Trial observation report

The International Centre for Trade Union Rights ('ICTUR') monitors the trial of a members of the KESK trade union federation who are accused of criminal offences. They assigned me to travel to Turkey between the dates of 12th – 14th January 2014 in order to monitor the hearing scheduled for the 13th January in Ankara. My function was as independent legal observer attending the hearing. The hearing was scheduled for several day,

KESK (Kamu Emekçileri Sendikaları Konfederasyonu) stands for Confederation of Public Employees Trade Unions. Eğitim Sen (Education and Science Worker's Union) is an affiliated union for teachers.

2014-03-10/ S. GÄRDE

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1. BACKGROUND

The court hearing I attended was heard on January 13, 2014 at Ankara Criminal Court of General Jurisdiction and was the first hearing of a trial launched on the ground of two day long protest meeting organized by KESK in order to protest against a new law establishing a '4+4+4+' education system public servants labour rights.

The demonstration had been held on March 28, 2012 at Ankara, Kızılay. Thousands of public employees gathered in Ankara on March 28, 2012. This demonstration was ended after police attack. As a result of this demonstration, the Ankara Public Prosecutors' Office placed a charge against 502 people, including President and General Secretary of KESK.

The Ankara Public Prosecutors' Office charge against 502 people on the ground that such acts consist of the violation of Act No. 2911 on Meetings and Demonstrations. The defendants are accused of causing damage to public properties and by using inappropriate violence.

2. THE ANKARA PUBLIC PROSECUTORS' OFFICE CHARGES

Offense: violation of the law no. 2911 on meetings and demonstrations, public officials using force and violence , damaging public and private goods

Offense date : 28-29 march 2013

Crime location: Crescent - Cankaya - Ankara

The law invoked by the procecutor:
Law No. 2911 on Meetings and Demonstrations 28/1, 32/1 1.sentence of paragraph,

Article 5237 of the Turkish Penal Code No. 265/1, 151 /1, 152/1-a , 53/1-2 , 58,

231 of the Criminal Procedure Act 5271 /11, the 325-326 materials (required criminal sanctions on the Rights of Suspects , improve results with the indictment claims prompt measures are regulated separately in the section)

In Turkish:

KANUN MADDELERİ :
2911 Sayılı Toplantı ve Gösteri Yürüyüşleri Yasasının 28/1,
32/1 madde fıkrası 1.cümlesi,
5237 Sayılı Türk Ceza Yasasının 265/1, 151/1, 152/1-a, 53/1-2, 58,

5271 Sayılı Ceza Muhakemesi Yasasının 231/11, 325-326 maddeleri (Şüpheliler Haklarında istenilen cezai yaptırım, arttırım ile tedbir istemleri iddianame sonuç istem bölümünde ayrı ayrı düzenlenmiştir.)

Within the scope of this lawsuit not only KESK but also other organizations such as DİSK (Confederation of Progressive Trade Unions), TMMOB (Chambers of Turkish Engineers and Architects), TTB (Turkish Medical Association) and representations of political parties and democratic mass organizations will be tried.

3. THE KESK POSITION AND OBJECTIVES

KESK organised a demonstration in accordance with their constitutional rights, that is "*the right to demonstrate without prior decision"*.

3.1 The education law

The demonstration was organised against a law proposal establishing a '4+4+4+' education system and limitations in law related to public servants labour rights.

The proposed changes of the Turkish education system approved measures that will allow schools specialising in religious education combined with a modern curriculum, known as imam hatip schools, to take boys and girls from the age of 11 instead of 15, and to provide optional classes in Koranic studies and the life of the Prophet Mohammad in other schools.

The law stipulates that children should complete 12 years schooling, though critics say the overall quality of education will suffer as parents have the option of putting their children into technical colleges grooming them for low-paid blue-collar and service industry jobs, like hairdressing for girls, from an early age.

KESK has stated that education desperately needs massive investment in more classrooms and more teachers, as half the country's 74 million people are under the age of 28.

The answer is 12, the number of years that legislation now steamrolling its way through the Turkish Parliament would require children to spend in school. The law proposes to increase compulsory schooling by four years, up from eight grades.

This may sound like just the thing to help Turkey overcome its education deficit. Forty percent of the country's 15-year olds are unable to reach basic competence in mathematic literacy. Turkey is ranked 32nd in scientific literacy out of the 34 O.E.C.D. countries in the organization's Program for International Student Assessment.

But the real purpose of the legislation may be less to keep children in school longer than to let them pursue intensive religious education younger.

Today's muddle goes back to Turkey's last great educational reform, which was enacted in 1997, just after the military helped push out of power an Islamist-led coalition. Back then, the incoming secularist government decreed that Turkish children would have to spend at least eight years in school, instead of the previous five.

This reform, along with a campaign to cut truancy and encourage girls to enrol in primary school, would turn out to be the key to getting young Turkish people better jobs. It was a

poverty-reduction measure on an epic scale. But these measures were also politically motivated. By requiring that all eight compulsory years of schooling be spent under the same primary-school roof, they abolished middle schools. This meant that children could not enter vocational schools until the ninth grade (rather than the sixth, as before).

The generals had their sight on delaying admission to one type of vocational school in particular: *imam hatip*, which were used to train the Islamic clergy. By the mid-1990s, they were attracting some 11 percent of children in the relevant age group and developing into a parallel system of education. For the staunch secularists in power that was too much.

By the time the AK Party took over from the generals, a decade ago, only about 2 percent of eligible children attended clerical schools. Since then, the AK Party has been determined to undo the effects of the 1997 reform. That's why the current reform proposes to both extend mandatory schooling to 12 years and divide that time into four years of primary school, four years of middle school and four years of high school (hence the "4 + 4 + 4" slogan). The idea is to revitalize middle schools and allow children to take a large number of elective options: in some cases, plumbing; in others, religious studies.

The bill is causing uproar. It was written without public debate — or even discussion in the education ministries own consultative body, the National Education Council — and it did not figure in the government's 2011 election manifesto. Fierce objections to it, mainly from the opposition Republican People's Party, led to fist fights and chairs being thrown in Parliament.

The critics' concerns are real. According to education specialists, the new measures would undermine educational standards and deepen social inequalities. The fifth grade, they argue, is just too early for children to be steered away from a basic curriculum and be asked to make vocational choices about how to spend the rest of their life.

Experts also say that the new system would hurt the less privileged. To get into the best schools in Turkey, children often have to take competitive examinations. Under the new law, children from deprived homes or who only know Kurdish when they enter the first grade will be hurt when they compete for middle school: they are unlikely to have overcome their handicap by the end of fourth grade in a system where Turkish is the language of instruction.

Another fear is that some parents will pull their daughters out of formal schooling after primary school to take advantage of options currently being considered that would allow for home schooling as early as the fifth grade.

The education faculties of most of Turkey's leading universities — including Sabanci University, Bosphorus University, Middle East Technical University and Koc University — have all issued press statements describing the reforms as hastily conceived, retrograde and out of step with current thinking.

As a result of this secularist policy, Islam was kept out of classrooms and madrasas were closed. It was only with the advent of a multi-party system that imam hatips were opened.

AKP proposed a draft bill through a parliamentary commission that, among other things, will help imam hatip schools like Osman's flourish by letting them take boys and girls from the age 11 instead of 15. Though the AKP bill stipulates that children should complete a total of

12 years education, up to the age of 18, critics say the changes will not address the fundamental issue of quality.

Everyone agrees on the need for change. Despite advances made in school attendance levels in the past 15 years, a World Bank study in 2010 showed only 16 percent of the 15-year-olds in Turkey attend schools with average reading, maths or science test scores that are comparable to or above an OECD average.

The AKP did drop some of its most contentious proposals from the initial draft, notably a provision allowing parents to withdraw their children from school at the age of 11 so they could opt for distance learning from home. Critics said it would have harmed girls' education; particularly, and potentially lead to more child marriages in backward, traditional communities in Turkey. Removal of the home learning option has left opponents' anger focused on the provision that allows parents to put children in vocational schools at the age of 11. While imam hatip schools fall in this category, so do technical schools providing classes in car maintenance, childcare, hairdressing and the like. Critics say it is too early for children to be making career choices with lowly aspirations.

"It's obvious that AKP's core motive with this draft is to boost the number of imam hatip schools and students, in line with Erdogan's desire to raise pious generations," Mehmet Bozgeyik, general-secretary of the Education and Science Workers' Union told.

