THE RIGHT TO ORGANISE AND ENGAGE IN COLLECTIVE ACTION WITHIN THE FRAMEWORK OF THE COUNCIL OF EUROPE

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INTRODUCTION

This paper analyses the interpretation given to the rights to organise and to engage in collective action within the framework of the Council of Europe, with specific reference to the comprehensive standards set out in the European Social Charter (ESC), which remains the leading European instrument in the field of social rights. Passing reference is also made to the relevant case-law of the European Court of Human Rights (ECrtHR) in this respect, which increasingly is influenced by and mirrors the requirements of the ESC. Taken together, these two instruments set out a comprehensive framework of minimum standards which has the potential to serve as an effective bulwark against the gradual erosion of workers' rights to organise and take collective action. In what follows, particular reference is made to the ESC and ECHR standards that relate to workers in the public sector, in light of ongoing debates in Turkey and elsewhere about the rights of civil servants in particular to engage in collective bargaining processes.

I. THE EUROPEAN SOCIAL CHARTER

Adopted in 1961,[1] the European Social Charter was intended to stand together with the European Convention on Human Rights in protecting human rights in Europe. Just as the Convention was designed to ensure respect for fundamental civil and political rights, the Charter was intended to ensure that the member states of Europe also respected basic economic and social rights. However, the Social Charter has at times been overshadowed, both by the Convention and by the social aspects of European Union law. This has been the result of a number of factors. Social rights have become increasingly marginalised within European political and legal debates since the 1970s: the rights recognised in the Charter are often now seen as optional extras in an era of globalization, neo-liberalism and free markets. The

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[*] Any views expressed here are personal to the author.

[1] The European Social Charter was signed by thirteen member States of the Council of Europe in Turin on 18 October 1961 (CETS n° 35; 529 UNTS 89). It entered into force on 26 February 1965, after the number of 5 ratifications was attained.

Charter has also lacked exposure, both among lawyers and among the wider population.

However, a process of 'revitalisation' of the Charter was launched by the Council of Europe Ministerial Conference on Human Rights held in Rome in November 1990.[2] The objective of this process was to breathe new life into the Charter. Subsequently, the Turin Protocol in 1991 clarified and strengthened the role of the European Committee on Social Rights (ECSR), formerly the Committee of Independent Experts, which provides a legally-binding interpretation of the Charter through its jurisprudence. In 1995, an Additional Protocol to the European Social Charter was adopted, which established a 'collective complaint mechanism':[3] this allows NGOs with an international standing which are registered with the Council of Europe, as well as national employer and trade union federations, to lodge a collective compliant with the ECSR alleging a breach of the Charter on the part of a State which has ratified the Additional Protocol. In 1996, agreement was also reached on a Revised European Social Charter, which extends and deepens the list of social rights protected by the Charter mechanism.[4]

Compliance with the Charter is monitored by the ECSR through a process whereby State Parties submit periodic reports to the Committee, setting out the steps they are taking to give effect to their obligations under the Charter. The ECSR adopts conclusions on the reports submitted by the States, making a finding either of conformity or non-conformity, or deferring a conclusion until additional information can be obtained. In adopting its conclusions, the ECSR frequently uses information from a wide variety of sources, including the International Labour Organisation (ILO), domestic NGOs, employers' organisations and trade unions.[5] These conclusions in turn are submitted to the Governmental Committee, which is made up of civil servants representing each State Party: this Committee's role is to select particular conclusions of the ECSR which deserve particular comment from the Committee of Ministers of the Council of Europe, where national ministers sitting collectively can adopt recommendations addressed to individual States or resolutions.

This process lacks any formal judicial finding of a violation, unlike the case with the European Convention on Human Rights. However, the conclusions of the ECSR are legal findings of conformity or non-conformity, and therefore the ECSR's conclusions over the years add up to an authoritative

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2 See David Harris, "A Fresh Impetus for the European Social Charter", 1992, 41, *International and Comparative Law Quarterly, p.* 659.

3 CETS n° 158, opened for signature in Strasbourg on 9 November 1995. See Robin Churchill and Urfan Khaliq, "The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?", 2004, 15 *European Journal of International Law, pp.* 417-456.

4 CETS n° 163, opened for signature in Strasbourg on 3 May 1996. The Revised European Social Charter entered into force on 1 July 1999.

5 This is done in accordance with article 24 of the Charter. In addition, it is provided that one representative of the ILO sits as an observer in the ESCR's meetings.

case-law on how the Charter should be interpreted and applied. In addition, the ECSR's decisions in collective complaints, which reach the Committee from State Parties which have ratified the 1995 Additional Protocol to the ESC, also help to clarify the scope and content of the Charter rights.

A State Party can select which of the specific guarantees set out in Part II of the Charter will be legally binding upon it, subject to certain minimum requirements – states must accept to be bound by a certain minimum number of the 'core' requiements. Virtually all member states have committed themselves to respect a series of social rights as set out in Part II, including the guarantees contained in Article 5, which protects the right of workers and employers to organise, and Article 6, which protect the right to bargain collectively – Greece and Turkey remain the two major exceptions.

1. Article 5 ESC - The Right to Organise

Employers and workers have the right to form national or international associations for the protection of their economic and social interests.

