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**Collective Social Rights in Turkish Constitutional Law: A Comparative Analysis
of Trade Union Rights from the Constitution of 1961 to the Constitution of
1982**

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Abbreviations

C87	Freedom of Association and Protection of the Right to Organise Convention
C98	Right to Organise and Collective Bargaining Convention
CAS	ILO Conference Committee on the Application on Standards
CEACR	ILO Committee of Experts on the Application of Conventions and Recommendation
CESCR	Committee on Economic, Social and Cultural Right
CFA	ILO Committee on Freedom of Association
DİSK	Confederation of Revolutionary Workers' Unions
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECSR	European Committee of Social Rights
ESC	European Social Charter
EU	European Union
FCC	Fact-Finding and Conciliation Commission on Freedom of Association
GDP	Gross-Domestic Product
HAK-IS	HAK-IS Trade Union Confederation
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICFTU	International Confederation of Free Trade Unions
ILC	International Labour Conference
ILO	International Labour Organisation
ITUC	International Trade Union Confederation
KESK	Confederation of Public Employees' Trade Unions
OECD	Organisation for Economic Cooperation and Development
MERIP	Middle East Research and Information Project
MESK	Turkey's Metal Industrialists Union
MISK	Confederation of Nationalists' Trade Unions
NGO	Non-Governmental Organisation
TISK	Turkish Confederation of Employers Associations
TODAI	Public Administration Institute for Turkey and Middle East
TURK-IS	Confederation of Turkish Trade Unions
UDHR	Universal Declaration of Human Rights
UN	United Nations

“Forward, without forgetting
Where our strength can be seen now to be!
When starving or when eating
Forward, not forgetting
Our solidarity!

Forward, without forgetting
Till the concrete question is hurled
When starving or when eating:
Whose tomorrow is tomorrow?
And whose world is the world?”

Solidarity Song Poem by Bertolt Brecht

*Dedicated to my father
who always takes stand behind the justice, equality and truth*

Collective Social Rights in Turkish Constitutional Law: A Comparative Analysis of Trade Union Rights from the Constitution of 1961 to the Constitution of 1982

*“As if it harm’d me, giving others the same chances and rights as myself
As if it were not indispensable to my own rights that others possess the same.”
Walt Whitman – Thought of Equality*

1-INTRODUCTION

World Employment and Social Outlook: 2017 is released by ILO and it draws attention to Turkey that the regional unemployment rate is expected to increase from 8.9 per cent in 2016 to 9.2 per cent in 2017, driven by growing unemployment in Turkey among other countries.¹ It is very important because Turkey should take into account causes of unemployment to promote social peace. However there is not magical formula to fight against unemployment and social inequalities. It is all about social peace which is strongly related to collective social rights in employment. I will try to understand and analyze collective social rights and its effects on employee within the context of Turkish Constitutional History.

The political and administrative process experienced by Turkey since the establishment of the Republic is a constitutional process narrow sense. The political changes and developments in society have been finally reflected in the constitution and collective social rights.

1.1. Aim of the thesis and research question:

The Turkish constitutional history consists of the three Republican Constitutions those of 1924, 1961 and 1982. State elites played a pre-dominant role in the making of all three constitutions. The Constitution of 1961 played a major role in development of collective social rights in Turkey. However the Constitution of 1982 which is in force reflects the authoritarian mentality of its military founders. During the 1961 Constitution, there were some important legal developments in terms of promotion of social justice, collective social rights and social state. The 1961 Constitution stipulated in article 2 that the Turkish Republic was a social state. The approach of the Constitution of 1961 to human rights was also

¹ http://www.ilo.org/global/research/global-reports/weso/2017/WCMS_541211/lang--en/index.htm p.33 [Last accessed: 01.01.2017]

requiring adoption of social rights. Article 10 of the Constitution of 1961 adopted “positive liberty” approach as follows:

Article 10: Every individual is entitled, in virtue of his existence as a human being to fundamental rights and freedoms, which cannot be usurped, transferred or relinquished.

The state shall remove all political, economic and social obstacles that restrict the fundamental rights and freedoms of the individual in such a way as to be irreconcilable, with the principles embodied in the rule of law, individual well-being and social justice. The state prepares the conditions required for the development of the individuals’ material and spiritual existence.

