DOES NEW LABOUR UNIONS AND COLLECTIVE AGREEMENT ACT OF TURKEY GUARANTEE UNIONIZATION RIGHTS OF ALL WORKERS OR NOT?

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Abstract

The new Trade Unions and Collective Agreement Act of Turkey has been made with the reasoning to guarantee freedom of association for all workers in the light of ILO Conventions. 25th Article regulates “guarantee of freedom of trade union” and states that the provisions of Labour Law No.4857 about employment security will be applied when a worker is dismissed from job because of being member to a trade-union or participating to its collective activities. Employment security rules regulated by Labour Code No.4857 of Turkey cover only the workers of workplaces in which more than 30 employees work. That is why there are different opinions whether a worker can be protected against unfair dismissal of employer because of using collective labour rights according to new law if s/he works in a workplace in which less than 30 workers employed or not. As it is known 11th article of ILO Convention No.87 requires each signatory State to take all necessary and appropriate measures to ensure workers exercise freely the right to organise. Also adequate protection should be provided for employees against anti-union discrimination in respect of their employment according to ILO Convention No.98. Leaving workers out of the scope of the guarantee for unionization by the way of regulation will be accepted as a violation of ILO Conventions ratified by Turkey. In addition to this, putting the workers of small enterprises out of the legal guarantee of the freedom by law is not only against to universal basic right for being member to trade unions freely, but also violates the principles of Turkish Constitution about the freedom of organization and “equality before law”. Leaving some workers out of the coverage of guarantee of freedom of union will affect many of the workers because the structure of economy in Turkey mainly bases on small enterprises do not employ more than 30 workers. As a result, new law will not make positive effect on unionization in contrary to its official
reasoning if it is applied according to the limits put by Labour Law. This also will be a new reason for deepening the fragmentation between regular workers of big enterprises and vulnerable workers of small enterprises. It is aimed by this study to evaluate the effects of new regulation about guarantee of the freedom of trade union over unionisation in Turkey considering the exclusion of workers of small enterprises by referring to the responds of trade unions and with the help of different point of views by doctrine and legal practice by supreme court decisions comparatively in the light of international conventions and European countries’ laws.

Key words: Guarantee of the freedom of trade union, New Collective Labour Law, Unionisation, Freedom to association, Workers of small enterprises.

INTRODUCTION

As it is known, labour needs to get organized for asking their rights in work. That is why two ILO conventions about freedom of association are at the top of the list when it comes to international labour standards.¹ It is tried to guarantee the trade union freedom legally with the article 5 of European Social Charter and other related international instruments besides ILO Convention No.87 and 98.

Turkish collective labour law has been changed in 2012 and new “Trade Unions and Collective Agreement Act No.6356” is made with the reasoning to guarantee “freedom of association” for all workers in the light of ILO Conventions by Parliament. Yet it does not turn out as a simple text which provides easiness for workers to assembly and struggle for their rights. It is generally evaluated as not being in conformity with the freedom of association regulated by ILO Conventions and European Social Charter mainly, on contrary much more restrictive compared to the previous codes about the subject.² It is claimed that even the new law is positive in some matters, but also should be criticised because of being uncertain and including inconsistency to fundamental principles for some provisions, and determined those could be subject to the review of Constitutional Court by being against to

the freedoms and “equality principle” of Constitution. Just like the different opinions in doctrine, some trade unions were totally against to the new law, yet some thought that it is negative partially. Not any labour union found it completely suitable to the ILO principles. Also it is objected by international union confederations ETUC and ITUC.

One of the discussion points regarding the new law is whether all workers could have been protected against to anti-union dismissals or not. New code refers to the employment security provisions by Labour Law No.4857 for the protection of workers when employee is fired because of being a member or participating activities of a trade union. The rules of Labour Law No.4857 about unfair dismissal can be used only for the employees who work for more than 6 months in a workplace with more than 30 workers. It is also stated in the same provision that an employee may ask for compensation without opening a reemployment lawsuit, but it is not absolutely clear if this rule covers the ones out of the conditions looked for unfair dismissal case. Even other restrictions are put aside, this means the workers of small enterprises cannot be under the protection. Because Turkish economy is based on small enterprises mainly, this is very important issue for unionisation. It is determined that 52% of workers work in workplaces with less than 30 workers according to the statistics of Ministry of Labour and Social Security, and the number of the workers who will be out of trade union security is estimated to rise more than 60% when those workers with less than 6 months seniority are taken into account.