> *"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 Contracting 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."*

Article 5 ESC guarantees workers' and employers' right to organise. This covers not only workers in activity but also persons who exercise rights resulting from work (such as pensioners, unemployed persons).[6]

a. Formation and Organisation of Trade Unions

Trade unions and employer organisations must be free to organise without prior authorisation, and initial formalities such as declaration and registration must be simple and easy to comply with. If fees are charged for the registration or establishment of an organisation, they must be reasonable and designed only to cover necessary administrative costs.[7] Requirements as to minimum numbers of members comply with Article 5 if the number is reasonable and presents no substantial obstacle to the founding of organisations.[8]

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6 *Conclusions I*, Statement of Interpretation on Article 5, p. 31; *Conclusions XVII-1*, Poland, p. 375.

7 *Conclusions XV-1*, United Kingdom, p. 628.

8 *Conclusions XIII-5*, Portugal, p. 172.

b. The Right to Join or Not to Join a Trade Union

Domestic law must guarantee the right of workers to join a trade union and make provision for adequate sanctions and remedies where this right is not respected. Trade union members must be protected from any harmful consequence that their trade union membership or activities may have on their employment, particularly any form of reprisal or discrimination in the areas of recruitment, dismissal or promotion because they belong to a trade union or engage in trade union activities. Where such discrimination occurs, domestic law must make provision for compensation that is adequate and proportionate to the harm suffered by the victim.[9]

Furthermore, no worker may be forced to join or remain a member of a trade union. Any form of legally compulsory trade unionism is incompatible with Article 5.[10] The freedom guaranteed by Article 5 is the result of a choice and such decisions must not be taken under the influence of constraints that rule out the exercise of this freedom. The same rules apply to employers' freedom to organise.[11]

c. Trade Union Activities

Trade unions and employers' organisations must enjoy full be independence in respect of matters relating to their organisation or functioning. As a result, any excessive state interference with the independence of trade unions in respect of their activities and functioning will constitutes a violation of Article 5.[12]

The following examples constitute infringements in breach of Article 5: prohibiting the election of or appointment of foreign trade union representatives, substantially limiting the use that a trade union can make of its assets, and/or substantially limiting the reasons for which a trade union is entitled to take disciplinary action against its members. Trade unions must also be free to form federations and join similar national and international organisations.[13] Trade unions are also entitled to choose their own members and representatives, while trade union leaders must have access to the workplace and union members must be able to hold meetings at work in so far as employers' interests and company requirements permit.[14] There must

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[9] *Conclusions I*, Statement of Interpretation on Article 5, p. 31; *Conclusions 2004*, Bulgaria, p. 32.162.

[10] *Conclusions III*, Statement of Interpretation on Article 5, p. 30; *Conclusions VIII*, Statement of Interpretation on Article 5, p. 77; *Conclusions XV-1*, Denmark, p. 142.

[11] Confederation of Swedish Enterprise v. Sweden, Complaint No. 12/2002, Decision on the merits of 15 May 2003, §29.

[12] *Conclusions XII-2*, Germany, p. 98; *Conclusions XVII*, United Kingdom, p. 510.166.

[13] *Conclusions I*, Statement of Interpretation on Article 5, p. 31.

[14] *Conclusions XV-1*, France, p. 240.

also be provision in domestic law for a right of appeal to the courts to ensure that all these rights are upheld.

d. Representativeness

Domestic law may restrict participation in various consultation and collective bargaining procedures to representative trade unions alone. For the situation to comply with Article 5, the following conditions must be met:

a) decisions on representativeness must not present a direct or indirect obstacle to the founding of trade unions;
b) areas of activity restricted to representative unions should not include key trade union prerogatives;
c) the criteria used to determine representativeness must be reasonable, clear, predetermined, objective, prescribed by law and open to judicial review.[15]

e. Restrictions

Article 5 applies both to the public and to the private sector.[16] Under Article G of the Charter, any restrictions must be "*prescribed by law and...necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals*". Thus, any restriction on the rights of public servants to organise will be contrary to the provisions of the ESC, unless they can be shown to be necessary and proportionate, in the sense of being narrowly tailored to achieve a legitimate objective.

With regard to the armed forces, Article 5 states as follows: '*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*'. The states party are thus entitled to restrict or withdraw the right of members of the armed forces to organise.[17] The Committee must check, however, that bodies defined in national law as belonging to the armed forces do indeed perform military functions.[18]

With regard to the police, the Committee has found that 'it is clear, in fact, from the second sentence of Article 5 and from the *travaux préparatoires* on this clause, that while a state may be permitted to limit the freedom of organisation of the members of the police, it is not justified in depriving them of all the guarantees provided for in the article'.[19] In other words, police officers must enjoy the main trade union rights, which are the right to

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15 *Conclusions XV-1*, Belgium, p. 74 ; *Conclusions XV-1*, France, p. 240.

16 *Conclusions I*, Statement of Interpretation on Article 5, p. 31.

17 European Federation of Employees in Public Services v. France, Italy and Portugal, Complaint No. 2/1999, No. 4/1999, No. 5/1999, Decision on the merits of 4 December 2000.

18 *Conclusions XVIII-1*, Poland, p. X.