According to the provision, the duty of state relating to protection of human rights is not only negative (not to interfere), but also positive (to provide). Moreover Constitution of 1961 included a section about social and economic rights which were far from being individual claim rights because of Article 53 of the Constitution which regulated the duties of state. However Constitution of 1982 which was product of military intervention of 1980 coup d’etat, have shredded and blunted collective social rights in respect of freedom of association and right to collective bargaining.

The thesis aims to articulate collective social rights within the Turkish Constitutional History in the light of European Convention of Human Rights and International Labour Organization Standards, in particular Freedom of Association and Protection of the Right to Organise Convention (C87) and Right to Organise and Collective Bargaining Convention (C98). This thesis is asking *the issue of how the workers enjoy or rather are not able to enjoy the collective social rights which are guaranteed by the positive law including national and international level in Turkey.*

International standards and compliance, comparative national domestic law and examples are showed to highlight an importance of the issue. The thesis aims to demonstrate how labour relations and trade unions rights were embedded in the Turkish Constitutional History.

1.2.Methodology

Since the main scope of the thesis is Turkey and its Constitutional History, international commitments of the country and their compliance with the international standards are mainly

used. In particular, jurisdiction and observations of the ILO Committees' and ECtHR jurisdiction played a crucial role to analyze the evolution and current situation of the trade unions rights in Turkey. The thesis is based on the socio-legal methodology since interdisciplinary approach is needed if there is a comparison between legal documents and legal history. Moreover, the responses from the governments, employers' and trade unions, articles and statistical data are also used. For the avoidance from the legal formalism, the socio-political examples, state and class relationship and class conflict are also exemplified.

1.3.Delimitations

The main focus of the research question is limited to Turkey and its treaty commitments. Therefore, freedom of association, collective bargaining process and the right to strike are selected and articulated in terms of the Constitutional Law. Needless to say, there are lots of other instruments such as American Convention on Human Rights and African Charter on Human and People's Rights. However they are excluded from the scope of this thesis because they are not directly related to Turkey. Moreover, a constitutional referendum was held throughout Turkey on 16 April 2017. Although it included very important amendments for Turkey's political future and administrative system, it was also excluded from the content. The reason is that the aim of the amendments is not to enact democratic provisions for fundamental rights and principles. Rather than, it was too political which did not talk about the people and their rights in Turkey.

Some other international protection and supervisory mechanisms other than ILO and ECHR are articulated briefly for drawing the general framework. However, with respect to Country Analysis on Turkey, only ILO's standards and observations based upon C87 and C98 were emphasized.

1.4.Introductions of the Chapters

In the first chapter, the issue of whether labour rights should be recognized as human rights or not is discussed. Then collective social rights are tried to be explained within the context of international mechanisms such as the ILO and the ECHR. Finally, the relationship between internal and external democracy in the trade unions is showed by emphasizing trade unions tools to raise their voices.

The second chapter is important in a practical sense since it tries to show how protection and supervisory mechanisms are working in particular the ILO, the ECHR and the European Social Charter as well.

The third chapter focuses on the history of trade unionism in Turkey. Since the thesis aims to explain the evolution of the trade union rights from the 1961 Constitution to the 1982 Constitution in Turkey, this chapter draws a framework for this comparison.

The fourth chapter is related to the state and class relationship in Turkey as a part of history of struggle, it aims to elucidate the effects of this socio-political relationship on the Turkish legal system.

The fifth chapter focuses on the Country Analysis on Turkey while giving information about current constitutional situation and domestic law.

Finally, analysis, recommendations and possible solutions for social justice are explained in the final chapter.

2-CHAPTER 1 : COLLECTIVE SOCIAL RIGHTS IN INTERNATIONAL LAW

Workers' rights and unions of workers have an inter-sectional structure that has political, economic and social background. As rights do not fall from the sky, they are the results of the political struggles and product of the political forces at the time². Understanding this structure and its gradual evolution is not only vital for workers, also important in order to analyze current world order in context of Turkey and relations between society, politics and economy from a perspective of International Human Rights Law.

2.1.Are Labour Rights Considered as Constitutional Rights under the Constitutional Guarantee?

