına AİHM Güvencesi. *Radikal İki*. 9 Aralık, 2007.

43 Balcı, Ş. G. Avrupa İnsan Hakları Mahkemesinin “Satılmış ve Diğerleri/ Türkiye” Kararı. *Çalışm.a ve Toplum*. İstanbul, 2008, 2(217).

44 Sur, M. Avrupa İnsan Hakları Divanı'nın Gustafsson/İsveç Kararı. *Kenan Tunçomağ'a Armağan*. İstanbul: İÜHF, 1997.

45 Gülmez, M., *supra* note 26, p. 37.

strike within the scope of ECONHR (art. 11). In this decision, to judge that article 11 of ECONHR has been violated, the Court has clearly mentioned the right to strike and its importance for unions through references to both ILO supervisory bodies and Social Charter (revised). On the other hand, in this decision ECHR states that some restrictions can be introduced to the right to strike depending on certain conditions. However, a full prohibition to apply to the public officers in general is beside the mark. In the context of the limitations brought to the right to strike, it is stated that the public officer categories subject to the limitation should be defined as clear and limitative as possible.

The defence of the Turkish Government in ECHR is based on the reservations made to European Social Charter (revised) (art. 5, art. 6) and the opinion that the ILO Conventions No. 87 and 151 do not force the states to recognize the right to strike, is defended. Departing from the fact that the decisions taken by the supervisory bodies of ILO are not binding, the thesis that one state cannot be liable for the articles which are not ratified is put forward. Moreover, the Turkish Government stresses the situation of the public officers in the national legislation and claims that they are subject to a separate and quite detailed regulation.

On the contrary, Gülmez argues that the reservations made to European Social Charter (revised) would not exempt Turkish Government from assuring the rights regulated in these articles. Stating that the same articles appear in the first chapter of the Charter as the principles on which the party countries have agreed, he mentions that the states that have ratified the Convention are liable for the annulment of the union restrictions in their national legislation.⁴⁶

Hence, the contemporary approach of the ECHR within the context of “advanced normative interaction” is an integrated one regardless of the ratification of the international law conventions. The Court employed such an approach to the Demir and Baykara/Turkey case (No. 34503/97; Judgement of 12. 11. 2008) about the right to collective agreement for the public officers and used this in its other decisions, making reference to this one.⁴⁷

Apart from the requirements of judicial compliance, regulations about public officers are also quite distant from meeting the social expectations. The first article of the Final Declaration of the “Workshop on Union and Democratic Rights of the Public Officers” organized by the State Personnel Administration in 2010 states “*Since the right to collective bargaining and to strike of the public officers exist in the international conventions on human rights ratified by Turkey, regulations to enable the exercise of these rights should be done in the Constitution.*” In the second article, “*in order to provide the union rights of the public officers with a meaningful integrity*” these regulations to be put into practice was considered as “*requirement of social state*” and in the last article it was declared that the reservations done to European Social Charter (articles 5 and 6)

46 Gülmez, M. Anayasanın 90. Maddesi, TİS ve Grev Hakkı. *KESK Konferans Kitabı*. Ankara, 2006. Cited in Balcı, Ş. G., *supra* note 43, p. 220.

47 Gülmez, M., *supra* note 26, p. 9.

should be removed.⁴⁸ Although this workshop had been organized under auspices of the state, the approach adopted in the final declaration was not reflected in constitutional amendment right after this meeting.

5. Constitutional Regulations About Right to Strike

The regulation largely agreed on in the public opinion is the annulment of the provision to prohibit such collective actions as strike with political grounds, solidarity strike, general strike, occupation of workplace, slowing down of work and performance reduction (art. 54/7). However, the regulations to limit the right to strike with the interest strikes and provisions on the postponement are still preserved.

According to the Law on Collective Bargaining, Strike and Lockout No. 2822, the Council of Ministers has the power to postpone the strike based on the rationale of “general health” or “national security”. And as for the Constitutional regulation, the dispute to continue by the end of the postponement period would be resolved by the High Board of Arbitration (art. 54). Hence, the regulation that converts the government’s power of strike postponement into a strike prohibition through mandatory arbitration has still the force of Constitutional provision.