19 *Conclusions I*, Statement of Interpretation on Article 5, p. 31.

negotiate their salaries and working conditions, and freedom of association.[20]

2. Article 6 ESC - The Right to Bargain Collectively

"With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:

1. *to promote joint consultation between workers and employers;*
2. *to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;*
3. *to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;*

and recognise:

4. *the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."*

a. Article 6§1- Joint Consultation

Joint consultation is consultation between employees and employers or the organisations that represent them.[21] Such consultation can take place within tripartite bodies provided that the social partners are represented in these bodies on an equal footing.[22] If no adequate joint consultation mechanisms are in place, the state must take positive steps to encourage it.[23]

Consultation must take place on several levels: national, regional/sectoral. It should also take place in the private and public sector (including the civil service).[24] Consultation must cover all matters of mutual interest, and particularly: productivity, efficiency, industrial health, safety and

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[20] European Council of Police Trade Unions v. Portugal, Complaint No. 11/2001, Decision on the merits of 22 May 2002. Note also that a new collective complaint has been submitted to the Committee which raises important issues in this respect: No. 83/2012 - European Confederation of Police (EUROCOP) v. Ireland - registered on 7 June 2012. The complainant organisation alleges that police representative associations in Ireland, and more specifically, the Association of Garda Sergeants and Inspectors (AGSI), do not enjoy full trade unions rights, which include, in particular, the right to join an umbrella organisation and the right to bargain collectively. The complainant organisation alleges a violation of Articles 5 (the right to organise), 6 (the right to bargain collectively), and 21 (the right to information and consultation) of the revised European Social Charter.

[21] *Conclusions I*, Statement of Interpretation on Article 6§1, pp. 34-35.

[22] *Conclusions V*, Statement of Interpretation on Article 6§1, p. 41.

[23] *Conclusions III*, Italy, p. 33 ; *Centrale générale des services publics (CGSP)* v. *Belgium*, Complaint No. 25/2004, Decision on the merits of 9 May 2005, §41.

[24] *Conclusions III*, Denmark, Germany, Norway, Sweden, p.33; *Centrale générale des services publics (CGSP)* v. Belgium, Complaint No. 25/2004, Decision on the merits of 9 May 2005, §41.

welfare, and other occupational issues (working conditions, vocational training, etc.), economic problems and social matters (social insurance, social welfare, etc.).[25]

In order to render the participation of trade unions in the various procedures of consultation efficacious, it is open to States parties to require them to meet representativeness criteria subject to certain general conditions. With respect to Article 6§1, any criteria of representativeness must not excessively limit the possibility of trade unions to participate effectively in consultation: futhermore, representativity criteria should be prescribed by law, should be objective and reasonable and subject to judicial review which offers appropriate protection against arbitrary refusals.[26]

b. Article 6§2 – Promotion of negotiation

This provision requires that domestic law should recognise that employers' and workers' organisations may regulate their relations by collective agreement. If necessary, positive measures should be taken to facilitate and encourage the conclusion of collective agreements. However, whatever procedures are put into place, collective bargaining should remain free and voluntary.[27]

Collective bargaining procedures which apply to public officials may be subject to regulations determined by law. Nevertheless, such officials always retain the right to participate in any processes that are directly relevant to the determination of the procedures applicable to them.[28]

In order to render the participation of trade union in various procedures of collective negotiations efficacious, it is open to States parties to require them to meet an obligation of representativeness, again however only as long as any requirement of representativity does not excessively limit the possibility of trade unions to participate effectively in collective bargaining, and is necessary and proportionate.[29]

c. Article 6§3 - Conciliation, mediation and/or arbitration procedues.

Conciliation, mediation and/or arbitration procedures should be instituted to facilitate the resolution of collective conflicts, through law, collective agreement or industrial practice.[30] Such procedures should also exist for resol-

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25 *Conclusions I*, Statement of Interpretation on Article 6§1, pp. 34-35; *Conclusions V*, Ireland, pp. 42-43.

26 *Conclusions 2006*, Albania, p. XX.

27 *Conclusions I*, Statement of Interpretation on Article 6§2, p. 35.

28 *Conclusions III*, Germany, p. 34; European Council of Police Trade Unions v. Portugal, Complaint No. 11/2001, Decision on the merits of 21 May 2002, §58.

29 *Conclusions 2006*, Albania, p. XX.

30 *Conclusions I*, Statement of Interpretation on Article 6§2, p. 37.

ving conflicts which may arise between the public administration and its employees.[31]

Article 6§3 applies to conflicts of interest, i.e. generally conflicts which concern the conclusion of a collective agreement or the modification, through collective bargaining, of conditions of work contained in an existing collective agreement. It does not concern conflicts of rights, i.e. conflicts related to the application and implementation of a collective agreement, or to political disputes.[32] All arbitration systems must be independent, and the outcome of arbitration may not be predetermined by pre-established criteria.[33]

Any form of compulsory recourse to arbitration is a violation of this provision, whether domestic law allows one of the parties to defer the dispute to arbitration without the consent of the other party or allows the Government or any other authority to defer the dispute to arbitration without the consent of one party or both. Such a restriction is only allowed within the limits prescribed by Article G.[34]

d. Article 6§4 - Collective action in cases of conflicts of interest, including the right to strike.