It is aimed by this study to evaluate the effects of new regulation about guarantee of the freedom of trade union over unionisation in Turkey considering the exclusion of workers of small enterprises by referring to the responds of trade unions and with the help of different point of views by doctrine and legal practice by supreme court decisions comparatively in the light of international conventions and European countries’ laws.

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5 Aziz Çelik, p.5.
LOOKING CLOSER TO THE PROVISION ABOUT PROTECTION OF TRADE UNION FREEDOM

New code naturally includes provisions for securing the use of freedom of trade union for trade-union officers, shop stewards and members consecutively. Article 25 is titled as “Guarantee of Freedom of Trade Union” and regulates the protection of labour against the anti-union discrimination and dismissals. It has nine paragraphs related with different possible situations of anti-union practices. It is stated that employer cannot discriminate or dismiss employees because of being member or participating activities of a trade union in first three paragraphs, then remedies, sanctions and procedure like burden of proof are regulated with last six paragraphs. If an employer violates the bans on anti-union practices regulated by first three paragraphs apart from dismissal, has to pay union compensation not less than annual wage of employee according to fourth paragraph.

5th paragraph of the provision is about the remedies when anti-union dismissal exists; “In case of termination of contract of employment for reasons of trade union activities, a worker shall have the right to apply to the court as provided in the Articles 18, 20 and 21 of Labour Law No. 4857. Where it has been determined that the contract of employment has been terminated for reasons of trade union activities union compensation shall be ordered independent of the requirement of application of the worker and the employer’s granting or refusing him permission to restart work in accordance with Article 21 of the Law No. 4857. However, in case the worker is not allowed to start work the compensation specified in the first paragraph of Article 21 of this Law No. 4857 shall not apply. Non application to a court pursuant to the aforementioned provisions of the Law No. 4857 shall not be an obstacle for the worker to claim union compensation separately.”

The problem comes up at this point is that Articles 18, 20 and 21 of Labour Law No. 4857 are about employment security, and cover only employees who work more than 6 months with a permanent contract in a workplace more than 30 employees work basically according to the 18th article. So the question is if an employee does not meet these conditions can be benefited from the legal sanction of anti-union dismissal or not. In other words, the last sentence of the paragraph which states that an employee may ask for union compensation separately, even s/he does not apply to court for reinstatement can be used by the workers who have seniority less than six months and/or with

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a fixed term contract and/or work in a workplace with less than 30 employees. Because the right looks like to be associated with the 18th article by the first sentence, there emerges uncertainty. Even recent law is enacted with the change of draft law just for protecting small and medium-sized enterprises (SME) against to the union compensation claims of workers according to the proceedings of the parliament\textsuperscript{7}, it is found unacceptable by doctrine to exclude the workers from guarantee of trade union freedom in the presence of Turkey’s commitments for ILO Conventions and European Social Charter besides “equality before law” principle and trade-union freedom regulated by Turkish Constitution as superior regulations.

EVALUATION OF RESTRICTIVE LAW ABOUT PROTECTION OF TRADE UNION FREEDOM BY DOCTRINE

There are different interpretations made by doctrine about the subject. Narmanlıoğlu thought that new law would be positive for security of trade union freedom compared to previous one when he evaluates the draft law. Because there was not an option for workers to ask for only union compensation without applying for reemployment in previous law, in other words union compensation was accepted as a result of not hiring the employee again after court decision on unfair dismissal by employer. Yet he evaluated the draft law which proposed the right to apply for reemployment by every worker without seeking for the conditions regulated by labour law and naturally thought that was fair by covering all workers\textsuperscript{8}, unfortunately this rule changed during the parliament debates, and as it is explained above, current law regulates this right only for the workers who work more than 6 months in a workplace with more than 30 employees by basing on an employment contract of indefinite duration. The question is whether at this point the last sentence of article 25/5 of effective law gives right to all workers termless for applying to court for union compensation or not.