Labour rights have been partly ignored in human rights law. They were classified usually as individual and/ or collective social rights.³ Recently, both international and national level, organizations and courts have more often begun to consider labour rights as an integrated and complementary part of human rights. However, in human rights law and labour law literature, some countenance the labour rights as human rights, while others exclude labour rights from human rights doctrine by putting them in a different category.

International labour law is very much part of international human rights law which is not dealt with exclusively ILO, but also broader international human rights law⁴. Although this relation between international labour law and international human rights law is based on the ILO standards that have been adopted over years since its foundation, there are some critics in the literature that examines labour rights as human rights with scepticism and suspicion. Virginia Mantouvalou finds that there are three different approaches in the literature that question whether labour rights as a part of human rights or not⁵. First, *positivistic approach* according to which a group of rights are human rights as certain as treaties recognize them and they are supported in law. The second one called "*instrumental approach*" by Mantouvalou and it looks at the results of strategies such as litigation or civil

² Jay Youngdahl, *Solidarity First: Labour Rights Are Not the Same as Human Rights*, (2009), New Labour Forum 18:1, 31-37, p. 35.

³ Virginia Mantouvalou, *Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation*, (2013), Human Rights Law Review 13:3, 529-555, p. 529.

⁴ Lee Swepston, *United States Labour Law in the Context of International Labour Law*, Conference in Cornell University (2001), p. 1. <http://www.leeswepston.net/Cornell.htm#ft1> [last accessed: 25 February 2017]

⁵ Virginia Mantouvalou, *Are Labour Rights Human Rights?*, (2012), European Labour Law Journal, Volume 3, No: 2, 151-172, p.151.

society which promote labour rights as human rights. If strategies of them are not successful, labour rights as human rights are not endorsed. The last one, *normative approach* examines what a human right is and it classifies some labour rights as a part of human rights, while others will be excluded.

2.1.1. Labour Rights As Human Rights: Three Perspectives

As Mantouvalou states that “*Labour rights are entitlements that relate specifically to the role of being a worker.*”⁶ Some of these rights are exercised individually and others collectively. These rights are based on different foundations such as freedom, equality, and prohibition on discrimination with regard to human rights discourse. There are some debates about whether labour rights are human rights or not. Mantouvalou finds that there are in fact three approaches in the literature that excludes labour right from human rights discourse for different reasons. Although this approach is minority position since the new developments and jurisprudence which encompasses labour rights as human rights, this minority position’s arguments are also important to understand the developments of labour rights discourse in the human rights law.

Positivistic approach catalogues human rights treaties protecting and explicitly recognizing labour rights as human rights, while others were not classified under the roof of human rights. Positivistic approach causes confusion by leaving a number of other labour rights outside the scope that whether labour rights are human rights will be depend on what the drafters decided. Importantly, if particular document decides which rights are human rights, it should be remembered that “*Almost all the relevant United Nations human rights standards were adopted after the ILO Conventions on the four basic human rights subjects of concern to the ILO.*”⁷ More recently, the terminology of “human rights” is not safe from ILO terms. As Swepston indicates the history of term that “*The term human rights incorporates all the notions that make up what the ILO terms ‘decent work’. It is now firmly established in International Human Rights Law that everyone has the right to a decent working life, including many aspects that are dealt with in subsequent chapters of this book. One powerful argument for considering that most ILO standard-setting falls into the human rights category is that articles 6 to 10 of the ICESCR are a brief restatement of ILO standards adopted up*

⁶ Ibid, p. 152.

⁷ Lee Swepston, *United States Labour Law in the Context of International Labour Law*, Conference in Cornell University (2001), p. 2. <http://www.leeswepston.net/Cornell.htm#ft1> [last accessed: 25 February 2017]

until that time."⁸ Moreover, ILO endorsed a list of labour rights as human rights in the 1998 Declaration of Fundamental Principles and Rights at Work which applies to all ILO Member States, irrespective of whether they have ratified the relevant conventions or not. It encapsulates four core rights: Freedom of association and right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in employment and occupation. It shows that ILO's major concerns are strongly related to the major human rights issues as well. If the issues of equality, prohibition of discrimination, prohibition of slavery and child labour are seen as a part of human rights, these major human rights concerns of the ILO show that labour rights concern both general human rights and the more specific labour rights⁹.