Article 6§4's provisions must be read with reference to an additional provision set out in the Appendix to the ESC:

> *Appendix: It is understood that each Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article G.*

The ECSR has interpreted Article 6(4) as requiring States Parties to guarantee the positive right to take collective action, including the right to strike.[35] If national legislation or the case-law of domestic courts has the effect of reducing the substance of this right to such an extent as to render the right ineffective or nominal, then this will constitute a situation of non-conformity with the Charter.[36] For example, a Dutch law which permitted a court to prevent strike action on the basis that it was 'premature' was declared by the ECSR not to be conformity with Article 6(4).[37] Similarly, in Collective Complaint No. 59/2009 - *European Trade Union Confederation (ETUC)/ Centrale Générale des Syndicats Libéraux de Belgique (CGSLB)/*

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[31] *Conclusions III*, Denmark, Germany, Norway, Sweden, p. 33; *Conclusions V*, France, p. 46.

[32] *Conclusions V*, Statement of Interpretation on Article 6§3, p. 45; *Conclusions V*, Italy, p. 46.

[33] *Conclusions XIV-1*, Iceland, p. 388.

[34] *Conclusions 2006*, Portugal, p. XX.

[35] *Conclusions I*, Statement of Interpretation on Article 6§4, p. 34.

[36] *Conclusion XVII-1*, Netherlands, p. 317.

[37] *Conclusions XVII-1*, Netherlands, p. 319.

Confédération des Syndicats chrétiens de Belgique (CSC)/ Fédération Générale du Travail de Belgique (FGTB) v. Belgium – the Committee concluded that that the scope and frequency of judicial intervention in social conflicts in Belgium, in particular concerning restrictions imposed on the action of picket line, violated Article 6§4.

Restrictions on who can trigger strike action will also not be in conformity with Article 6(4) if excessively constricting. Limiting the right to call a strike to the most representative trade unions in a particular workplace is considered by the ECSR to be excessive.[38] However, limiting the right to strike to recognised trade unions and similar organisations is legitimate, provided that national law does not make it unduly difficult for such an organisation to be established.[39]

Public officials enjoy the right to strike under Article 6§4. Therefore prohibiting all public officials from exercising the right to strike is not in conformity with Article 6§4.[40] Furthermore, allowing public officials only to declare 'symbolic strikes' is not sufficient.[41] The right to strike of certain categories of public officials may be restricted, such as police officers or members of the intelligence services. However, under Article G, these restrictions should be limited to public officials whose duties and functions, given their nature or level of responsibility, are directly related to national security or other particular aspects of the general interest.[42]

Once a strike has been called, any employee has the right to participate in the strike, concerned, irrespective of whether he is a member of the trade union which called the strike or not. In addition, the decision to call a strike by a trade union cannot be restricted by the imposition of excessive procedural requirements.[43]

Article 6(4) applies to collective action arising out of 'conflicts of interests': it does not extend to cover strike action over 'conflicts of rights', i.e. political strikes or strikes directed at altering the terms of a legally binding collective agreement.[44] Within those limits, the right to strike should be guaranteed in the context of any negotiation between employers and employees in order to settle an industrial dispute.[45] This can extend to cover 'secondary' action taken against ultimate *de facto* employers, as well as

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38 *Conclusions XV-1*, France, pp. 254-257.

39 See E. Kovacs, "The Right to Strike in the European Social Charter", 2005, 26, *Comparative Laour Law and Policy Journal,* pp. 445-476.

40 *Conclusions I*, Statement of Interpretation on Article 6§4, pp. 38-39; Conclusions XIV-1, Denmark, p. 180.

41 *Conclusions 2004*, Bulgaria, p. 44.

42 *Conclusions I*, Statement of Interpretation on Article 6§4, pp. 38-39.

43 *Conclusions XVIII-1*, United Kingdom, p. 10.

44 *Conclusions I*, Statement of Interpretation on Article 6(4), p. 38.

45 *Conclusions IV*, Germany, p. 50.

against future employers over future terms and conditions of employment when the transfer of part of a business is at issue.[46]

The right to strike may be restricted, provided that any restriction is prescribed by law, serve a legitimate purpose and is necessary in a democratic society (as required by Article G of the Charter). In other words, governments must show that restrictions on the right to strike have a clear objective justification. 'Peace obligations' and other time limits on strikes are permissible, provided that the overall system of industrial relations in which they function are in conformity with Article 6§4 and reflect the general will of the social partners.[47]

Prohibiting strikes in sectors which are essential to the community, such as in public transport and the health services, may serve a legitimate purpose, but States Parties will also have to show that the extent of the restriction on the right to strike is not disproportionately wide even in such circumstances.[48] Furthermore, simply banning strikes even in essential sectors – particularly when they are extensively defined, i.e. 'energy' or 'health' – is not deemed proportionate to the specific requirements of each sector. At most, the introduction of a minimum service requirement in these sectors might be considered in conformity with Article 6§4.[49]

The legal consequences that flow from the exercise of the right to strike by workers should not be such as to effectively restrict the availability of this right. The ECSR has taken the view that a strike should not be considered a violation of the contractual obligations of the striking employees. If a strike entails a formal termination of the employment contract, this does not necessarily violate Article 6(4), if in practice strikers are fully reinstated when the strike has ended. However, national legislation which provides limited protection for employees exercising their right to engage in collective action will be found to be contrary to the Charter.[50]

III. THE ECHR AND THE RIGHT OF FREEDOM OF ASSOCIATION

The ESC standards in respect of freedom to organise and the right to engage in collective action now constitute a comprehensive set of norms founded on the principle of freedom of association and collective action. This jurisprudence has also begun to influence the case-law of the European Court of

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46 *Conclusions XVIII-1*, United Kingdom, p. 10-1.