The new law after legislation has been evaluated negatively as an elimination of the guarantee of freedom of trade union for half of the workers within the scope of law in Turkey by Çelik. He gives information about the legislation process of law, and says that this rule is accepted


based on an amendment offered by ruling party deputies in parliamentary debates upon the requests of employers’ organizations. About 6 million workers may not be able to perform their constitutional and legal union rights. As a result mere existence of this rule is a violation of the principle of equality, he states.\(^9\)

Dereli remarks that even article 25/5 of new law gives the impression of only the workers within the coverage of employment security rules have the right to open lawsuit and causes a negative reaction from labour unions, with the last sentence it is understood that all workers can ask for union compensation when the text evaluated with liberal construction. Also he says that contrary situation cannot be accepted when a new law made for the need to strengthen the trade union freedoms, and that type of understanding gets behind of the previous laws. He also mentions about the draft law by Ministry of Work which provided the right for all workers to sue employer for reinstatement without looking for the conditions regulated by employment security rules of labour law, and indicates that even current law turned out by basing on the same requirements with Labour Law No.4857, asking for union compensation is a right given to all workers according to the last sentence of article 25/5.\(^10\)

Astarlı thinks that it is not fair at all to set the employer free without regulating any sanction for firing an employee because of being a member or participating to activities of a trade union as it is understood with the letter of law. As Dereli and Çelik, he thinks that the draft law was much more on the side of trade union freedom before enacted as it stands recently. He also shares the same idea about the recent law is being against to the freedom of trade union regulated by Constitution and International Conventions and also 10\(^{th}\) article of Constitution about the principle of equality before law. He refers to 8/2\(^{nd}\) and 11\(^{th}\) articles of ILO Convention No.87, 1\(^{st}\) article of ILO Convention No.98 and Article 5\(^{th}\) of Revised European Social Charter besides 51/1\(^{st}\) article of Turkish Constitution, and he states that this rule cannot be interpreted against to the freedom of trade-union by making discrimination between the workers by basing on the letter of it, on the contrary international rules should be applied before because of the 90\(^{th}\) article of Constitution which orders to judge considering international rule first if it is related with fundamental human rights when there is a dispute between internal law and international convention accepted as a law by Parliament. So he hopes this restrictive rule will be cancelled by Constitutional Court, yet he suggests courts to

\(^9\) Aziz Çelik, p.5-6.
\(^{10}\) Toker Dereli, p.47.
interpret the law in favour of freedom of trade union for all workers by deciding about the union compensation without seeking if the worker is within the coverage of employment security or not until that time.  

It is also claimed that workers of workplaces in which less than 30 employees work does not only have the right to apply for reinstatement, but also cannot demand union compensation because 25/5\(^{th}\) provision begins by referring to 18\(^{th}\) article of labour law, and the opposing view which says all workers may ask for union compensation by the way of liberal interpretation of law is not suitable for the letter of recent regulation. 

It is determined that freedom of trade union, which was under guarantee of laws even before employment security law in Turkey, will be unsecured if the new law about the subject is interpreted as only for the workers within the scope of employment security. Also it should be applied by courts in a way suitable to the ILO Conventions and equality principle of Constitution, which means judges must decide that a worker can claim union compensation at least, even s/he is not qualified for employment security. In other words, union compensation can be demanded by all workers without seeking minimum six month seniority and/or working in a workplace with minimum 30 workers and/or by an employment contract of indefinite duration, and as soon as possible recent law should be changed as for all workers can be benefited guarantee of freedom of trade union in equal conditions.

THE NUMBER OF THE SMALL ENTERPRISES AND WORKERS EMPLOYED BY THEM IN TURKISH ECONOMY AND THE UNIONISATION RATES

As it is told above, 6 million workers as more than half of the workers in scope of the trade unions and collective agreement law in Turkey are estimated to be left out of the coverage of guarantee of freedom trade union, because 52\% of workers work in workplaces with less than 30 workers according to the statistics of Ministry of Labour and Social Security. It is mentioned as 60-70\% of all workplaces by some other writers.