Turkey, a Muslim country of 74 million, is politically polarised over the place religion should hold in society and the state, and some of the fiercest battles between the two camps have been fought over education policy. Indeed, the bill is designed to erase a piece of legislation that is hated by the AKP - the Compulsory Education Act of 1997. That act made it mandatory for children to attend 8 years of continuous schooling, in a state system devoid of religion. The number of pupils at imam Hatip School subsequently fell from around 600,000 to less than 60,000 in the following years.

Political opponents fear a manifold increase in imam hatip numbers will deepen the foundations of the AK support base for years to come and sharpen divisions in Turkish society.

3.2 Public servants' labour rights

Regarding public servants' labour rights, the main legislation is the 4688 numbered Act on Public Servants' Trade Unions. The latest amendments to this Act were made with the 6289 numbered Act[1] that makes various amendments to the principal Act. Changes the title of the Act to "Act on Public Employees' Unions and Collective Bargaining". The trade union organisations for public servants were critical of Act 6298 on Public Servants' Trade Unions and Collective Agreement, which does not grant them full trade union and collective bargaining rights and that this Act is not in full compliance with ILO standards. More about this below.

[1] http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=TUR&p_classification=02&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY When you go down to 2001-06-25, you may find the 4688 numbered Act and other legislations that amend this act, including 6289. The information note on the 6289 numbered Act, which is to be find in NATLEX under 2012-04-04.

4. THE DEMONSTRATION

In order to protest against the new law establishing a '4+4+4+' education system KESK organized a two days long protest meeting.

Also other organizations such as DİSK (Confederation of Progressive Trade Unions), TMMOB (Chambers of Turkish Engineers and Architects), TTB (Turkish Medical Association) and representations of political parties and democratic mass organizations participated in the demonstration.

The demonstration was held on March 28, 2012 at Ankara, Kızılay and March 29 close to KESK office.

Before the meetings negotiations was held with minister of labour, Interior and Justice and the governor of Ankara. The prime minister asked the demonstration to be cancelled.

The public was informed about the demonstration in advance the 13 - 14 March 2012.

KESK position was according to the constitution they had the right to go through with a peaceful demonstration.

Three different groups (in total about 5 000 participants) were meeting at three different places in order separately to go to Kilizilav the place for the common meeting. On the way to Kilizilav the groups were stopped and surrounded by the police. The Police used water cannons and tear gas trying to stop the demonstration.

Members of KESK and other organisations on their way to Ankara from different parts of Turkey was stopped in their villages. Different reasons were used to stop the busses such as lack of security belts. This meant that lot of persons were hindered to come to Ankara at all and apply their rights to demonstrate.

Due to that the police attacked the demonstrators violently with water cannons and tear gas the demonstrators protested against their actions and tree cars and some public property was harmed. KESK position is that this was a result of the police attack on a peaceful demonstration.

The second day about 500 members of KESK assembled close to the KEAS office in order to march to the parliament. The police that surrounded the group stopped the demonstration.

As a result of the demonstrations, the Ankara Public Prosecutors' Office placed a charge against 502 people, including President and General Secretary of KESK and the leaders of the other organizations DİSK (Confederation of Progressive Trade Unions), TMMOB (Chambers of Turkish Engineers and Architects), TTB (Turkish Medical Association).

5. THE STATE OF TURKEY INTERNATIONAL OBLIGATIONS

Turkey is a member of the UN, the International Labour Organization ("ILO"), and the Council of Europe. As such it has ratified the core international treaties relating to trade union

rights, including ILO Conventions 87 and 98, and the European Convention on Human Rights (ECHR), the most relevant Articles being 6 (right to a fair hearing) and 11 (right to association). Although Turkey has not accepted Articles 5 or 6 (trade union rights) of the European Social Charter, the European Court of Human Rights (ECtHR) embedded into article 11 (the right to association) the ILO jurisprudence and the European Social Charter, effectively saying that they should be applied anyway[2].

[2] Demir and Baykara v Turkey [2009] IRLR 766 in the Grand Chamber.

.../...

5.1 The right to assembly - the European convention of human rights

> Freedom of Assembly
> Article 11
>
> Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> No restrictions Shall be placed on the exercise of These rights other than Such as are The prescribed by law and are Necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article Shall not preventable the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Everyone has the right to freedom of peaceful assembly and freedom of association, including the right to form and join trade unions for the protection of his interests. The exercise of these rights shall not be subject to any restrictions except those which are prescribed by law and are necessary in a democratic society, in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection for other people's rights and freedoms. This article shall not prevent the members of the armed forces, the police or the State Administration of lawful restrictions on the exercise of these rights.

Article 11 deals with the right to freedom of peaceful assembly. The requirement that the gathering will be peaceful comprises an important demarcation of protection. Outside this right fall demonstrations and meetings where organizers or participants intend to resort to violence. It can also occur that the demonstrations were planned as peaceful manifestations degenerates into fights or even more serious use of force. When such methods are used, does Article 11 no longer protect the gatherings.

The right to participate in peaceful assembly not only means that the authorities must allow such demonstrations but also those who participated in such a gathering must not afterwards suffer a penalty or sanction for having organized or participated in the gathering.

In contrast, Article 11 does not mean that the person who conducts the meeting in such a way that he was violating the law are punished for breaking the law. The demonstrator blocking a road where a controversial shipment shall go forward or, to prevent access to a building or facility can thus without prejudice to Article 11, be punished for his act (Commission targets 13079/87 against Germany , see also Barraco v. France) .

In Djavit An and Adali cases, both against Turkey, had Turkish Cypriots living in northern Cyprus, been refused permission to travel to southern Cyprus in order to attend meetings with the Greek Cypriots. The reason that permission was refused was that by participating in such meetings were considered to carry propaganda against the Turkish authorities, but the European Court held that the restriction on freedom of assembly did not have a legal basis and that it was contrary to Article 11.

In case Güneri and others against Turkey had political meetings that a political party wanted to organize in cities in south eastern Turkey been banned , and in case Yeilgöz against Turkey had a group from an NGO been prevented from entering a specific area of south eastern Turkey to hold meetings with the local population. The European Court took into consideration the security problems in this part of Turkey but considered that it still were not been sufficient reasons for these restrictions on freedom of assembly.

In case Cetinkaya against Turkey, Cetinkaya had been convicted of participating in an illegal public meeting at which it adopted a declaration criticizing the Turkish authorities for their reluctance to investigate some abuse. The European Court found that he had been convicted solely for their attendance at the meeting and that the punishment was not compatible with Article 11.

5.1.1 Refusal to authorize the demonstration - effects on legality of demonstration

Article 11 does not prevent a State to apply the police regulations in the implementation of public gatherings. A requirement for those wishing to arrange such a meeting to make a prior announcement or to request permission of the authority is not contrary to Article 11 as long as these formalities do not prevent the implementation of the gathering. The licensing process may not take that long for rapid manifestation to be prevented. The requirement for expedited processing of questions about the demonstration condition becomes particularly important when a demonstration shall be implemented in a timely matter, eg in response to a recent event.

A decision to refuse permission for a public meeting was considered in case Zeleni Balkani against Bulgaria to constitute a violation of Article 11, even though the decision a year later was dispelled by the court.

Also in case Baczkowski and others against Poland had a decision to refuse permission for a demonstration but only after the scheduled date of the demonstration, which meant that Article 11 had been violated.

In case Patyi and others against Hungary, the authorities had refused to allow a demonstration outside the prime minister's private residence . Since it had been about a small group of protesters who would not have created problems for traffic, was the decision to refuse permission considered to conflict with Article 11.

In the case Curve and others against Hungary the Court considered it had been a disproportionate measure to disband a demonstration simply because of the lack of prior notification to the police.

Also in case Nurettin Aldemir and others against Turkey was the case of a demonstration held without permission. Police intervention to disperse the protesters had been done with such powerful medium that it was disproportionate, why freedom of association in Article 11 had been violated in this case.

In case Éva Molnár v. Hungary, the police had cancelled a demonstration due to the absence of prior notification, but the police had allowed the demonstration to proceed for several hours before it was cancelled and was thus deemed to have shown sufficient respect.

.../...

In case Samut Karabulut v. Turkey, had a demonstration held without permission been dissolved by force by the police before the demonstrators had time to express their opinions . A threat to public safety had not existed, and police actions were not found in consistent with Article 11.