On the other hand, ILO states that the power of postponement of a strike should not be granted to the Government on the grounds of “national security” or “public health.” Instead, should be given to an independent organ to which the entire parties trust.⁴⁹ Hence, Turkey was often in the agenda of the ILO General Conferences related to the regulations on the postponement of the strike.⁵⁰

Besides, the concerns about the constitutional amendment reflected in the 99th International Labour Conference were also based on the limitations in the right to strike. It was emphasized that the amendment draft was adopted by the Parliament without providing the opinion of the social parties and concerns about the fact that the preparation of approximation laws could take long time.⁵¹

The entire approximation laws on the labour relations are at the agenda of the Parliament. Moreover, in the draft to regulate the collective labour relations, it states that in case the dispute continues by the end of the postponement, a decision of strike could be taken again. This regulation contradicts with the constitutional provisions on the postponement of the strike (art. 54). However, it is considered possible to become law as per article 90 of the Constitution.⁵²

48 Devlet Personel Başkanlığı, Kamu Görevlilerinin Sendikal ve Demokratik Hakları Çalıştayı. Ankara, 2010.

49 ILO, Freedom of Association (Digest of Decisions and Principles of The Freedom of Association Committee of The Governing Body of the ILO). International Labour Office, Geneva, 2006, p. 117.

50 Kutal, M., *supra* note 31, p. 327.

51 ILC, Conference Committee On The Application of Standarts Extracts From The Record of Proceedings, 99th Session, Geneva, 2010 [interactive]. [accessed on 03-17-2011]. <http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_145220.pdf>.

52 Article 90 of the Constitution states: “*For the disputes to originate from the fact that the laws and the international treaties on the fundamental rights and freedoms put into force by appropriate procedures*

Another issue to be debated in terms of the constitutional amendment is the approach dominating the lockout regulations. In the rationale of article 7 of the amendment proposal, the expression “*right to strike and lockout*” has been used.⁵³ According to this, lockout is a “right” as well as the strike and “even it is an inevitable result” of the strike. Hence, the Prime minister noted *lockout possibility* many times against the claims for right to strike for public officers.

In fact the approach commonly adopted for the working life suggests that lockout and the right to strike cannot be considered equivalent with each other. Hence, the ILO Supervisory Bodies do not have a decision in which the lockout is considered as a right. The right to strike was governed in the United Nations International Convention on Economic, Social and Cultural Rights (art. 8/d), however lockout was not mentioned.

Gülmez argues that a similar approach is adopted by the EU, too. Stating that the “right to collective action” included in the Social Charter does not render lockout equivalent to the strike and states that the countries which do not recognize lockout as a “right” could not be criticised.⁵⁴

Conclusion

The labour legislation of Turkey has prohibited and limited the exercise of the union rights historically. In this aspect, the labour movement was not permitted to develop in relative independent conditions and the supervision via legislation regulated the union rights within narrow patterns. For this reason, in order to assess the development of labour movement in Turkey, the essential characteristics of the political culture must also be taken into consideration in addition to the objective conditions of the economy and the efforts to be articulated to the international capitalism. Because the regulations in force are far behind the international norms those not threaten the global capitalism.

Almost all of the legal regulations in Turkey, including the constitutional amendment, are based on the aim of conformity with the EU and ILO norms. However, there are still many issues of contradiction in terms of union rights, harmonization of which is one of the prerequisite criteria for the negotiations of “social policy and employment” chapter. Hence, EU’s last Progress Report on Turkey (2011) indicates that the current legal framework is not conformable to the EU norms and ILO conventions.

have different provisions, the provisions of the international conventions domain.” Gülmez, M., *supra* note 23, p. 38 suggests that this provision is binding for the executive bodies as it is for the legislative bodies. It is stated that the legislative bodies are liable for not making any law contradictory to the international treaties and emphasize is put in the fact that the existing contradictions should be corrected starting from the Constitution.

53 TBMM, 7/ 11/ 1982 Tarihli ve 2709 Sayılı Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinde Değişiklik Yapılması Hakkında Kanun Teklifi ve Anayasa Komisyonu Raporu, (2/ 656), Ankara, 2010.