Instrumental approach leaves the issue to civil society, institutions or unions; however, labour rights shall not be left to the mercy of these. According to this view, labour rights as human rights are endorsed, if these institutions are successful in promoting them as human rights. Nevertheless, this view may lead to leave some labour rights outside the scope and labour rights may vary from one country or one region to the other. Evolving case law of the European Court of Human Rights illustrates the gaps of this instrumental approach. The ECtHR was in the past reluctant to uphold workers' claims. It rejected the right to strike or right to consultation as components of freedom of association in 1970s.¹⁰ The argument was that considering labour rights as an instrument of human rights causes the undermining of labour rights. For this reason, institutions or courts gave priority to individual rights and upheld individual claims against collective labour rights. However the development of labour law scholarship and urgency of recognition of labour rights require the characterization of labour rights as human rights. Workers need protection in not only limited area of employment, but also occupation sphere. The case law of the ECHR has in recent years been receptive to workers' claims and as Mantouvalou states, "*The Court extended the principles of the Convention in the employment sphere through the adoption of an 'integrated approach' to interpretation.*"¹¹ The Court recognized in the recent case law that individual claims and labour rights are inter-acting and they can affect each other. The Court has extended the

⁸ Lee Swepston, *Human Rights and Rights at Work*, in *The International Labour Organization and the Quest for Social Justice 1919-2009*, International Labour Office Geneva (2009), ed. Gerry Rodgers, Eddy Lee, Lee Swepston and Jasmien Van Daele, p. 38.

⁹ *Ibid*, p. 3.

¹⁰ *Schmidt and Dahlstrom v. Sweden*, Application No: 5589/72, Judgment of 6 February 1976; *National Union of Belgian Police v. Belgium*, Application No: 4464/70, Judgment of 27 October 1975.

¹¹ Mantouvalou, *Are Labour Rights Human Rights?*, p. 158.

principles of the ECHR in the employment sphere. In the important case, *Wilson and Palmer v. UK*¹², for instance, held that providing financial incentives to individuals that cease to be represented by unions for the purposes of collective bargaining violate article 11 of the ECHR¹³. As Collins stated that “*It revealed a profound re-orientation in the ECHR’s interpretation of Conventions rights in the context of workplace and employment relations.*”¹⁴ Thus instrumental use of labour rights leaves the protection of labour rights to the mercy of courts, governmental or non-governmental organizations which can easily lead to failure in the practical achievements because of the absence of concrete legal principles. Recognizing labour rights as an instrument of human rights may create a precedent that a particular labour right is not a human right which may be hard to reverse.

In the normative approach all human beings are entitled to universal and imperative human rights by virtue of their humanity. The normative view’s arguments against labour rights as human rights are that labour rights are not urgent and compelling moral claims; they are not universally applicable and finally they are evolve over time, while the universal human rights are always contemporary which can be claimed at any time.¹⁵ However labour rights are urgent and compelling moral claims which people need since employment and occupation are the contexts where people already live in. In the workplace and employment relationship, there is degrading ill-treatment done by an employer and instances of serious abuse in the employment sphere. Domestic workers, *for instance*, may work in the conditions of “modern slavery” in their employment sphere¹⁶. Conditions of modern slavery illustrate how compelling the underlying interests of those affected can be. Labour rights are universal claims since they are applicable if any person, without discrimination, becomes a worker and is the part of employment relationship, this person will be entitled to be treated with the respect that universal human rights require. Finally, labour rights are also timeless like other human rights because they have some abstract principles which are always applicable such as freedom from forced labour etc. Moreover, labour rights can be revised when the system of

¹² *Wilson and Palmer v. UK*, Application no: 30668/ 96, 30671/96 and 30678/ 96, Judgment 2 July of 2002.

¹³ Freedom of Assembly and Association

¹⁴ Hugh Collins, *The Protection of Civil Liberties in the Workplace*, (2006), *Modern Law Review* : 69, 619-631, p. 627.

¹⁵ Mantouvalou, *Are Labour Rights Human Rights?*, p. 164., “*Mantouvalou called it: ‘Labour rights as timeless entitlements’*”

¹⁶ Virginia Mantouvalou, *Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers*, (2006) , *Industrial Law Journal*: 35, p. 395.

production, employment relations or technology changes. However it does not mean that fundamental principles of labour rights will be abolished.