\begin{itemize}
\item Astarlı, pp.166-179.
\item Ercüment Özkaraca, “6356 Sayılı Kanunda Sendikal Güvenceler(Guarantees for Unionisation in Law No.6356), Çalışma ve Toplum, 2013/3; 173-216, p.205.
\item Çelik, pp.5-6.
\item Astarlı, p.177.
\end{itemize}
Small and middle scaled enterprises are classified as micro, medium and big sizes by a law order in Turkey. Less than 10 workers can be employed in micro-size and less than 50 in medium-size according to definitions made by that law order. Enterprises are grouped according to annual number of average persons engaged regarding relative sizes of sectors. (1, 2-9, 10-19, 20-49, 50-249, 250+ etc.) in by TUIK(Turkish Statistical Institute) under the title of “Size of enterprise’s group”. When we look to the last published Annual Business Statistics 2010, the number of the enterprises(Industry and Service Statistics apart from programming and publishing, finance and insurance sectors) employ 1-19 workers are 2 262 755 of total 2 321 979 and 20-49 workers are 38 951. The number of the workers employed are 2 565 829 for the first and 1 187 479 for the latter of total 7 883 750, which roughly means that 50% of employment is in the enterprises which employ less than 50 workers. It was close to this in 2009; the number of enterprises employing between 1-49 workers were 99% of all enterprises while 98,2% in Europe 27 according to the European Business Facts and Figures 2009. It is also indicated that 78% of total employment is covered by SME’s in 2009.

There are 11 600 000 workers in Turkey when all sectors are considered in January 2014. With a simple calculation by using the rates above roughly 7 000 000 workers are employed by the enterprises having less than 30 employees, which is almost the same with the estimation made by Çelik. Also unionisation rate in Turkey is 9,45% according to the official numbers in January which means that only 1096 000 of 11 600 000 are members of trade unions. Average rate of unionisation is 23% in Europe and 17% in OECD Countries. It is determined that unionisation will be effected much more negatively from new law, because 95% of the workplaces employ less than 30 workers which means approximately 7 000 000 workers.

TRADE UNION FREEDOM AS A FUNDAMENTAL RIGHT IN INTERNATIONAL CONVENTIONS AND THE SITUATION OF TURKEY

Protection of Labour against to anti-union practices is tried to be guaranteed by ILO Conventions No.87 and 98 at first. ILO Convention No.87; “Freedom of Association and Protection of the Right to Organise Convention” 11th article states that “Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise” and also 8/2nd article states that “The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention”. ILO Convention No.98; “Right to Organise and Collective Bargaining Convention” Article 1 states that; “Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment”.

Turkey approved both conventions. That is why adequate protection should be provided for all employees against to anti-union discrimination and all necessary measures to ensure all the workers to perform trade union freedom should be undertaken by Turkey, and also internal law of the country besides application of it should not be incompatible with these guarantees.

This problem has been mentioned by the Report of the Committee of Experts on the Application of Conventions and Recommendations which is about Application of International Labour Standards published 2014 related with Freedom of Association, Collective Bargaining and Industrial Relations. It is explained that there are comments of social partners; trade unions and employer organizations about the issue besides comments of ITUC in a communication made in 2012. It is recorded that with regard to the complaints procedures, Turkish Government refers to section 25 of Act No. 6356 which describes the protection against acts of anti-union discrimination guaranteed to workers. In this respect, the Committee notes the concerns expressed with regard to section 25(5) of Act No. 6356 referring to the procedures provided for in the Labour Act (No. 4857), in so far as the Labour Act, by virtue of its section 18, appears to protect against anti-union dismissals only workers who are employed, for an indefinite period, by an establishment employing thirty or more workers and who meet a minimum seniority of six months. The Committee notes that the

Government indicates in its report that the new legislation does not link the compensation for anti-union discrimination with the number of workers employed by the enterprise. The Government also indicates that this issue is under examination by the Constitutional Court whose decision will be binding. The Committee requests the Government to provide information on this decision once it has been handed down. The Committee trusts that all workers will be covered by the new provision.22

Also Turkey is a member of Council of Europe that is why laws and legal application of Turkey should be in harmony with European Social Charter. 5th Article of Charter states that; “All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interests “ and explains it with the revised text as; “With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations” under the title of “The right to organise”.23

The text of 5th Article of Charter is similar with ILO Convention 87, article 8/2, so Turkey should ensure the right to organize for all workers without any discrimination as a party of Social Charter too.