In case Hyde Park and others (No. 5 and No. 6) against Moldova had protesters arrested and convicted for participating in an illegal demonstration. Measures had not been necessary and was therefore contrary to Article 11.

In Makhmudov against Russia had refused permission for a demonstration because of the alleged danger of terrorist acts in connection with the demonstration. The European Court found it not proven that there really existed such a risk and believed that assembly had not been respected.

5.1.2 Permissible restrictions - requiring proportionality

State's obligation to respond to public policy means that permission for a demonstration may be refused if its implementation is expected to lead to unrest and these cannot be prevented with reasonable effort. Such restrictions on freedom of assembly, however, are subject to a requirement of proportionality. This means that a prohibition to hold a demonstration may not in terms of time or place be more extensive than is actually required to maintain order.

The permit that can be done in terms of public meetings will not normally relate to the ideological content of the manifestation referred to the gathering. However, there may be exceptions even to this rule. In one case, the Commission found no objection to the Austrian authorities banned a gathering whose purpose was to propagate the Austrian union with Germany. The restriction of the freedom of assembly considered in this case justifiable in view of national security (Commission goals 9905/82 against Austria).

In cases Gazioglu Others and Akgol and Göl , both against Turkey, was the question of demonstrations held without permits and dissolved by the police, after which participants indicted. European Court held that the authorities must show tolerance at demonstrations carried out without the use of violence and found the interventions in these cases disproportionate.

Gatherings intended to promote the use of violence or other criminal activity may be prohibited without falling foul of Article 11. In some cases, additional support for a ban is taken from Article 17 of the Convention, which contains a general reservation for actions aiming at the destruction or undue prejudice to the rights protected by the Convention . Just as the Commission found support in this article to justify interference with freedom of expression when it is used to express Nazi or racist views, it should also be regarded as permitted under Article 11 that prohibit demonstrations or other gatherings of Nazi or racist nature or to otherwise way to intervene against those who organized or participated in these sessions.

In Barraco against France had protesters sentenced for blocking the traffic by placing the cars on a highway. The disturbances had been so great that they should not have been tolerated. No breach of Article 11.

5.2 Article 11 and the ILO convention

In the case of *Demir and Baykara v Turkey*,[3] the Grand Chamber unanimously held that Article 11 of the ECHR should now be interpreted in line with the jurisprudence of ILO committees (as well as the standards and principles enshrined in the European Social Charter). The ECtHR, in defining the meaning of the ECHR, can and must take into account elements of international law other than the Convention. The consensus emerging from specialised international instruments (such as ILO conventions) and from the practice of contracting states may constitute a relevant consideration for the Court when it interprets the provisions of the EHRC.[4]

The ECtHR also held that article 11(2) of the EHRC indicates that states are bound to respect freedom of assembly and association, subject to the possible imposition of "lawful restrictions" on the exercise by members of its armed forces, police or administration of the rights protected in article 11. The restrictions imposed on the three groups mentioned in Article 11(2) are to be construed strictly and should therefore be confined to the "exercise" of the rights in question. These restrictions must not impair the very essence of the right to organise.[5]

5.3 ILO and the right to demonstrate

Within the ILO case law the right to organise public meetings and demonstrations has a long history and clear advise been given to the parties involved.

Workers should enjoy the right to peaceful demonstration to defend their occupational interests.[6] The right to organize public meetings constitutes an important aspect of trade union rights. In this connection, the Freedom of Association Committee (the Committee) has always drawn a distinction between demonstrations in pursuit of purely trade union objectives, which it has considered as falling within the exercise of trade union rights, and those designed to achieve other ends.[7]

Protests are protected by the principles of freedom of association only when such activities are organized by trade union organizations or can be considered as legitimate trade union

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[3] [2009] IRLR 766

[4] ibid, at [85]

[5] ibid, at [96] – [98], in the context of the right of civil servants to organise and form trade unions

[6] (See the 1996 Digest, para. 132; and, for example, 306th Report, Case No. 1884, para. 695; 307th Report, Case No. 1909, para. 493; 320th Report, Case No. 2023, para. 425; 321st Report, Case No. 2031, para. 174; 326th Report, Case No. 2113, para. 374; 330th Report, Case No. 2189, para. 453; 335th Report, Case No. 2320, para. 664; 336th Report, Case No. 2340, para. 650; 337th Report, Case No. 2318, para. 338, and Case No. 2323, para. 1043.)

[7] (See the 1996 Digest, paras. 133 and 464; 300th Report, Case No. 1818, para. 364; 308th Report, Case No. 1934, para. 131; 309th Report, Case No. 1852, para. 340; 311th Report, Case No. 1969, para. 148; 332nd Report, Case No. 2238, para. 968; and 334th Report, Case No. 2222, para. 219.)

.../...

activities as covered by Article 3 of Convention No. 87.[8]

Trade union rights include the right to organize public demonstrations. Although the prohibition of demonstrations on the public highway in the busiest parts of a city, when it is feared that disturbances might occur, does not constitute an infringement of trade union rights, the authorities should strive to reach agreement with the organizers of the demonstration to enable it to be held in some other place where there would be no fear of disturbances.[9]

The authorities should resort to the use of force only in situations where law and order is seriously threatened. The intervention of the forces of order should be in due proportion to the danger to law and order that the authorities are attempting to control and governments should take measures to ensure that the competent authorities receive adequate instructions so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations which might result in a disturbance of the peace.[10]

The requirement of administrative permission to hold public meetings and demonstrations is not objectionable per se from the standpoint of the principles of freedom of association. The maintenance of public order is not incompatible with the right to hold demonstrations as long as the authorities responsible for public order reach agreement with the organizers of a demonstration concerning the place where it will be held and the manner in which it will take place.[11]

Permission to hold public meetings and demonstrations, which is an important trade union right, should not be arbitrarily refused.[12]

Although the right of holding trade union meetings is an essential aspect of trade union rights, the organizations concerned must observe the general provisions relating to public meetings, which are applicable to all. This principle is contained in Article 8 of Convention No. 87, which provides that workers and their organizations, like other persons or organized collectivities, shall respect the law of the land.[13]

It is for the government, which is responsible for the maintenance of public order, to decide whether meetings, including trade union meetings, may, in particular circumstances, endanger public order and security, and to take any necessary preventive measures.[14]

Trade unions must conform to the general provisions applicable to all public meetings and must respect the reasonable limits which may be fixed by the authorities to avoid

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[8] (See 333rd Report, Case No. 2204, para. 228.)

[9] (See the 1996 Digest, para. 136; 304th Report, Case No. 1850, para. 213; 309th Report, Case No. 1940, para. 284; 318th Report, Case No. 1994, para. 460; 327th Report, Case No. 2148, para. 802; and 336th Report, Case No. 2340, para. 650.)

[10] (See the 1996 Digest, para. 137; and, for example, 300th Report, Case No. 1811/1816, para. 311; 304th Report, Case No. 1837, para. 55; 308th Report, Case No. 1914, para. 670; 311th Report, Case No. 1865, para. 336; 320th Report, Case No. 2027, para. 872; 328th Report, Case No. 2143, para. 593; 330th Report, Case No. 2189, para. 453; 332nd Report, Case No. 2218, para. 422; 336th Report, Case No. 2340, para. 651; and 337th Report, Case No. 2323, para. 1031.)

[11] (See the 1996 Digest, para. 138; 334th Report, Case No. 2222, para. 219; 335th Report, Case No. 2285, para. 1184; and 336th Report, Case No. 2358, para. 719.)

[12] (See the 1996 Digest, para. 139; 316th Report, Case No. 1773, para. 612; and 334th Report, Case No. 2222, para 219.)

[13] (See the 1996 Digest, para. 140; 332nd Report, Case No. 2187, para. 719; and 334th Report, Case No. 2222, para. 219.)