Jan Youngdahl said that “*The replacement of solidarity and unity as the anchor for labour justice with individual human rights will mean the end of the union movement.*”¹⁷ It is understandable to be worried about the idea of framing labour struggles as human rights issues may lead to occupy center stage of the labour movement. However, it should not be forgotten that certain labour rights, such as the right to strike, can only be exercised through collective action; while others, such as right to work or right to privacy, are mainly exercised individually. Thus the principles of human rights law will not eviscerates the concerns of union movement. On the contrary, it supports and elevates common concerns of all workers by putting these concerns on the agenda of international community. As Compa suggested that “*Workers are empowered in campaigns when they are themselves convinced and convincing the public that they are vindicating their fundamental human rights, not just seeking a wage increase or more job benefits.*”¹⁸

International law that does not include labour rights as human rights does usually ignore the relationship between these. However it is easy to see that there is always a minimum core of social rights that the authorities ought to protect which is described as follows in the UN Committee on Economic, Social and Cultural Rights’ General Comment No. 3, paragraph 10¹⁹:

“a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.”

¹⁷ Jay Youngdahl, *Solidarity First: Labour Rights Are Not the Same as Human Rights*, (2009), New Labour Forum 18:1, 31-37, p. 31.

¹⁸ Lance Compa, *Solidarity and Human Rights*, (2009), New Labour Forum: 18, 38-42, p.42.

¹⁹ COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (CESCR): Fifth session (1990)* General comment No. 3: The nature of States parties’ obligations (art. 2, para. 1, of the Covenant)

ILO requires member states to submit all ILO Conventions and Recommendations to their competent authorities. ILO has the unique obligation that there is an obligation for new ILO standards to be taken into consideration at the national level even if they do not ratify conventions. All the issues show that labour rights are the complementary part of the human rights. Although international labor law and labour rights have been ignored in some circumstances in the context of International Human Rights Law, Swepston reminds that “*It was in fact the first international law and human rights subject, with the campaign in the 1830s to eliminate slavery.*”²⁰ It shows that the very beginning of the idea of ‘human rights’ is not independent from the relationship between human rights and labour rights. There are many important and vital intersections between these two. This relation may be purely seen the relation between Universal Declaration of Human Rights, that is undoubtedly seen as human rights, and ILO Standards. These intersections arise from the fact that the Universal Declaration of Human Rights took into account of what ILO had done; and the ILO took into consideration of the UDHR.

As Swepston states that “*The important thing is that they form part of the same universe of human rights, mutually supportive and fully complementary. And while a great deal of progress has been made in realizing these rights some new problems have arisen and some older problems are still with us.*”²¹ Labour rights are undoubtedly part of the human rights since they are mutually supportive and fully complementary. In today’s world, workers were left to the mercy of employers with the unclarified working conditions and employment relationship. This is because human rights are, primarily normative standards just like labour rights and labour rights are human rights. As a German writer Gunter Grass wrote that “*Questions about the reasons for the growing gap between rich and poor are dismissed as ‘the politics of envy’. The desire for justice is ridiculed as utopian. The concept of “solidarity” is relegated to the dictionary’s list of foreign words.*”²² Solidarity should be revitalized in promoting labour rights as human rights. Recognition that labour rights are human rights implies that they are stringent normative entitlements²³ and should be reflected in law as well.

²⁰ Swepston, *United States Labour Law in the Context of International Labour Law*, p.3.

²¹ Lee Swepston, *The Universal Declaration and Workers’ Rights 60 Years Later*, (2009): Web Journal of Current Legal Issues, p. 2. <http://www.leeswepston.net/univdec.html> [last accessed: 25 February 2017]

²²Gunter Grass, *The Gravest Generation*, *The New York Times*, May 7, 2005. http://www.nytimes.com/2005/05/07/opinion/the-gravest-generation.html?_r=0 [last accessed: 20 February 2017]

²³ Virginia Mantouvalou, *Are Labour Rights Human Rights?*, p. 172.