54 Gülmez, M. Toplu Pazarlık ve Grev Hakları ve Türkiye. *Avrupa Sosyal Şartı ve Türkiye Kolokyumu*. Ankara, 1993. Cited in Çelik, A. Avrupa Birliği Anayasası: Sosyal Haklar Açısından Kaçırılan Bir Fırsat [interactive]. 2005 [accessed on 19-10-2011]. <http://www.kristalis.org.tr/aa_dokuman/AB%20Anayasasi%20isci%20Haklari%20Acisindan.pdf>.

Incompatibility of norms is particularly based on the lack of *indivisibility principle* for union rights in Turkey. Within this context, union rights are not realized by a holistic approach where the right to strike constitutes the main contradiction issue with respect to both legal and implementation patterns. Turkish Government continues the reservations on The European Social Charter (revised), claims that the ILO Conventions no 87 and 151 do not force the states to recognize the right to strike and ignores the decisions of supervisory bodies on strike.

Therefore, the right to strike is still limited to interest disputes in Turkey and Government potency of strike postponement continues, despite ILO stating that the power of postponement of a strike should not be granted to the Government with the grounds of “national security” or “public health.” Moreover, the regulation forcing mandatory arbitration at the end of the postponement period has still the force of Constitutional provision after the amendment of the constitution.

In spite of the requirements of the ECHR decisions about Turkey, constitutional amendment excluded the public officers from the scope of the right to strike. Thus, the amendment appears to be insufficient even to meet the decisions of the Court. As for the public officers, regulations are also quite distant from meeting the social expectations.

On the other hand, a few harmonizing regulations also entered in force with the introduction of the constitutional amendment. Concordantly, the way to be member of more than one union in the same sector and at the same time was opened and the right to collective agreement for the public officers was regulated. Besides, certain provisions related to the strike prohibitions were removed from the legislation. Within this framework, the annulment of the provision to prohibit such collective actions as strike with political grounds, solidarity strike, general strike, occupation of workplace, slowdown of work and performance reduction is the one largely agreed in the public opinion.

As mentioned above, the principal aim of the amendment is based on meeting the international standards, as specified clearly in the rationales of the amended articles via referencing to ILO norms. Moreover some of these regulations seem to be appreciated by both ILO and the EU.

However, none of them removes the inadequate content of the amendment. Because each type of union rights takes strength from the existence of the other and solely in such a situation becomes an effective and meaningful right. For this reason, the unity of these rights will put forward a significant perspective in terms of the spirit of political democracy. Not long before the constitutional amendments, the final declaration of the workshop organized by the State Personnel Administration has also been prepared adopting this approach. Furthermore, this approach was even emphasized to be a requirement of the social state. On the contrary, the Constitution reflects a will to consider the union rights independently.