47 *Conclusions 2004*, Norway, p. 404.

48 *Conclusions 2004*, Bulgaria, pp. 43-44.

49 *Conclusions I*, Statement of Interpretation on Article 6§4, p. 38; Conclusions 2004, Bulgaria, pp. 43-44.

50 *Conclusions XVIII-1*, United Kingdom, p. 11.

Human Rights in interpreting Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

1. Article 11 ECHR – Freedom of Association

> 1. 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.
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> 2. No restrictions shall be placed on the exercise of these rights other than such as 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 of the rights and freedoms of others. This article shall not prevent 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.

Initially, the ECrtHR adopted a relatively restricted approach to applying this right in the context of collective action. For example, in *Swedish Engine Drivers' Union v Sweden* (1976) 1 EHRR 617, at paragraph 40, the Court noted that: 'the members of a trade union have a right, in order to protect their interests, that the trade union should be heard. Article 11(1) certainly leaves each State a free choice of the means to be used towards this end. Whilst the concluding of collective agreements is one of these means, there are others'. However, in recent years, the Court's approach has developed under the influence of the ESC standards.

For example, in *Wilson v. United Kingdom* (2002) 35 EHRR 20, the Strasbourg Court held that national law which permitted employers to treat employees that were unprepared to renounce the right to consult a union less favourably violated ECHR article 11, since it effectively frustrated the union's ability to strive for protection of its members. The ECrtHR concluded that trade unions have the right to make representations to employers and ultimately take action to protect their interests:

> 41. The Court observes at the outset that although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights. In the present case, the matters about the applicants complain—principally, the employers' de-recognition of the unions for collective bargaining purposes and offers of more favourable conditions of employment to employees agreeing not to be represented by the unions—did not involve direct intervention by the State. The responsibility of the United Kingdom would, however, be engaged if these matters resulted from a failure on its part to secure to the applicants under domestic law the rights set forth in Article 11 of the Convention.
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> 42. The Court recalls that Article 11(1) presents trade union freedom as one form or a special aspect of freedom of association. The words "for the

protection of his interests" in Article 11(1) are not redundant, and the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible. A trade union must thus be free to strive for the protection of its members' interests, and the individual members have a right, in order to protect their interests, that the trade union should be heard. Article 11 does not, however, secure any particular treatment of trade unions or their members and leaves each State a free choice of the means to be used to secure the right to be heard...

44. ... the Court has consistently held that although collective bargaining may be one of the ways by which trade unions may be enabled to protect their members' interests, it is not indispensable for the effective enjoyment of trade union freedom. Compulsory collective bargaining would impose on employers an obligation to conduct negotiations with trade unions. The Court has not yet been prepared to hold that the freedom of a trade union to make its voice heard extends to imposing on an employer an obligation to recognise a trade union. The union and its members must however be free, in one way or another, to seek to persuade the employer to listen to what it has to say on behalf of its members. In view of the sensitive character of the social and political issues involved in achieving a proper balance between the competing interests and the wide degree of divergence between the domestic systems in this field, the Contracting States enjoy a wide margin of appreciation as to how trade union freedom may be secured.

45. The Court observes that there were other measures available to the applicant unions by which they could further their members' interests. In particular, domestic law conferred protection on a trade union which called for or supported strike action "in contemplation or furtherance of a trade dispute". The grant of the right to strike, while it may be subject to regulation, represents one of the most important of the means by which the State may secure a trade union's freedom to protect its members' occupational interests. Against this background, the Court does not consider that the absence under United Kingdom law of an obligation on employers to enter into collective bargaining gave rise, in itself, to a violation of Article 11 of the Convention.

46. The Court agrees with the Government that the essence of a voluntary system of collective bargaining is that it must be possible for a trade union which is not recognised by an employer to take steps including, if necessary, organising industrial action, with a view to persuading the employer to enter into collective bargaining with it on those issues which the union believes are important for its members' interests. Furthermore, it is of the essence of the right to join a trade union for the protection of their interests that employees should be free to instruct or permit the union to make representations to their employer or to take action in support of their interests on their behalf. If workers are prevented

from so doing, their freedom to belong to a trade union, for the protection of their interests, becomes illusory. It is the role of the State to ensure that trade union members are not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers.

47. In the present case, it was open to the employers to seek to pre-empt any protest on the part of the unions or their members against the imposition of limits on voluntary collective bargaining, by offering those employees who acquiesced in the termination of collective bargaining substantial pay rises, which were not provided to those who refused to sign contracts accepting the end of union representation. The corollary of this was that United Kingdom law permitted employers to treat less favourably employees who were not prepared to renounce a freedom that was an essential feature of union membership. Such conduct constituted a disincentive or restraint on the use by employees of union membership to protect their interests. However, as the [judgment of the apex national court] made clear, domestic law did not prohibit the employer from offering an inducement to employees who relinquished the right to union representation, even if the aim and outcome of the exercise was to bring an end to collective bargaining and thus substantially to reduce the authority of the union, as long as the employer did not act with the purpose of preventing or deterring the individual employee simply from being a member of a trade union.