2.2.Rights and Duties of the States under International Law Obligations

Many international instruments and bodies guarantee the collective social rights, especially freedom of association. Collective social rights are protected in several human rights treaties, the most comprehensive of which are the International Covenant on Economic, Social and Cultural Rights and ILO Standards, specifically Convention No. 98 and No.87. Yet Article 22 of the Universal Declaration of Human Rights is the most general and concrete regulation building on the ILO's dedication to social security that proclaims the right of everyone to social security. Since states' interdependent character obliges them to comply with the international standards, this will usher "*in a new era of accountability for violations of social rights in international law and dispel claims that social rights were not intended to be justiciable.*"²⁴

Two important conventions which are C87 and C98 were adopted just before and just after the adoption of Universal Declaration of Human Rights.²⁵ Article 23/4 of the UDHR enshrines *the right of any person to form and to join trade unions for the protection of his interests* as a fundamental human right. In transforming these provisions of the UDHR into legally binding obligations for the States, the UN adopted two inter-dependent covenants: International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁶ Article 22 of the ICCPR includes the right to freedom of association, including the right to form and join trade unions. This is applicable at other levels than the universal level such as the European context. Article 11 of the European Convention on Human Rights recognizes freedom of assembly and association in terms of collective social rights. Moreover, another international instrument which is the ICESCR guarantees in Article 8 the right of everyone to form and join trade union of his choice. Furthermore, it recognizes in the Article 8/1/d, the right to strike that is exercised in conformity with the laws of that particular country.

International law obliges States to take their human rights obligations under Covenant. It should be noted that collective social rights are justiciable and States should ensure their justiciability at a national level. The adoption of an Optional Protocol to the

²⁴ Manisuli Ssenyonjo, *Economic, Social and Cultural Rights: An Examination of State Obligations*, in a Research Handbook in International Human Rights Law ed. Sarah Joseph and Adam McBeth, Edward Elgar Publishing (2010), p. 36.

²⁵ Lee Swepston, *ILO Labour Standards and General Human Rights*, p. 5.

²⁶ Manisuli Ssenyonjo, *Economic, Social and Cultural Rights: An Examination of State Obligations*, p.37

ICESCR²⁷ providing for individual and group communications, inter-State communications and an inquiry procedure in cases of grave or systematic violations of any social rights was long overdue. It is also noteworthy that there are some specific human rights obligations of States parties to the ICESCR arising from Article 2/1 which directly affect all of the substantive rights under the ICESCR including collective social rights. As Vienna Convention enshrines that human rights obligations undertaken by States must be performed in good faith²⁸.

Under Article 2/1 of the ICESCR, States have an obligation to take steps by all appropriate measures, including legislative measures towards full realization of the rights. States parties are also obliged to improve continuously conditions of social rights and generally to abstain from taking regressive measures. The Committee on Economic, Social and Cultural Rights identified minimum core obligations in General Comments²⁹ and stated that a State party cannot justify its non-compliance with these core obligations which are non-derogable rights.³⁰ Moreover, international law imposes three important obligations to States: the obligations to respect, to protect and to fulfill.³¹

According to the Article 5 of the European Social Charter, State parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, the right to organize and moreover Article 6 recognizes the right to collective bargaining in terms of collective social rights. The rights and obligations of the Covenants and Charter are binding on every State party as a whole. Therefore, judicial, legislative, administrative or informational and social measures must be undertaken to achieve the full realization of the collective social rights, especially freedom of association and right to collective bargaining. Within this scope, freedom of association should be linked together with the right to organize, right to form or join trade unions, right to collective bargaining and right to strike as well.

²⁷ General Assembly on 10 December 2008, https://treaties.un.org/doc/source/docs/A_RES_63_117-Eng.pdf , [Last accessed 1 March 2017]

²⁸ Article 26 of the Vienna Convention on the Law of Treaties

²⁹ CESCR, General Comments: No:11, No:13 and No:14

³⁰ General Comment No: 14 and CESCR, Poverty and the International Covenant on Economic, Social and Cultural Rights, UN DOC. E/C.12/2001/10 (10 May 2001), p.18.

³¹ Asbjørn Eide, *Economic and Social Rights, in Human Rights: Concepts and Standards* ed. Symonides (2000), UNESCO Publishing, p.109.