References

- Akkaya, Y. Yetiş Ya Avrupa Birliği, 2004 [interactive]. [accessed on 12-12-2011]. <http://www.sendika.org/yazi.php?yazi_no=895>.
- Akkaya, Y.; Güngör, F. Düzen ve Kalkınma Arayışları İçinde Türkiye’de Sendikacılık ve Milliyetçilik. Tarih ve Milliyetçilik, 1. *Ulusal Tarih Kongresi Bildiriler, Mersin Üniversitesi (30 Nisan-2 Mayıs 1997)*.
- Avrupa Komisyonu, 2011 Yılı Türkiye İlerleme Raporu, Brüksel, 2011 [interactive]. [accessed on 07-01-2012]. <http://www.abgs.gov.tr/files/AB_Iliskileri/AdaylikSureci/IlerlemeRaporlari/2011_irlleme_raporu_tr.pdf>.
- Aydın, M. Anayasa Mahkemesi Kararlarında Sendika Özgürlüğü. *TÜHİS*. 2006, 20(1-2): 1-34.
- Balcı, Ş. G. Avrupa İnsan Hakları Mahkemesinin “Satılmış ve Diğerleri/Türkiye” Kararı. *Çalışma ve Toplum*. İstanbul, 2008, 2(217): 219-235.
- Candoğan, G. Memura Grev Hakkına AİHM Güvencesi. *Radikal İki*. 9 Aralık 2007.
- Case of *Demir and Baykara v. Turkey*, Application No. 34503/97, ECHR.
- Çelik, A. Milli Güvenlik Gerekçeli Grev Ertelemeleri. *Çalışma ve Toplum*. İstanbul, 2008, 3(18): 87-135.
- Çelik, A. Avrupa Birliği Anayasası: Sosyal Haklar Açısından Kaçırılan Bir Fırsat, 2005 [interactive]. [accessed on 19-10-2011]. <http://www.kristalis.org.tr/aa_dokuman/AB%20Anayasasi%20iscisi%20Haklar%20Aisindan.pdf>.
- Çelik, A. AB Emeğe Zararlı mı? *Birikim*. 2004, 187: 44-54.
- Çelik, A. Avrupa Birliği Sosyal Politikası: Gelişimi, Kapsamı ve Türkiye’nin Uyum Süreci-1, 2004 [interactive]. [accessed on 19-10-2011]. <http://www.kristalis.org.tr/aa_dokuman/absosyalpolitikasi1.pdf>.
- Çelik, N. *İş Hukuku Dersleri*, Beta Yayınevi. İstanbul, 1998.
- Çetik, M.; Yüksel, A. *Türkiye’de Endüstri İlişkileri, Türkiye Ekonomik ve Toplumsal Tarih Vakfı*. İstanbul, 1999.
- Dereli, T. Uluslar arası Çalışma Normları, Sendika Özgürlükleri ve Türkiye: ILO Eleştirileri Açısından Yeni Yasa Taslağının Değerlendirilmesi. *AB-Türkiye & Endüstri İlişkileri*. Hekimler, A.; Yayınevi, B. (eds.). İstanbul, 2004.
- Devlet Personel Başkanlığı, Kamu Görevlilerinin Sendikal ve Demokratik Hakları Çalıştayı. Ankara, 2010.
- Enerji Yapı Yol- Sen/ Türkiye Kararı, Başvuru No. 68959/01, 2009 [interactive]. [accessed on 25-11-2011]. <<http://www.yargitay.gov.tr/aihm/upload/68959-01.pdf>>.
- Erdayı, U. Türk Mevzuatının Sendika Özgürlüğüne İlişkin 87 Sayılı Uluslararası Çalışma Örgütü Sözleşmesi’ne Uyum Sorunu. *Süleyman Demirel Üniversitesi İktisadi ve İdari Bilimler Dergisi*. 2009, 3(3): 201-226.
- Charter of Fundamental Rights of the European Union (2000/c364/01) [interactive]. [accessed on 03-29-2011]. <http://www.europarl.europa.eu/charter/pdf/text_en.pdf>.
- Gernigon, B.; Odero, A.; Guido, H. ILO Principles Concerning The Right To Strike, 2000 [interactive]. [accessed on 10-29-2010]. <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/--normes/documents/publication/wcms_087987.pdf>.
- Gülmez, M. Sendikal Hakların Bölünmezliği: Toplu Sözleşmesiz ve Grevsiz Sendika Hakkı, Özünden Yoksundur. *Çalışma ve Toplum*. İstanbul, 2010, 3(26): 9-49.
- Gülmez, M. Anayasanın 90. Maddesi, TİS ve Grev Hakkı. *KESK Konferans Kitabı*. Ankara, 2006.
- Gülmez, M. Sendikal Haklara İlişkin Sözleşmelerin İç Hukuka Üstünlüğü ve