[14] (See the 1996 Digest, para. 143; and 300th Report, Case No. 1791, para. 339.)

disturbances in public places.[15] The right to hold trade union meetings cannot be interpreted as relieving organizations from the obligation to comply with reasonable formalities when they wish to make use of public premises.[16] Trade unions should respect legal provisions which are intended to ensure the maintenance of public order; the public authorities should, for their part, refrain from any interference which would restrict the right of trade unions to organize the holding and proceedings of their meetings in full freedom.[17]
The obligation on a procession to follow a predetermined itinerary does not constitute a violation of trade union rights.[18] In general, the use of the forces of order during trade union demonstrations should be limited to cases of genuine necessity.[19]

The police authorities should be given precise instructions so that, in cases where public order is not seriously threatened, people are not arrested simply for having organized or participated in a demonstration.[20]

5.4 ILO, fair trial and criminal charges within the labour area

The ILO Committee on Freedom of Association note the following relevant principles in their "Digest of Decisions", under the heading on Civil Liberties:

"41. Allegations of criminal conduct should not be used to harass trade unionists by reason of their union membership or activities.
[…]
68. The apprehension and systematic or arbitrary interrogation by the police of trade union leaders and unionists involves a danger of abuse and could constitute a serious attack on trade union rights.
[…]
100. It should be the policy of every government to ensure observance of human rights and especially of the right of all detained or accused persons to receive a fair trial at the earliest possible moment.
[…]
104. As concerns allegations that legal proceedings are overly lengthy, the Committee has recalled the importance it attaches to such proceedings being concluded expeditiously, as justice delayed is justice denied.
[…]
106. The absence of guarantees of due process of law may lead to abuses and result in trade union officials being penalized by decisions that are groundless. It may also create a climate of insecurity and fear, which may affect the exercise of trade union rights.
107. The safeguards of normal judicial procedure should not only be embodied in the law, but also applied in practice.
[…]

[15] (See the 1996 Digest, para. 141; 300th Report, Case No. 1791, para. 339; 304th Report, Case No. 1865, para. 247; 308th Report, Case No. 1914, para. 670; 327th Report, Case No. 2148, para. 802; 335th Report, Case No. 2285, para. 1184; 336th Report, Case No. 2358, para. 719; and 337th Report, case No. 2318, para. 339.)
[16] (See the 1996 Digest, para. 142.)
[17] (See the 1996 Digest, para. 144; 326th Report, Case No. 2113, para. 372; 335th Report, Case No. 2320, para. 669, and Case No. 2330, para. 878.)
[18] (See the 1996 Digest, para. 145.)
[19] (See the 1996 Digest, para. 146; 327th Report, Case No. 2148, para. 802; and 334th Report, Case No. 2222, para. 216.)
[20] (See the 1996 Digest, para. 147; 300th Report, Case No. 1818, para. 364; and 336th Report, Case No. 2340, para. 651.)

109. The Committee has always attached great importance to the principle of prompt and fair trial by an independent and impartial judiciary in all cases, including cases in which trade unionists are charged with political or criminal offences.
118. The Committee has recalled that the International Covenant on Civil and Political Rights, in Article 14, states that everyone charged with a criminal offence shall have the right to adequate time and the necessary facilities for the preparation of his defence and to communicate with counsel of his own choosing.
[…]

Currently, the relevant international standards and principles are reflected to a degree within the national legal framework in Turkey, but they are subject to wide ranging restrictions.

As the ILO principles cited above show, which are an absolute baseline, rather than a recommended maximum, the freedom to associate can be undermined by the application and procedure followed in relation to other laws.

6. NATIONAL LEGAL REGULATIONS

6.1 The Constitutional regulation

The Turkish Constitution protects the rights and freedoms of association in Part Two:

Article 33 allows for everyone to form or become a member of an association without prior permission; and

Article 34 protects the right of everyone to hold peaceful meetings and demonstration marches without prior permission, although that right can be restricted by law on a number of grounds and “the formalities, conditions and procedures governing the exercise of the right to hold meetings and demonstration marches shall be prescribed by law”.

6.2 Criminal law

Law nr 2911[21]

Actions against the prohibitions

> Article 28/1:
> Those who organize or administrate illegal meetings or demonstrations and those who participate in the acts of these persons shall be punished with imprisonment of one year and six months to three years, provided that the offence does not constitute an offense with a higher punishment.
>
> Article 32/1, 1st sentence:
> If those who attend an illegal meeting or a demonstration insist on not dissolving despite the warning and the use of force, they shall be punished with imprisonment from six months to three years.

The English versions of the Criminal Code and the Criminal Procedure Act I have taking part of have some problems. The only problem with the Criminal Code translation is that apparently the translator disregarded an abrogated article, altering the numbering of the articles. To be more specific, Article 263 of the Turkish Penal Code is abrogated and the translator inserted the wording of article 264 to article 263. This means that in order to read article 265/1, you have to look at article 264/1 in the translation, which is "prevention of performance". The articles before article 263, match the original.

> *Prevention of performance*
> Article 265/1: Any person who uses force or threat against a public officer to prevent him from performing a duty is punished with imprisonment from six months to three years.
>
> *Damage to property*
> Article 151/1: Any person who entirely or partially destroys, demolishes, corrupts, breaks or dirties other's movable or immovable property in such a way not to be used any more, is punished with imprisonment from four months to three years, or imposed punitive fine.
>
> *Qualified form of damage to property*
> Article 152/1: In case of commission of this offense by damaging;
>
> a) Buildings, premises or other property belonging to public institutions and corporations, or allocated to public service or in places used for public interest,
> b) All kinds of property or facilities reserved to prevent fire, flood, accidents or other disasters,
> c) Trees, shrubs or wine yards wherever they are being planted, excluding places in the status of State forest,
> d) Plants used for supply of irrigation, utility water or useful for prevention of disasters,
> e) Buildings, premises or property owned by employers or workers, or trade unions/syndicates or confederations during lock-out or strikes,
> f) Buildings , premises or property owned or used by political parties, professional organizations in the status of public institution and their supreme committees,
> g) Commission of offense with the intention of injuring a public officer to take revenge even if his office period is terminated,
> the offender is punished with imprisonment from one year to six years.
>
> *Disqualification from use of certain rights:*

[21] An official English version of the Law nr 2911 was not to find but article 28/1 was translated by the lawyer Zeynep Kılıçkaya.

article 53/1-2: (1) As legal consequences of sentence to imprisonment due to a felonious intent, a person may be disqualified from;
a) Undertaking of a permanent or temporary public service; within this scope, such person is suspended from membership in Turkish Grand National Assembly, or office in any department of the State, province, municipality or employment in an institution and corporation controlled by these administrations,
b) Use of right of voting or right to be elected,
c) Use parental right; assignment in the status of guardian or curator,
d) Employment as manager or auditor in the foundations, associations, unions, companies, cooperatives and political parties in the status of legal entity,
e) To perform a profession or art as free-lancer or tradesman subject to consent of a professional organization in the status of public institution or public corporation.
(2) A person may not use these rights until the punishment of imprisonment is fully executed.

Recidivism and Offenses of Special Risk
Article 58:
(1) Provisions relating to recidivism are applied in case of commission of an offense after finalization of the decision for conviction. Execution of the sentence is not sought for adoption of this provision.
(2) The provisions relating to recidivism may not be applicable for the offenses committed;
a) After lapse of five years as of the execution date of the sentence to imprisonment more than five years due to previous conviction,
b) After lapse of three years as of the execution date of sentence to imprisonment for five years or less due to previous conviction.
(3) In case of recidivism, the offender is punished with imprisonment if an alternative between imprisonment and administrative fine is provided in the relevant article of the law for the current offense.
(4) The provisions relating to recidivism may not be applicable in the felonious or negligent offenses and exclusive military offenses. Excluding offenses such as felonious homicide, felonious injury, plunder, swindling, production and trading of narcotic and harmful drugs or counterfeiting of valuable stamps, the decisions taken by the foreign courts may not be taken as basis in recidivism.
(5) The provisions relating to recidivism may not be applicable for the offenders not attained the full age eighteen on the commission date of the offense.
(6) The punishment to be imposed in case of recidivism is executed according to the regime exclusive to the recidivists and the convict is released following the execution of the sentence but kept under control and observation as precaution.
(7) The decision for conviction should contain a statement notifying adoption of special execution regime and imposition of precaution seeking control and observation of the recidivist after release.
(8) The sentence and precaution seeking control and observation of the recidivist after release is executed according to the procedure setout in the law.
(9) The court may decide adoption of special execution regime and precaution seeking control and observation of the recidivist after execution of the sentence also for the inveterate offenders, and the persons who commits offense in a professional manner or the offenders belonging to an organized group.