Since the principle of the interdependence and indivisibility of all human rights, all economic and social rights are justiciable and States are responsible the full realization of these.³²

2.2.1. ILO and its Conventions

The ILO was established, in 1919 by the Treaty of Versailles, as tripartite that is, representatives of employers and workers form an integral part of national delegations and have the right to vote. The impact of this tripartite structure on the decisions made cannot be overemphasized.³³ The Treaty of Versailles only references to the right to organize and bargain collectively. In 1998 the ILO adopted a Declaration of Fundamental Rights and Principles at Work which is a significant for ILO itself. The ILO has taken the position that there are certain principles to workers' protection that they must be protected whatever the country and whatever the economic situation.³⁴ At the international level, World Summit for Social Development (Copenhagen, 1995) encourages to all States to promote "respect for basic workers' rights fully implementing the Conventions of the ILO" and Governments reached a new consensus on the need to put people at the center of development at the World Summit for Social Development.³⁵ Taking into account all of these, all member states of the *ILO have a legal obligation arising from their membership in the ILO to apply certain basic principles of fundamental rights*.³⁶ Moreover, in article 2 of the Declaration, freedom of association and right to collective bargaining are recognized as fundamental principles.

Freedom of association and right to collective bargaining which are collective social rights are among the basic and principal issues of the ILO. Two main conventions are the Convention no: 87 with 154 ratifications and Convention no: 98 with 164 ratifications.³⁷ Although there are high numbers of ratifications, many categories of workers and area of employment cannot fully enjoy these rights.³⁸ Moreover, fundamental conventions have not

³² CESCR, Concluding Observations: United Kingdom of Great Britain and Northern Ireland – Dependent Territories, UN Doc. E/C.12/1/Add.79 (5 June 2002)

³³ Lee Swepston, *The Universal Declaration and Workers' Rights 60 Years Later*, p. 2.

³⁴ Lee Swepston, *International Labour Conference: ILO Declaration on Fundamental Principles and Rights at Work and Annex, The Introductory Note*, Adopted June 18, 1998, International Legal Materials, Vol:37, p. 1.

³⁵ <http://www.un.org/esa/socdev/wssd/text-version/> [Last accessed: 1 March 2017]

³⁶ Lee Swepston, *ibid*, p.2.

³⁷ As of 12 March 2017.

³⁸ ILO Report of Director-General, *Freedom of Association in Practice: Lessons learned Global Report under the follow-up in the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Conference, 97th Session Report 1 (B), 2008, paragraph: 15. http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_096122.pdf [Last accessed: 1 March 2017]

been ratified in many countries. Therefore, many workers are not protected under the conventions. ILO Report of Director-General states that *these fundamental rights are still not enjoyed by millions around the world, and where these rights are recognized, there continue to be challenges in applying them. In some countries certain categories of workers are denied the right of association, and workers' and employers' organizations are illegally suspended or their internal affairs are subject to interference. In extreme cases trade unionists are threatened, arrested or even killed.*³⁹ In some cases, the ILO and Committee on Freedom of Association have been able to document hundreds of releases of trade unions from prison and returns from exile if there is a ratification of the convention.⁴⁰

C.87 establishes principles and guarantees regarding the right to organize between the State and the unions of employers' and workers' in the context of freedom of association. C.98 protects workers and their union organizations from employers and such interferences while it also promotes collective bargaining. According to the C.87 article 2, workers have the right to establish and subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization. Moreover, protection mechanism for freedom of association obliges States to take all necessary and appropriate measures to ensure that these rights are fully and freely enjoyed by workers.⁴¹

Trade unionism and collective social rights should be promoted and enjoyed in a fully democratic society. Therefore, article 2/1 of the C.98 protects workers' and employers' organizations against *any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.* Article 2/2 of the C.98 states what constitutes such interference as *acts which are designed to promote the establishment of workers' organizations under the domination of employers or employers' organizations or to support workers' organizations by financial or other means, with the object of placing such organizations under the control of employers or employers' organizations.*

Other convention of ILO regarding collective social rights is Convention No: 151 on Labour Relations in Public Service which is applicable to all persons that are employed in public authorities except armed forces, police and high level policy-making or managerial

³⁹ Ibid., paragraph: 15.

⁴⁰ Lee Swepston, *ILO Labour Standards and General Human Rights*, p. 24.

⁴¹ Part 2, Article 11.

employees. Although this convention applies to public servants, it explicitly prohibits any interference from public authorities and requires independence in article 5 of the C. 151.