- Yasalarımızdaki Aykırılıklar. *Çalışma ve Toplum*. İstanbul, 2005, 1(4): 11–56.
- Gülmez, M. Uyum Düzenlemelerinin Üvey Evladı: Sendikal Haklar. *Anayasa ve Uyum Yasaları*. Ankara: Türkiye Barolar Birliği Yayını, 2002.
- Gülmez, M. Toplu Pazarlık ve Grev Hakları ve Türkiye. *Avrupa Sosyal Şartı ve Türkiye Kolokyumunu*. Ankara, 1993.
- Güzel, K. E. Anayasa Değişikliği ve Sendikal Haklar, 2010 [interaktyvus]. [accessed on 10-12-2010]. <http://www.sendika.org/yazi.php?yazi_no=31895>.
- ILC, Conference Committee On The Application of Standards Extracts From The Record of Proceedings, 99th Session, Geneva, 2010 [interactive]. [accessed on 03-17-2011]. <http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_145220.pdf>.
- ILO, Freedom of Association (Digest of Decisions and Principles of The Freedom of Association Committee of The Governing Body of the ILO). International Labour Office, Geneva, 2006.
- Işıklı, A. *İş Hukuku, İmaj Yayıncılık*. Ankara, 1996.
- Işıklı A. 1960-1986 Döneminde Türkiye’de İşçi Hakları. *Türkiye’de İşçi Hakları (Osmanlı Döneminden 1986’ya)*. Ankara: Türkiye Yol- İş Sendikası, 1986.
- ITUC, Internationally Recognised Core Labour Standards In The European Union, 2009 [interaktyvus]. [accessed on 02-17-2011]. <http://www.ituc-csi.org/IMG/pdf/FINAL_EU_CLS_2009_report_1_.pdf>.
- Karadağ, A.; Akbaş, Z. Kurumsal Güvencelerin İşlevsizlik Kavşağındaki Demokrasi: Türkiye. *Mustafa Kemal Üniversitesi, Sosyal Bilimler Enstitüsü Dergisi*. 2009, 6(11): 162–188.
- Koray, M. *Değişen Koşullarda Sendikacılık*. İstanbul, TÜSES, 1994.
- Kutal, M. Uluslararası Çalışma Normları Karşısında 1982 T.C. Anayasası’nın Grev Hakkına İlişkin Hükümleri. *Osman Güven Çankaya’ya Armağan*. Ankara: Kamu İşverenleri Sendikası, 2010.
- Kutal, M. Uluslararası Çalışma Normları Karşısında Kamu Görevlilerinin Sendikal Örgütlenme Haklarına İlişkin Bazı Gözlemler. *Kamu-İş Dergisi*. 2002, 4(6).
- Kutal, M. Bakanlar Kurulu Tarafından Ertelenen Grevler. *İktisat ve Maliye Dergisi*. 1977, 13(12).
- Makal, A. Cumhuriyet’ten 21. Yüzyıla Türkiye’de Çalışma İlişkileri. *Cahit Talas Anısına Güncel Sosyal Politika Tartışmaları*. Ankara Üniversitesi Siyasal Bilgiler Fakültesi, Yayın No: 595. Ankara, 2007.
- Müftüoğlu, Ö. AB’ye Üyelik Sürecinin İktisadi ve Toplumsal Boyutları. *Türkiye Sosyalist İktisat Kongresi*. İstanbul, 2005.
- Özkiraz, A.; Talu, N. Sendikaların Doğuşu; Türkiye ve Batı Avrupa Ülkeleri Karşılaştırması. *Sosyal Bilimler Araştırmaları Dergisi*. 2008, 2: 108–126.
- Öztürk, A. Siyasal Kültür Bağlamında Türkiye’de Devlet- Sivil Toplum İlişkisi: Sendikacılık Örneği. *Bilgi*. 2007, 1(14): 1–35.
- Özveri, M. Sendikal Hak ve Özgürlüklerde 2010 Anayasa Değişikliği. *İş’te Çalışanlar*. 2010, 4: 27–29.
- Satılmış ve Diğerleri/Türkiye Kararı, Başvuru No. 74611/01, 26876/02, 27628/02, 2007 [interactive]. [accessed on 27-12-2011]. <http://www.yargitay.gov.tr/aihm/upload/74611_01%20Satilmis%20vd.pdf>.
- Sur, M. Avrupa İnsan Hakları Divanı’nın Gustafsson/ İsveç Kararı. *Kenan Tunçomağ’a Armağan*. İstanbul: İÜHF, 1997.
- Tanör, B. *İki Anayasa, Beta Yayınevi*. İstanbul, 1994.
- TBMM, 7/11/1982 Tarihli ve 2709 Sayılı Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinde Değişiklik Yapılması Hakkında Kanun Teklifi ve Anayasa Komisyonu Raporu. (2/656). Ankara, 2010.
- TBMM, Tutanak Dergisi, 8. Dönem, C: 4, 47. Birleşim, 1947.
- Urcan ve Diğerleri/ Türkiye Kararı, Başvuru No. 23018/04, 23034/04, 23042/04,

23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04, 23676/04, 2008 [interactive]. [accessed on 29-12-2011]. <<http://www.yargitay.gov.tr/aihm/upload/23676-04.pdf>>.