6.3 PUBLIC SERVANTS' LABOUR RIGHTS

Regarding public servants' labour rights, the main legislation is the 4688 numbered Act on Public Servants' Trade Unions. The latest amendments to this Act were made with the 6289 numbered Act[22] that makes various amendments to the principal Act. Changes the title of the Act to "Act on Public Employees' Unions and Collective Bargaining". Makes various changes to membership of unions including allowing for public employees to become union

[22] http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=TUR&p_classification=02&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY When you go down to 2001-06-25, you may find the 4688 numbered Act and other legislations that amend this act, including 6289. The information note on the 6289 numbered Act, which is to be find in NATLEX under 2012-04-04.

members during their employment probation period and senior employees and their assistants in workplaces of more than 100 employees may join unions. The requirement of two years service before being able to found a trade union has been abolished. Matters which are to be included in unions' and confederations' statutes have been simplified. The functions and rights of workplace union representatives have been set out and a Public Employee Advisory Board established.

One attachments to this report (ANNEX 2) is the EU-Turkey Joint Consultative Committee Report. The relevant information on public servants is found as of page 6 of this report.

The report states that, there are several areas of concern. The lack of protection against anti-union discrimination for workers in small companies, the obstacles to gaining competence for collective bargaining and the restrictions on the right to strike. Large differences in interpretation of the new Act exist. Different views were expressed on the freedom to establish enterprise, regional or professional unions. It remains unclear whether such unions will be allowed to operate. Article 25.5 on protection against anti-union discrimination for workers in companies with less than 30 workers is ambiguous and controversial. The definition of a legal strike as strictly related to collective bargaining seems to contradict the constitutional definition. All these questions are referred to the interpretation of the courts and case law.

The main opposition party in the Parliament has brought many of the provisions of the new Act 6356 before the Turkish Constitutional Court with claims for annulment. The Court, however, has not made any decision yet.

The trade union organisations for public servants were critical of Act 6298 on Public Servants' Trade Unions and Collective Agreement, which does not grant them full trade union and collective bargaining rights.

The co-rapporteurs are of the opinion that this Act is not in full compliance with ILO standards.

7. HEARING ON 13 JANUARY 2014

The case was scheduled for 10.00 am in the Criminal Court in Ankara. At the hearing itself, not many people were attending, only half of the public gallery was covered.

As has been reported before[23] factors about the procedure strike an observer as being counter fair trial principle. The prosecutor sat alongside the one judge, and did not speak during the hearing. The principle that the prosecution should be independent of the court was not obvious. The prosecution was more seen to be part of the state power and state administration of justice visualised in the courtroom.

The defence lawyers were as well very inactive during the hearing and did not make any oral submissions. Due to the lack of activity from both the prosecutor and the lawyers it was obvious that the main part of the trial had been conducted in written before the hearing. The lawyers must already have made written defences.

[23] See trial observer, Michael Newman report from 2013

The only active persons during the oral hearing were the group of about 20 persons consisting of the leaders of the 502 accused persons. They gave their statements, demanding the court to protect their rights to demonstrate. The defendants all spoke of the evidence against them being based on their union activity, a demonstration and holding meetings in public. Many said that they believed the trial to be "political" rather than "legal". The arguments were more a political protest than legal argument but related as well to what had happened during the demonstrations.

The courts transcribe only recorded the judge's summary of the accused statement; either the lawyers never corrected the summery, or the present accused.

The hearing was over at about 13:00.

Around 100 trade union members demonstrated outside the court after the hearing demanding basic labour rights. A short statement was made by Lami Özgen, president of KESK, proclaiming KESK's right to freedom of association as fundamental.

8. EVALUATION OF THE HEARINGS/TRIAL PROCESS
(extent complied with international standards)

8.1 Legal framework[24]
The main international standards relevant for the purposes of this report are set out in ILO Conventions 87 and 98, along with ECHR Articles 11 and 6, Turkey has ratified all of which.

8.2 The hearing

During the hearing 13 of January the evidences was not presented and no witnesses was heard and I understand that this is due to the written procedure in the case.

The right to be tried by an independent and impartial tribunal must be applied at all times and is a right contained in article 14(1) of the International Covenant on Civil and Political Rights, which provides that "in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"(emphasis added).

With regard to the minimum guarantees contained in article 14(3) of the Covenant with respect to criminal proceedings, the Human Rights Committee has pointed out in General Comment No. 13 that their observance "is not always sufficient to ensure the fairness of a hearing as required by paragraph 1"1 of article 14, which may thus impose further obligations on the States parties. In particular, when it comes to cases in which a capital sentence may be imposed, "the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception".

The right to a fair trial as guaranteed by article 6(1) of the European Convention on Human Rights was violated in the case of Botten, where the Supreme Court of Norway gave a new

[24] This section relies heavily on Sarah Hemingway's observation report for ICTUR in the Sinter Metal trial.

judgement, convicting and sentencing the applicant, in spite of not having summoned or heard him in person. This was so, although the proceedings before the Court had included a public hearing at which the applicant was represented by counsel. In the view of the European Court, the "Supreme Court was under a duty to take positive measures" to "summon the applicant and hear evidence from him directly before passing judgement".

The right to a fair trial can be violated in many ways, but as a general principle it has always to be borne in mind that the accused person must at all times be given a genuine possibility of answering charges, challenging evidence, cross-examining witnesses, and doing so in a dignified atmosphere.

Failures and shortcomings at the stage of criminal investigations may seriously jeopardize the right to fair trial proceedings and thereby also prejudice the right to be presumed innocent. Article 14(3)(e) of the International Covenant provides that, in the determination of any criminal charge against him, everyone shall be entitled to "examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". Article 6(3)(d) of the European Convention on Human Rights contains an identically worded provision.

With regard to article 6(3)(d) of the European Convention on Human Rights, the European Court held in the Delta case that "In principle, the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6, provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness makes his statement or at some later stage of the proceedings...".

Consequently, in the Delta case, where the applicant was convicted on the basis of testimony given by witnesses at the police-investigation stage whose credibility neither the applicant nor his legal counsel had been able to challenge, the European Court found a violation of the right to a fair trial in article 6(1) and (3)(d) of the Convention.

Due to the hearings did not include any witness hearings and no legal arguments it is very difficult to judge if the hearings was fair or not. Many countries have changed the criminal proceedings and have introduced oral proceedings and that will be my recommendation for Turkey as well.

Since the judgment is not yet provided, it is not possible to assess whether the court applied the substantive law in conformity with international standards and principles.

Due to the lack of the criminal proceedings to be in full at the public hearing the risk for the proceedings not to be fair can not be excluded when the proceedings can impeded access to justice for the defendants.

It is however possible to conclude that 20 of the accused did have a lawyer and did in person argue their positions in the case during the hearing without being interrupted.

9. CONCLUSION

9.1 The objectives of the demonstrations

For me it is clear that the objectives from KESK and other trade unions were to protest the change of the education and labour law for public servants. I have not find that the organisations did have any other objectives for the demonstration.

9.2 The lack of permission

As has ben stated by the European court of human rights many times the lack of permission in advance must not necessary make a demonstration illegal or forbidden even if the law says that. In each case such restrictions on freedom of assembly, is subject to a requirement of proportionality . This means that a prohibition to hold a demonstration may not in terms of time or place be more extensive than is actually required to maintain order.

9.3 The proportionality test

If the permission will not be granted there must be – according to the case law of European court of human rights – obvious security reasons. Due to the material I have taken part of it is not possible to conclude if the arguments from the government have any bearing at all – but due to that the demonstration was attended by public officials and many of them teachers there is a general base to relay on that the participant are not in general violent in nature.

9.4 Illegal violence?

The representatives of KESK have stated that any physical action taken by the demonstrators was only related to provocation and violence from the police. In this part only evidence such as film, tapes, witnesses and other findings can give a final conclusion. In this part the court must give the burden of proofs clearly on the state and any doubts must be interpreted in favour of the defendants.

9.5 The court application of international and regional state obligations

Due to the hearings has not been followed by a judgment yet, it has not been possible to comment on the extent to which the court applied, or interpreted, the law in line with standards of European convention and the ILO case law.

It is however clear that the possibility to ban a peaceful demonstration in accordance with Article 11 European convention and the ILO regulations is very limited. The objectives for the demonstration do not give reason for a ban.

The criminal law definition of what is legal and illegal according to the Turkish criminal law is unclear. The possibility for the State to ban demonstration in criminal law is as well limited according to the European convention. Only the lack of permission is not enough for criminalise a demonstration. There are needs for proportionality test in each case.

.../...