48. Under United Kingdom law at the relevant time it was, therefore, possible for an employer effectively to undermine or frustrate a trade union's ability to strive for the protection of its members' interests. The Court notes that this aspect of domestic law has been the subject of criticism by the Social Charter's Committee of Independent Experts and the ILO's Committee on Freedom of Association (see paragraphs 32–33 and 37 above). It considers that, by permitting employers to use financial incentives to induce employees to surrender important union rights, the respondent State has failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention. This failure amounted to a violation of Article 11, as regards both the applicant trade unions and the individual applicants.[51]

Two very important recent rulings by the European Court of Human Rights (ECHR) have now confirmed that the exercise of the Article 11 right to freedom of association extends to cover aspects of collective bargaining and the right to strike. The judgement in the first case, *Demir and Baykara v. Turkey* (Application No. 34503/97), was delivered on 12 November 2008. In

[51] See also: Associated Society of Locomotive Engineers and Firemen v United Kingdom, Application no. 11002/05, Judgment of 27 February 2007 – here, the ECrtHR held that restrictions in national law limiting the freedom of trade unions to select their membership violated Article 11.

this judgment, the ECHR noted the provisions of Article 11 had to be strictly construed and that they could not impair the very essence of the right to organise. The court went on to rule that the right to collectively bargain with an employer in principle had become one of the essential elements of the right to form and join trade unions, guaranteed under Article 11. The Grand Chamber of the European Court of Human Rights went on to find that there had been a disproportionate and unjustified interference with the right to freedom of association, on the basis that a union of civil servants was prohibited under Turkish law from entering into a collective agreement with a public authority: civil servants could not be treated as 'members of the administration of the state' and denied the right to engage in collective bargaining. The reasoning of the Court I worth reproducing in detail:

> 119. As to the necessity of such interference in a democratic society, the Court reiterates that lawful restrictions may be imposed on the exercise of trade-union rights by members of the armed forces, of the police or of the administration of the State. However, it must also be borne in mind that the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining in such cases whether a "necessity" – and therefore a "pressing social need" – within the meaning of Article 11 § 2 exists, States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts (see, for example, *Sidiropoulos and Others v Greece*, 10 July 1998, § 40, Reports 1998-IV). The Court must also look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in the appropriate provision of the Convention and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see, for example, *Yazar and Others v. Turkey*, nos. 22723/93, 22724/93 and 22725/93, § 51, ECHR 2002-II).
>
> 120. As to whether, in the present case, the non-recognition of the applicants' union was justified by a "pressing social need", the Grand Chamber endorses the following assessment of the Chamber:
>
> > "it has not been shown before it that the absolute prohibition on forming trade unions imposed on civil servants ... by Turkish law, as it applied at the material time, met a 'pressing social need'. The mere fact that the 'legislation did not provide for such a possibility' is not sufficient to warrant as radical a measure as the dissolution of a trade union."
>
> 121. The Court further considers that at the material time there were a number of additional arguments in support of the idea that the non-

recognition of the right of the applicants, as municipal civil servants, to form a trade union did not correspond to a "necessity"...

126. The Court thus considers that the combined effect of the restrictive interpretation by the Court of Cassation and the legislature's inactivity between 1993 and 2001 prevented the State from fulfilling its obligation to secure to the applicants the enjoyment of their trade-union rights and cannot be justified as "necessary in a democratic society" within the meaning of Article 11 § 2 of the Convention.

127. Accordingly, there has been a violation of Article 11 of the Convention on account of the failure to recognise the right of the applicants, as municipal civil servants, to form a trade union...

The Grand Chamber then turned to whether the Turkish Court of Cassation's annulment of the collective agreement between the relevant trade union and the public authority was lawful, based on its interference with Article 11(2):

140. The development of the Court's case-law concerning the constituent elements of the right of association can be summarised as follows: the Court has always considered that Article 11 of the Convention safeguards freedom to protect the occupational interests of trade-union members by the union's collective action, the conduct and development of which the Contracting States must both permit and make possible...

141. As to the substance of the right of association enshrined in Article 11 of the Convention, the Court has taken the view that paragraph 1 of that Article affords members of a trade union a right, in order to protect their interests, that the trade union should be heard, but has left each State a free choice of the means to be used towards this end. What the Convention requires, in the Court's view, is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests (see...*Swedish Engine Drivers' Union*, cited above, § 40...).

142. As regards the right to enter into collective agreements, the Court initially considered that Article 11 did not secure any particular treatment of trade unions, such as a right for them to enter into collective agreements (see *Swedish Engine Drivers' Union*, cited above, § 39). It further stated that this right in no way constituted an element necessarily inherent in a right guaranteed by the Convention (see *Schmidt and Dahlström v Sweden*, § 34).

143. Subsequently, in the case of *Wilson, National Union of Journalists and Others*, the Court considered that even if collective bargaining was not indispensable for the effective enjoyment of trade-union freedom, it might be one of the ways by which trade unions could be enabled to protect their members' interests. The union had to be free, in one way or another, to seek to persuade the employer to listen to what it had to say on behalf of its members (*Wilson, National Union of Journalists and Others*, cited above, § 44).