Urhan, B.; Çelik, S. Türkiye’de Sistemin “Milli Güvenlik” Algısı ve Bunun İşçi Hareketleri ve Sendikacılık Faaliyeti Üzerindeki Etkisi. *Çalışma ve Toplum*. İstanbul, 2010, 2(25): 109–140.

KONSTITUCINĖ TEISĖ PROFESINIŲ SAJUNGŲ VEIKLOJE TURKIJOJE. LYGINAMASIS ASPEKTAS

Nilgün Ongan

Stambulo universitetas, Turkija

Santrauka. *Istoriškai susiklostė, kad Turkijos profsajungų judėjimas niekada nesiformavo laisvai, o teisinis judėjimo reguliavimas spraudė profsajungų teises į siaurus rėmus. Todėl, norint įvertinti Turkijos profesinių sąjungų judėjimą be objektyvių ūkio sąlygų apžvalgos ir be siekio įsilieti į tarptautinę kapitalistinę aplinką, būtina atsižvelgti ir į politinę kultūrą. Deja, galiojantys potvarkiai labai toli atsilieka nuo tarptautinių normų, kurios, iš esmės, nekelia grėsmės pasauliniam kapitalizmui.*

Konstituciniai straipsniai ignoruoja profesinių sąjungų politines funkcijas ir riboja profesinių sąjungų kūrimą dėl daugelio bendrų saugumo reikalavimų. Valstybės pareigūnams draudžiama streikuoti, o teisė streikuoti ribojama interesų konflikto prielaida. Be to, vyriausybės teisė atidėti streikus yra susiaurinta iki streikų draudimo ir privalomai vykdomų arbitražo potvarkių, kuriuos garantuoja Konstitucija.

Lyginant su Europos standartais, ypač netobula valstybės tarnautojų kolektyvinės sutarties teisė, nes į ją neįtraukiama teisė streikuoti ir matomas didelis neatitikimas tarptautiniams teisminiams sprendimams. Turkiją daug kartų kritikavo Europos Žmogaus Teisių Teismas (EŽTT) dėl profesinių teisių valstybės pareigūnams apribojimo ir dėl draudimo streikuoti.

Turkijos vyriausybės gynyba EŽTT remiasi Europos Socialinės Chartijos (Pataisytos Chartijos 5 ir 6 straipsniai) ir Tarptautinės darbo organizacijos (TDO) konvencijų Nr. 87 ir 151 nuostatomis, kad valstybės neprivalo pripažinti teisės streikuoti. Atsižvelgiant į tai, kad TDO sprendimai neprivalomi, teigiama, kad valstybė nėra atsakinga už neratifikuosius sprendimus. Be to, Turkijos vyriausybė akcentuoja valstybės pareigūnų situaciją teisėtvarkos požiūriu ir tai, kad jų veikla tvarkoma atskiru ir gana detaliu aprašu.

Tačiau, oponentai teigia, kad Pataisytos Europos Socialinės Chartijos nuostatos neatleidžia Turkijos vyriausybės nuo teisių aptariamų šioje diskusijoje garantijos. Kadangi šios teisės aptariamos ir pirmame Chartijos skyriuje, dėl kurio sutarė visos šalys. Oponentai teigia, kad valstybės atsakingos teisiskai už profesinių sąjungų veiklos ribojimų anuliavimą savo valstybinėje teisėje.

Reikšminiai žodžiai: *profesinės sąjungos teisės, Turkija, teisė streikuoti, politinė kultūra.*

Nilgün Ongan, Stambulo universiteto Ekonomikos fakulteto Darbo ekonomikos ir pramoninių santykių katedros docentė; Socialinių mokslų (darbo ekonomikos) daktarė. Mokslinių tyrimų kryptys: pramoniniai santykiai, darbo judėjimai, profesinių sąjungų teisės.

Nilgün Ongan, Istanbul University, Faculty of Economics, Department of Labour Economics and Industrial Relations, Assistant Professor; Doctor of Social Sciences (Labour Economics). Research interests: industrial relations, labour movements, union rights.