The action from police to stop demonstrators' transports from different parts of the country to Ankara was obviously counter the rights in Article 11 and ILO conventions.

A constitutional test of the criminal law definition of what is allowed and legal ought to be developed. It is obvious that the space for demonstrations not to be hindered by the authorities must be wide and that only clear and obvious reasons for the limitation of that rights must be at hand.

Regarding the hearings it has not been possible to draw conclusions about the general conduct of proceedings due to that I only attended one day of the hearing. The nature of the legal protection afforded to union members in Turkey is however in doubts due to the criminalisation of the demonstration and the amount of accused persons. Will it be possible to find that all participants – 502 persons - have violated the obligation for a peaceful action? The action taken by the prosecutor looks more as an action for future action not to be taken.

Providing a right to organise is only of value if the right can be effectively organised; it follows that the right is emaciated if its exercise is penalised in practice. The use of the Penal Code in against KESK means that members are placed in doubt about whether trade union demonstrations are lawful. This doubt, whether it is in the intention of the prosecuting authorities or even the unintended consequence of their prosecution, is enough to render the right to organise potentially ineffective.

10. RECOMMENDATIONS

The legislature should provide for greater protection of public workers trade union rights and freedoms in line with international standards.

My recommendation in regards to the Turkish labour law for public servants is that the law ought to be scrutinised by a Turkish/International committee composed by experienced labour lawyers with a mandate to deliver a legal opinion in order to develop an argument for change.

I also recommend when the judgment comes - if necessary - to take initiatives on further constitutional cases and if not successful the case can be taken to Strasbourg. Specifically the proportionality test in regards to the police action will be possible to try in both instances.

The defendants could as well take into consideration to make a complaint to the ILO Committee on Freedom of Association regarding non-compliance with the principles of freedom of association ev. based on proposed legal opinion.

REX/382

EU-Turkey Joint Consultative Committee

ANNEX 1

Brussels,

32nd meeting of the EU-Turkey Joint Consultative Committee (JCC)

7-8 November 2013

JOINT REPORT
Trade Union Rights Situation in Turkey

RAPPORTEURS

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Introduction

The trade union rights situation has been a standing item on the agenda of the EU-Turkey JCC since its 18th meeting in The Hague in 2004. The EU-Turkey JCC has discussed the trade union rights situation in Turkey several times, and one milestone in the work of the EU-Turkey JCC in analysing the trade union rights situation was the joint report by Mr R. Işik and Mr T. Etty presented at the 22nd JCC meeting held in Brussels in 2007. Two new and extensive reports on the trade union rights situation were prepared by the co-rapporteurs Mr Işik and Mr Boyle in 2008.

The JCC underlined that the issue of trade union rights would remain high on its agenda, and followed up on this decision by mandating the co-rapporteurs Mr R. Işik and Ms A. van Wezel to prepare an update to the 2008 joint report. A first draft of the updated report was presented to the 29th EU-Turkey JCC in 2012 and it was decided to postpone a full discussion in order to include the anticipated legislation in the JCC's considerations. It was also decided that the working process of the co-rapporteurs Prof. Işik and Ms van Wezel would involve conducting a full consultation with all social partners and the government after reviewing the new legislation.

During this new mandate, new legislation was enacted by the Parliament starting with amendments to the constitution. Accordingly, in September 2010 the amendment to the constitution cleared the way for replacing the Act on Public Servants' Trade Unions and Collective Agreement (Act No 4688) by Act No 6289 in April 2012[25]. Furthermore, on 18 October 2012 the Turkish Grand National Assembly adopted the Act on Trade Unions and Collective Labour Agreements No 6356, replacing the two previous Acts 2821 and 2822.[26]

The previous acts 2821 and 2822 originated in the period of military rule, and fell short of the requirements of ILO Conventions 87 and 98 and the European Social Charter. Turkey ratified the conventions in 1993 and 1952 respectively. As it is known, these conventions guarantee the rights of workers and employers to establish organisations of their own choosing to defend their interests collectively: convention 87 protects freedom of association and the right to organise, while convention 98 protects the right to collective bargaining for the social partners. ILO Conventions 87 and 98 are also part of the EU acquis and their implementation is one of the benchmarks for the opening of Chapter 19 on social policy and employment. The government of Turkey has indicated that the intention of the new legislation is to align its laws with the ILO conventions and the European Social Charter[27].

The two co-rapporteurs conducted their consultation mission on 18-19 December 2012. They spoke with all social partners, both within and outside the JCC, and employers' and workers' organisations in both the private and public sectors. They also spoke with government representatives closely involved in the drafting of the Act on Trade Unions and Collective Labour Agreements No 6356, and representatives of the ILO and of the European Union Delegation to Turkey.[28] All of these consultations were conducted separately in order to receive the most accurate and unbiased opinions from the social partners.

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[25] Date of approval 4.4.2012, published 11.4.2012.

[26] Entered into force November 7, 2012

[27] MoLSS: A new Era in Turkish Labour Relations: Act on Trade Unions and Collective Labour Agreements No 6356. March 2013, Ankara

[28] The programme of this mission is attached to this report

The co-rapporteurs greatly appreciate the openness of all the interviewees and thank them for their frankness. They shared insider information on the process of negotiation and on their own positions, and spoke freely on their assessment of the new laws and their expectations concerning implementation. By doing so they allowed the co-rapporteurs to identify perceived progress, but also to identify areas where future problems might be expected.

This report, submitted to the 32nd EU-Turkey JCC meeting in Brussels, presents the co-rapporteurs' findings.

New legislation for trade unions and employers' associations applicable to private law employment contracts[29], mainly in the private sector

Within the given mandate, the main aim of this Joint Report in general is to try to evaluate Turkey's new collective labour legislation – namely the Act on Unions and the Collective Agreement of November 2012 No 6356, which has replaced Acts 2821 and 2822 – from the perspective of universal standards of freedom of association, in particular the two ILO conventions 87 and 98, and also to propose the necessary amendments to the Acts regulating trade union rights, in order to achieve trade union rights in line with the EU standards. The new Act No 6356 combined the previously separate union[30] and collective bargaining legislation in the same Act. This change should be considered as a positive outcome; the definitions of key terms such as worker, employer, workplace, enterprise, industrial branch, union, trade union, employers' association, confederation, union officers, collective labour agreement, for workplace and/or workplaces, for groups, framework agreement, enterprise level, strike, lock-out, mediation and arbitration are harmonised. This consolidation has provided uniformity on terminology, in contrast to the previous two sets of legislation of 1963 and 1983, which regulated unions and collective bargaining in two separate acts (in 1963 acts 274 and 275; in 1983 acts 2821 and 2822). Some of the common key terms were defined differently in two acts at the same time, which caused problems in implementation.

Similarly, the justification and explanation of the Government on that point was 'with the new law, coherence among the legislation related with labour has been ensured. The text of the new law is shorter, concise and easier to understand'. Indeed, the total of 152 articles in Acts 2821 and 2822 have been combined into a single text with only 83 articles in the new Act No 6356.

The following are some of the improvements introduced with the new act:

The new Act sets forth, in article 3, the principle that unions may be established freely without prior authorisation.

The number of industry branches in which unions can be organised has been reduced to 20 from 28. As was the case in the previous acts, according to Article 4 of the new Act, auxiliary workers are still considered to be in the same branch of industry as the essential work of a given workplace.

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[29] This legislation is applicable to all employment contracts in both public and private sectors but not to public servants who are not considered under Turkish law to be working under employment contracts.

[30] "Union" is used here to refer to both trade unions and employers' associations.

The Act, in essence, appears to aim at establishing freedom of association, particularly regarding unions' internal affairs, which is expected to improve democracy in the unions. Accordingly, the new act establishes a more simplified process for the establishment, organisation and functioning of the unions. Moreover, the new Act reduces the impact of the state regarding cooperation with international workers' and employers' organisations. In addition, the new Act allows international organisations to establish representative offices in Turkey. Furthermore, union membership is simplified in that the notary requirement is abrogated and replaced by membership through the e-government system.

Despite the fact that the new Act, like the former Acts 2821 and 2822, does not allow membership of more than one union in the same branch of industry at the same time, an exception is adopted for part-time workers, allowing them to be members of more than one trade union in the same branch of industry at the same time provided that they are contracted by different employers.

The new Act explicitly regulates the situation of the unemployed and those fulfilling their military service requirements. Accordingly, membership of trade unions will remain valid for those unemployed temporarily for up to one year, and the trade union membership of those fulfilling their military duty will be suspended for the duration of their service.