LEGAL APPLICATION OF COURT OF CASSATION ABOUT GUARANTEE OF FREEDOM OF TRADE UNION BY 25/5th ARTICLE OF LAW NO.6356 AND THE CASE BEFORE CONSTITUTIONAL COURT

There is not a published known decision of Court of Cassation about the subject yet. But high court decided that a worker may claim trade union compensation even s/he is not in the scope of employment security, because freedom of trade union is a fundamental right and employer’s anti-union practice is an illegal act. In a case brought by a worker whose seniority

was less than 6 months before court with the claim of trade union compensation basing on anti-union dismissal, Court of Cassation decided that all workers are in the scope of legal protection even are out of the coverage of employment security according to the news given by Dr. Advocate Murat Özveri.\textsuperscript{24} This means that as ILO has been informed by the government, the last sentence of 5th paragraph of article 25 will be applied for all workers without discrimination, in other words workers out of the scope of employment security by labour law may apply for trade union compensation, but may not claim for reinstatement.

There is an annulment case before Constitutional Court brought by deputies about some articles of Trade Unions and Collective Agreement Law No.6356 besides article 25/5 because of being against to the provisions of Constitution and International Conventions.\textsuperscript{25} But there is not any decision given yet since January 2013, which is also criticized even by Minister of Work and Social Security. He says that he is not on the side of bans, but connects the problem with the necessity of dialogue between social partners as required by international organizations and expects it to be resolved by the decision of Constitutional Court, when he came under criticism of trade unions in an international congress.\textsuperscript{26} It is really tragic for legal guarantee of unionization as a part of basic right to association could be a questionable issue between social partners, or in parliament.

CONCLUSION

There is no doubt that all workers may not be under the full guarantee of law about freedom of trade union by 25/5 article of new Trade Unions and Collective Agreements Law No.6356 in Turkey. There may not be any sanction for employer when a worker who does not have 6 months seniority at least and/or works in a workplace with less than 30 employees and/or by an employment contract of definite duration is dismissed with anti-union practices. Because 95% of the workplaces in Turkey employ less than 30 workers, approximately 7 000 000 workers are going to be affected negatively from this elimination of legal guarantee. It causes an unfair discrimination between workers against unionization.

\textsuperscript{24} Sevgim Denizaltı, “Yargıtay; Sendikal Nedenle İşten Çıkarmak Haksız Fiil(Court of Cassation; Anti Union Dismissal is a Tort)”, Birgün, 10.06.2014, \url{http://birgun.net/haber/yargitay-sendikal-nedenle--isten-cikarmak-haksiz-fiil-15462.html}, date accessed 19.06.2014.

\textsuperscript{25} \url{http://www.anayasa.gov.tr/Gundem/Detay/462/}, date accessed 19.06.2014.

\textsuperscript{26} \url{http://www.memurdanhaber.net/tum-kamu/7-uluslararasi-is-sagligi-ve-guvenligi-konferansi-h4708.html}, date accessed 19.06.2014.
When we trace back to the historical story of the rule about protection of trade union freedom in new law beginning from draft law, it can be seen that fundamental rights and freedoms can be restricted by law nowadays. It is really hard to accept that universal fundamental rights can be put in jeopardy by the way of legislation.

On the other hand, thanks to judges of Court of Cassation who still have an understanding of the priority of fundamental rights and equality before law principle, as they decided in favour of a worker, whose seniority was less than 6 months, with the reasoning of anti-union dismissal should be accepted as an illegal act. Therefore all workers can ask for the guarantee of freedom of trade union by basing on this decision.

When it comes to the letter and legislation process of the new law, as it is told before there is still the possibility that it will be interpreted against the workers out of the scope of employment law. But also thanks to international conventions and organs for review of them in international organizations, guarantees should have to be provided for all workers for unionization as a result of fundamental right related to the freedom of association. And it is also expected the negative parts of the article 25/5 to be cancelled by Constitutional Court, or changed by parliament.

It will be seen how the things will go on in law and practice after now.

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