144. As a result of the foregoing, the evolution of case-law as to the substance of the right of association enshrined in Article 11 is marked by two guiding principles: firstly, the Court takes into consideration the totality of the measures taken by the State concerned in order to secure trade-union freedom, subject to its margin of appreciation; secondly, the Court does not accept restrictions that affect the essential elements of trade-union freedom, without which that freedom would become devoid of substance. These two principles are not contradictory but are correlated. This correlation implies that the Contracting State in question, whilst in principle being free to decide what measures it wishes to take in order to ensure compliance with Article 11, is under an obligation to take account of the elements regarded as essential by the Court's case-law.

145. From the Court's case-law as it stands, the following essential elements of the right of association can be established: the right to form and join a trade union (see, as a recent authority, *Tüm Haber Sen and Çınar*, cited above), the prohibition of closed-shop agreements (see, for example, Sørensen and Rasmussen, cited above) and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members (*Wilson, National Union of Journalists and Others*, cited above, § 44).

146. This list is not finite. On the contrary, it is subject to evolution depending on particular developments in labour relations. In this connection it is appropriate to remember that the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies. In other words, limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human rights (see, mutatis mutandis, *Refah Partisi (the Welfare Party) and Others v Turkey [GC]*, nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 100, ECHR 2003-II; and *Selmouni v France* [GC], no. 25803/94, § 101, ECHR 1999-V).

147. The Court observes that in international law, the right to bargain collectively is protected by ILO Convention No. 98 concerning the Right to Organise and to Bargain Collectively. Adopted in 1949, this text, which is one of the fundamental instruments concerning international labour standards, was ratified by Turkey in 1952. It states in Article 6 that it does not deal with the position of “public servants engaged in the administration of the State”. However, the ILO's Committee of Experts interpreted this provision as excluding only those officials whose activities were specific to the administration of the State. With that exception, all other persons employed by government, by public enterprises or by autonomous public institutions should benefit, according to the Committee, from the guarantees provided for in Convention No. 98 in the same

manner as other employees, and consequently should be able to engage in collective bargaining in respect of their conditions of employment, including wages (see paragraph 43 above).

148. The Court further notes that ILO Convention No. 151 (which was adopted in 1978, entered into force in 1981 and has been ratified by Turkey) on labour relations in the public service ("Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service") leaves States free to choose whether or not members of the armed forces or of the police should be accorded the right to take part in the determination of working conditions, but provides that this right applies everywhere else in the public service, if need be under specific conditions. In addition, the provisions of Convention No. 151, under its Article 1 § 1, cannot be used to reduce the extent of the guarantees provided for in Convention No. 98 (see paragraph 44 above).

149. As to European instruments, the Court finds that the European Social Charter, in its Article 6 § 2 (which Turkey has not ratified), affords to all workers, and to all unions, the right to bargain collectively, thus imposing on the public authorities the corresponding obligation to promote actively a culture of dialogue and negotiation in the economy, so as to ensure broad coverage for collective agreements. The Court observes, however, that this obligation does not oblige authorities to enter into collective agreements. According to the meaning attributed by the European Committee of Social Rights (ECSR) to Article 6 § 2 of the Charter, which in fact fully applies to public officials, States which impose restrictions on collective bargaining in the public sector have an obligation, in order to comply with this provision, to arrange for the involvement of staff representatives in the drafting of the applicable employment regulations.

150. As to the European Union's Charter of Fundamental Rights, which is one of the most recent European instruments, it provides in Article 28 that workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels.

151. As to the practice of European States, the Court reiterates that, in the vast majority of them, the right of civil servants to bargain collectively with the authorities has been recognised, subject to various exceptions so as to exclude certain areas regarded as sensitive or certain categories of civil servants who hold exclusive powers of the State. In particular, the right of public servants employed by local authorities and not holding State powers to engage in collective bargaining in order to determine their wages and working conditions has been recognised in the majority of Contracting States. The remaining exceptions can be justified only by particular circumstances (see paragraph 52 above).

152. It is also appropriate to take into account the evolution in the Turkish situation since the application was lodged. Following its ratification of Convention No. 87 on freedom of association and the protection of the right to organise, Turkey amended, in 1995, Article 53 of its Constitution by inserting a paragraph providing for the right of unions formed by public officials to take or defend court proceedings and to engage in collective bargaining with authorities. Later on, Law no. 4688 of 25 June 2001 laid down the terms governing the exercise by civil servants of their right to bargain collectively.

153. In the light of these developments, the Court considers that its case-law to the effect that the right to bargain collectively and to enter into collective agreements does not constitute an inherent element of Article 11 (*Swedish Engine Drivers' Union*, cited above, § 39, and Schmidt and Dahlström, cited above, § 34) should be reconsidered, so as to take account of the perceptible evolution in such matters, in both international law and domestic legal systems. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents established in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement...

154. Consequently, the Court considers that, having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions. Like other workers, civil servants, except in very specific cases, should enjoy such rights, but without prejudice to the effects of any "lawful restrictions" that may have to be imposed on "members of the administration of the State" within the meaning of Article 11 § 2 – a category to which the applicants in the present case do not, however, belong (see paragraph 108 above).