The double threshold requirement for trade unions to attain competence to conclude collective agreements remains. However, the branch of industry threshold is reduced from 10% to 3% and the enterprise threshold is reduced from 50% to 40%. The workplace threshold remains unchanged at 50%.

In spite of the adopted principle of unionisation at industrial level, four types of collective agreements are regulated under the new Act: workplace collective agreements, group collective agreements, enterprise collective agreements and framework agreements[31].

All of the imprisonments for certain offences are replaced by administrative fines.

Although it falls short of meeting the international standards, the scope of legal prohibitions on strikes and lockouts has been reduced.

Most respondents in the consultations of December 2012 did identify areas of progress, in particular in the freedom to organise and in the reduction of government interference in the internal affairs of trade unions and employer organisations. They appreciated the fact that the registration of a trade union had been made easier, that requirements for becoming a founder member had been reduced and that the obligation for highly costly notarial registration had been abolished. The absence of government officers in trade unions congresses, and the lowering of the minimum age for union membership from 16 to 15 years, were mentioned as positive steps.

The following are some of the points of criticism of the new Act. Several social partners found the underlying structure and way of thinking in the new act unchanged. In that sense they found no discontinuity and considered the new act more as a revision of the previous

[31] This should not be confused with "framework agreements" in EU practice. Please see article 33/III, IV and V of Act 6356.

ones. None of the social partners were fully satisfied with the result. At best they saw it as – for the moment– the best possible compromise. The main criticisms made by the social partners reflect their initial proposals and demands that have not been fully met or regulated under the new Act.

Some trade unions, in particular, expressed concerns about remaining restrictions on the right to organise and about government interference, in particular regarding data protection in connection with the right to privacy concerning the newly introduced e-government registration for trade union membership. Their concerns revolve around access to personal data both by the state and other persons. The government does not share this concern as they claim registration will be anonymous. Restrictions on the freedom to organise continue to exist as the act allows trade unions to be set up only at the industrial level, excluding workplace and professional unions. The employers' understanding of this issue is that, as the law does not explicitly prohibit workplace or professional organisations, they may be allowed, but this is still to be clarified with further court decisions. The exclusion from trade union membership of workers who are unemployed for more than a year and pensioners is seen as interference in internal affairs.

The main areas of concern, however, related to trade union discrimination and protection of trade unionists, as well as the competence for collective bargaining and continued limitations on the right to strike.

Protection against anti-union discrimination.

The last minute inclusion of Article 25.5 was opposed by all social partners the co-rapporteurs met. Different interpretations of this article were given: most considered it to be a clear example of anti-union discrimination and a lowering of protection compared to the previous act for trade unionists in small companies with less than 30 employees. They understood the article to mean that workers in companies with less than 30 employees are not allowed to go to court with a claim for compensation for unfair dismissal on the grounds of trade union membership or activity. This is considered to be an important issue as an estimated 95% of companies and 50% of the registered workforce works in these small enterprises and it might potentially affect more than 5 million workers. Trade unions fear that the new law will make it more attractive to dismiss these workers. Others, including employers, count on the Turkish courts to give a different interpretation and to continue to grant compensation to these trade unionists in the event of unfair dismissal. They want the same anti-discrimination protection for all workers, as do the trade unions. Trade unions brought this point to the attention of the President of the Republic and they supported opposition parties in Parliament in bringing this before the Constitutional Court.

Double threshold for collective bargaining competence.

A much debated and criticised issue in the previous acts remains unresolved in the current Act: the double threshold for gaining collective bargaining competence. The different views among trade unions are often mentioned as a reason for the continuation of this problem. However, it became clear that different opinions also exist between employers' and workers' organisations and among employers.

All trade unions agree that the thresholds at workplace (50% plus one) and enterprise level (40% plus one) are far too high. For employers however this is not negotiable. As far as the branch level threshold is concerned, TOBB in particular wishes to maintain a high threshold (preferably 5%, and not lower than 3%), while TISK, which finds a double threshold justifiable in the Turkish context, considers 1% to be acceptable as a negotiated outcome. TURK-IS-is, who wanted to maintain the previous threshold of 10%, was also prepared to accept a (gradual) lowering to below 3%. HAK-IS and DISK prefer no branch threshold at all. The government representatives said they had no objections to the removal of the branch threshold. Uncertainty, and in some cases considerable concern, exists about the impact of the proposed thresholds, including the transitional measures until 2018, on the collective bargaining competence of existing unions. In some branches, because of the new definition of the branches (reduced from 28 to 20) and despite the lowering of the branch threshold, unions may require substantially more members to maintain or gain collective bargaining competence.

Furthermore, one issue on this subject is the provisional article providing for transitional measures from 1% to 3% until 2018. According to this article, the only trade unions subject to these transitional measures are those which are members of one of the confederations in the Economic and Social Council in Turkey. In other words, there appears to be explicit discrimination in favour of such trade unions, in that trade unions that are not members of any confederation or that are members of confederations outside of the Economic and Social Council are excluded from this provisional article and are directly subject to the 3% rule. This is regarded as a violation of not only the principle of equality but also both individual and collective freedom of association.

The scope and the level of collective bargaining are also subject to criticism.

The right to strike

For trade unions a third important issue is the right to strike.

Though they acknowledged some lifting of restrictions, due to a more liberal definition of “essential services” and the lifting of the prohibitions on strikes in the aviation sector, the limitations remained too strict and government interference too strong. All of them felt this was a major weakness of the new Act.

There is a lack of clarity regarding the definition of a legal strike. While on the one hand the amendment of the constitution lifted restrictions on political, solidarity and other types of strike, the new act defines a legal strike as a strike related to collective bargaining only (Art. 58-1, 58- 2 and 58-3).

Social dialogue

All social partners appreciate the process of social dialogue as a means of reaching a negotiated result. Social dialogue was mentioned as a way to improve industrial relations. It was regretted that too many employers are still reluctant to have trade unions in their workplaces. Trade unions could be more engaged in other issues than just wages. It was suggested that social dialogue could contribute to improved health and safety conditions and to competitiveness.

Act No 6289 on Public Servants' Trade Unions and Collective Agreement

In the public sector the co-rapporteurs spoke with Kamu-sen, KESK and Memur-sen. Discussions with these public sector unions focussed on the Act on Public Servants' Trade Unions and Collective Agreement, No 6289, adopted in April 2012, and on the recent arrests and detention of members and officials of KESK.

The amendment of the Constitution in September 2010 opened the possibility for improving the trade union rights of civil servants. It took 19 months for the government to amend the Act on Public Servants' Trade Unions and Collective Agreement (Act No. 4688)[32]. The amendments leave several issues unresolved. Pensioners, students, judges, civil servants in military and security workplaces and security guards still do not have the right to establish or join trade unions. All three organisations representing employees in the public sector support the right to organise for all civil servants.

It shall also be indicated that, from the point of labour relations and the law, it is not correct to call the salary fixing system in the public sector collective bargaining. This system does not involve “negotiation” but merely “consultation”.

Municipal workers' right to collective bargaining remains restricted in spite of the judgments of the European Court of Human Rights. The right to strike is still not recognised for civil servants.

The previous Collective Consultation Committee (28 members, 14 from employers, 14 from employees) has been renamed the Collective Agreement Committee (30 members, 15 employers, 15 employees) in the new Act. In the previous Act a majority of votes in each of the groups was required to sign an agreement. Under the current Act only the heads of both groups, representing the largest organisation, sign on behalf of 2.5 million civil servants and 1.8 million pensioners. The period for collective bargaining in practice is just 15 days.

In the event of disagreement the matter can be referred by the heads of the parties to the Public Workers Arbitration Board (PWAB). Under the previous Act, each of the members of the Collective Consultation Committee could refer a matter for arbitration. The trade unions feel that the PWAB is not impartial and is dominated by government and employers. The decisions of the PWAB are binding and no right to appeal exists. In some respects the new amended Act makes collective bargaining even more restricted. To express their disappointment they organised a peaceful nation-wide demonstration on 23 May 2012.

In the context of anti-terrorism laws in Turkey trade unionists have also been arrested, kept in long pre-trial detention without clear charges brought against them and had their trade union activities used as evidence against them.