The judgement in the second case, *Enerji Yapi-Yol Sen v. Turkey* (Application No. 68959/01), was delivered on 21 April 2009. The case concerned a state prohibition on public sector trade unions from taking industrial action. Members of a trade union who discarded this prohibition were disciplined and the union brought the case to the ECHR, alleging that the ban on strike action interfered with their right to form and join trade unions as guaranteed under Article 11 ECHR. While the Strasbourg Court acknowledged that the right to strike was not absolute and could be subject to certain conditions and restrictions, it held that a ban applied to all public servants was too wide a restriction. The ECHR held that the disciplinary action was 'capable of discouraging trade union members and others from exercising their legitimate right to take part in such one-day strikes or other actions aimed at

defending their members' interests' and amounted to a threat to rights guaranteed under Article 11. The strike ban was not in response to a 'pressing social need' and the Turkish government had thus failed to justify the need for the impugned restriction in a democratic society.

The forthcoming case of *Prison Officers Association and others v. United Kingdom* will also be significant in this respect – in the UK, prison officers are prohibited by law from engaging in collective action, and this is being challenged as a breach of Article 11. In general, it remains to be seen how the ECHR case-law will continue to develop in this field.[52]

CONCLUSION

The ESC framework of standards in relation to the rights of workers to organise and engage in collective action is comprehensive, detailed and systematic. Restrictions upon these rights must be limited, strictly necessary and capable of being objectively justified. Furthermore, the substance or core of these collective rights cannot be nullified or practically rendered redundant. These standards are also influencing the development of the ECHR jurisprudence, whereby the individual Article 11 right to freedom of association is acquiring a collective dimension. Taken together, these standards constitute a bulwark against the tide of deregulation that is undermining workers' rights across Europe.

Appendix – Extracts from Conclusions of the European Committee on Social Rights relating to the interpretation of Articles 5 and 6 ESC.

Conclusions I, Statement of Interpretation on Article 5, p. 31: "Employers and workers have the right to form national or international associations, for the protection of their economic and social interest.

Conclusions I, Statement of Interpretation on Article 5, p. 31: "The Committee noted that two obligations were embodied in this provision, having a negative and positive aspect respectively. The implementation of the first obligation requires the absence, in the municipal law of each Contracting State, of any legislation or regulation or any administrative practice such as to impair the freedom of employers or workers to form or join their respective organisations. By virtue of the second obligation, the Contracting State is obliged to take adequate legislative or other measures to guarantee the exercise of the right to organise and, in particular, to protect workers' organisations from any interference on the part of employers".

Conclusions I, Statement of Interpretation on Article 5, p. 31: "All classes of employers and workers, including public servants, subject to the exceptions mentioned below, are fully entitled to the right to organi-

[52] For further discussion, see K. Ewing and J. Hendy, "The Dramatic Implications of Demir and Baykara", 2010, 39(1), *Industrial Law Journal*, pp. 2-51.

se in accordance with the Charter. Certain restrictions to this right are, however, permissible under the terms of the two last sentences of Article 5 in respect of members of the police and armed forces."

Conclusions I, Statement of Interpretation on Article 5, p. 31: "It is clear, in fact, from the second sentence of Article 5 and from the "travaux préparatoires" on this clause, that while a state may be permitted to limit the freedom of organisation of the members of the police, it is not justified in depriving them of all the guarantees provided for in the article."

Conclusions I, Statement of Interpretation on Article 6§1, pp. 34-35: "The Committee interprets this provision as meaning that any Contracting State which has accepted it is bound to take steps to promote joint consultation between workers and employers, or their organisations, on all matters of mutual interest and on the following questions among others: productivity, efficiency, industrial health, safety and welfare."

Conclusions I, Statement of Interpretation on Article 6§2, p. 35: "...the Contracting Parties undertake not only to recognise, in their legislation, that employers and workers may settle their mutual relations by means of collective agreements, but also actively to promote the conclusion of such agreement if their spontaneous development is not satisfactory and, in particular, to ensure that each side is prepared to bargain collectively with the other. Where adequate machinery for voluntary negotiation is set up spontaneously, however, the government in question is not, in the Committee's opinion, bound to intervene in the manner prescribed in this paragraph."

Conclusions III, Germany, p. 34: "The Committee also pointed out that, in connection with the Federal Republic of Germany, while it was impossible to draw up proper collective agreements for civil servants subject to regulations, Article 6 para. 2 nonetheless entails the obligation to arrange for the participation of those concerned, through the intermediary of their representatives, in the drafting of the regulations which are to apply to them. "

Conclusions I, Statement of Interpretation on Article 6§4, p. 34: "In its fourth paragraph, Article 6 deals with the right of employers to take collective action in cases of conflicts of interest, including the right to strike. The Committee notes that by this provision, the right to strike is for the first time explicitly recognised in an international convention."

Conclusions I, Statement of Interpretation on Article 6§4, p. 38: "Legislation denying the right to strike to persons employed in essential public services may, by virtue of Article 31, be compatible with the Charter whether such restriction be total or partial. Whether or not in a given case it is so compatible depends on the extent to which the life of the community depends on the services involved."

Conclusions I, Statement of Interpretation on Article 6§4, pp. 38-39: "As regards the right of public servants to strike, the Committee recognises that, by virtue of Article 31, the right to strike of certain categories of public servants may be restricted, including members of the police and armed forces, judges and senior civil servants. On the other hand, the Committee takes the view that a denial of the right to strike to public servants as a whole cannot be regarded as compatible with the Charter."