It has affected KESK and unions affiliated with KESK in particular.. Though the EU-Turkey JCC understands the unique situation with respect to terrorism Turkey finds itself in, it is of the view that basic democratic rights including trade union rights should be respected. Trade

[32] Act No 6289, date of approval 4.4.2012, published 11.4.2012.

unions should be able to exercise their rights in an atmosphere of freedom of expression and organisation. The EU-Turkey JCC discussed the importance of civil freedoms during its meeting in Berlin in June 2012.

The new legislation in practice

The work of the EU-Turkey JCC on trade union rights has always been based on the acknowledgement that ILO Conventions 87 and 98 are the benchmark for an impartial assessment of the trade union rights situation in Turkey.

Since 2005 the ILO has been actively engaged in encouraging the Turkish government and offering assistance to bring its labour legislation in line with Conventions 87 and 98. In particular Act No 2821 and Act No 2822 for workers and Act No 4688 for public servants have been the subject of detailed analysis and clear advice. The ILO supervisory bodies, the Committee of Experts on the Application of Ratified Conventions (CEARC), the Conference Committee on the Application of Standards (CAS) and the Committee on the Freedom of Association (CFA) advised in detail which amendments would bring the legislation in line with the relevant ILO Conventions. The Conference Committee on the Application of Standards discussed the case in 2007, 2009, 2010, 2011 and 2013.

The ILO Committee of Experts on the Application of Conventions and Recommendations has not yet been able to give its observations on Act 6356, amending Acts 2821 and 2822. In their report to the 102nd ILO Conference 2013, the Committee expresses the hope that the new Act 6356 will take all previous comments from ILO bodies into consideration, and requests the government to send a copy of the new Act on Trade Unions and Collective Labour Agreements. In June 2013 the Committee on the Application of Standards requested the Government to supply a detailed report to the Committee of Experts for examination at its meeting in November/December 2013. During the consultation mission in December the co-rapporteurs found that government representatives, employers and trade unions were aware that the new Act 6356 for workers was not in full compliance with the ILO Conventions, but most of them accepted the Act as the – for the moment – best possible compromise. No such acceptance existed among trade unions in the public sector, who wanted the Act 6289 on Public Servants' Trade Unions and Collective Agreement to be brought in line with the ILO Conventions.

On the question of whether the new Act will in practice remove the existing barriers to trade union organising and collective bargaining and improve industrial relations in Turkey, many of those consulted by the co- rapporteurs said that more time – two to four years was mentioned – was needed before a fair assessment of the impact of the new act on labour relations could be made. It was too early, according to them, to predict whether the new act would contribute to a higher rate of trade unionism and a better coverage of the workforce by collective bargaining agreements. Many bylaws and regulations still have to be implemented and certain issues, some of which have been mentioned above, need to be clarified and established by court decisions.

One of the key bylaws on union membership came into force during the preparation of this report, and others are expected before November 7 2013. According to government

publications[33], a total of 1 001 671 registered workers in January 2013 are union members. Given the total number of officially registered workers in Turkey (10 881 618), the official unionisation rate for Turkish workers was 9.21% in January 2013. In July 2013 this was 8.88% .Only 682 000 of them are covered by a collective bargaining agreement. The actual unionisation rate however is even lower, as about 40% of the workforce is in the unregistered economy.

On the controversial issues of Art. 25.5, protection against trade union discrimination in companies with less than 30 employees, the double threshold and the right to strike, several of the social partners hoped that in the near future improvements might be possible. Several trade unions expressed their intention to continue to call for these improvements. The Constitutional Court and other courts might criticise the weaknesses and some suggested that, through new negotiations, the sector threshold might remain at 1%.

Conclusions

The co-rapporteurs reiterate that two ILO conventions, Conventions 87 and 98, ratified by Turkey, are the reference point for the EU-Turkey JCC, as stated in its previous reports (2006 and 2008) as well as in its representations to the government. The co-rapporteurs also confirm that these conventions are one of the benchmarks for the opening of Chapter 19 on social policies and employment.

Since 2008, when the EU-Turkey JCC last discussed the joint report by the co-rapporteurs Mr Işik and Mr Boyle, new legislation has been enacted. In September 2010 the amendment of the constitution cleared the way for replacing the Act on Public Servants' Trade Unions and Collective Agreement (Act No 4688) with Act No 6289 in April 2012[34]. Furthermore, on October 18 2012 the Turkish Grand National Assembly adopted the Act on Trade Unions and Collective Labour Agreements No 6356, replacing the two previous Acts 2821 and 2822. The new Act harmonises the definition of key terms and is more concise, which makes implementation easier. The co-rapporteurs welcome these initiatives taken by the government and appreciate the stated intention to align its legislation with ILO conventions and EU standards.[35]

The co-rapporteurs conducted a full consultation mission in December 2012 and have spoken with all social partners, both within and outside the EU-Turkey JCC, who freely shared their assessments of the new Acts. The legislation process was preceded by extensive consultation of the social partners. Most of the criticisms raised by the social partners repeat their demands made during the negotiations for the new Act.

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33 http://www.csgb.gov.tr/csgbPortal/ShowProperty/WLP%20Repository/csgb/dosyalar/istatistikler/2013_ocak_6856
http://www.csgb.gov.tr/csgbPortal/ShowProperty/WLP%20Repository/csgb/dosyalar/istatistikler/2013_temmuz_6856

34 date of approval 4.4 2012 published 11.4.2012.

35 MoLSS: A new era in Turkish labour relations. The Minister for Labour and Social Security, Mr Faruk Celik states in the preface: “Collective bargaining processes and trade union rights and freedoms in the new law were arranged with a view to align with ILO Conventions and related articles of the European Social Charter.”

The co-rapporteurs note positive improvements in particular in the lifting of several restrictions on the establishment of trade unions and in instances of removing government interference in the internal affairs of trade unions and employers' associations. The replacement of the costly notary procedures for union membership (de)registration with e-government is seen as positive despite privacy concerns. International cooperation with other trade unions and employers' organisations has been made easier.

However, several areas of concern remain. In three areas of concern in particular, the co-rapporteurs are expecting problems to occur in the future. These areas are: the lack of protection against anti-union discrimination for workers in small companies, the obstacles to gaining competence for collective bargaining and the restrictions on the right to strike.

On important, contested, issues large differences in interpretation of the new Act exist. Different views were expressed on the freedom to establish enterprise, regional or professional unions. It remains unclear whether such unions will be allowed to operate. Article 25.5 on protection against anti-union discrimination for workers in companies with less than 30 workers is ambiguous and controversial. The definition of a legal strike as strictly related to collective bargaining seems to contradict the constitutional definition. All these questions are referred to the interpretation of the courts and case law. Many of the provisions of the new Act 6356 have been brought before the Turkish Constitutional Court with claims for annulment by the main opposition party in the Parliament. The Court, however, has not made any decision yet.

Unionisation rates and collective bargaining coverage in Turkey are among the lowest in the OECD. The objective of the new trade union legislation is to improve the representation of workers and strengthen industrial relations. The impact on the ground however will need time to be assessed, though concerns exist that existing unions might lose their collective bargaining competence. The co-rapporteurs recommend that the EU-Turkey JCC continue to follow up the trade union rights situation.

The co-rapporteurs appreciate the efforts of the government to bring its legislation in line with the ratified ILO Conventions 87 and 98. They acknowledge the improvements, but also found major gaps in compliance with international standards. They found government representatives and social partners to be aware that the new Act 6356 on Trade Unions and Collective Bargaining Agreements might not be in full compliance with ILO Conventions 87 and 98. They request the government to continue its efforts to bring its legislation in line with ILO Conventions.

The trade union organisations for public servants were critical of Act 6298 on Public Servants' Trade Unions and Collective Agreement, which does not grant them full trade union and collective bargaining rights. The co-rapporteurs are of the opinion that this Act is not in full compliance with ILO standards.

The ILO and the European Commission have not been able yet to give their assessment on whether or not the new Acts are in compliance with ILO Conventions 87 and 98. The co-rapporteurs look forward to the observations of the ILO Committee of Experts and to the follow-up that will be made by the European Commission.

The co-rapporteurs recommend that the government address the outstanding issues related to trade union and collective bargaining rights in both the private and public sectors and bring its legislation into compliance with the relevant ILO conventions and the European Social Charter. The EU-Turkey JCC stressed the importance of civil liberties during its meeting in June 2012 in Berlin and the co-rapporteurs confirm that these freedoms are essential for the functioning of trade unions.