The ILO Declaration of Philadelphia underlies the link between human rights and development: “*All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.*”⁴² As freedom of association and right to organize are at the heart of the democracy, these minimum labour standards should be implemented by all State parties. Since these conventions and principles just draw a frame for minimum performances, High Contracting Parties can do more, in principle.

2.2.1.1. Turkey’s Position Before ILO as a State Party

Turkey is an ILO member state since 1932 and has ratified all fundamental conventions, including above-mentioned ones. Out of 59 Conventions are ratified by Turkey, of which 53 are in force.

2.2.2. ECHR and its Judgments

At the regional level the Council of Europe included economic and social rights in two documents: in the former case the European Convention on Human Rights (ECHR) and in the latter the European Social Charter (ESC). Council of Europe provides an illustration of the legal protection of labour rights. European Social Charter and European Convention on Human Rights guarantee social and economic rights and moreover ECHR provides for a right to individual petition to the European Court of Human Rights (ECtHR).

Article 11 of the ECHR guarantees *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* in scope of the freedom of association. Article 8 of the ECHR includes the right to respect for private and family life which encompasses a right to work as established by different judgments of the ECtHR⁴³.

⁴² http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-islamabad/documents/policy/wcms_142941.pdf [last accessed: 10 March 2017]

⁴³ Such as *Sidabras and Dziautas v. Lithuania*, Application no: 55480/00 and 59330/00, Judgment of 27 July 2004; *Siliadin v. France*, Application No: 73316/01, Judgment of 26 July 2005.

The ECtHR extended the principles of the ECHR in the employment sphere through the adoption of an “integrated approach to interpretation⁴⁴”. It is an integrated approach because *it integrates certain socio-economic rights into a civil and political rights document*.⁴⁵ In a broader sense, it means that certain social and labour rights are essential components of the ECHR and should therefore be protected as such.

The first labour rights case where the Court adopted the integrated approach was *Wilson, National Union of Journalists and Others v. United Kingdom*⁴⁶. It is a collective labour law case held that providing financial incentives to individuals that cease to be represented by unions for the purposes of collective bargaining violates article 11 of the ECHR⁴⁷. The Court further stated that the *wide ban on access to employment can affect the ability to develop relationships with the outside world to a very significant degree, creating serious difficulties [...] in terms of earning a living, with obvious repercussions on the enjoyment of [...] private lives*⁴⁸. This is a very important case that recognized that the right to private life under article 8 may include the right to work as well. In these two cases, the Court took into account the ESC and ILO materials and read a social right *-the right to work*, into Article 8 of the ECHR that protects the right to private life. In *Siliadin v. France*⁴⁹ the Court held that lack of criminalization of extremely harsh working conditions amounted to a breach of Article 4 that guarantees prohibition of slavery and forced labour. There are more examples that the Court has extended the principles of the Convention in the employment sphere⁵⁰.

These cases demonstrate that ILO Law is part of the broader human rights approach. It is also proved by the ECtHR, since the Court relied on several ILO materials in all of these rulings. However reliance on materials of other bodies was strongly questioned in the Grand Chamber Case *Demir and Baykara v. Turkey*⁵¹. The Court briefly concluded that the retroactive annulment of the collective agreement was not necessary in a democratic society. *Tüm-Bel-Sen*, a civil servants’ trade union, had been recognized for the purposes of collective

⁴⁴ Virginia Mantouvalou, *Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation*, Human Rights Law Review 13:3, Oxford University Press

⁴⁵ Ibid, p. 536.

⁴⁶ Ibid, p.536.

⁴⁷ *Wilson and Palmer v. UK*, Application No: 30668/ 96; 30671/ 96; 30678/96, Judgment of 2 July 2002.

⁴⁸ *Sidabras and Dziautas v. Lithuania*, Application No: 55480/ 00 and 59330/ 00, Judgment of 27 July 2004.

⁴⁹ Holly Cullen, *Siliadin v France: Positive Obligations Under Article 4 of the European Convention On Human Rights* (2006) 6:3, Human Rights Law Review, p. 585.

⁵⁰ *Rantsev v. Cyprus and Russia*, Application No: 26965/04, Judgment of 7 January 2010

⁵¹ *Demir and Baykara v. Turkey*, Application no: 34503/ 97, Judgment of 12.11.2008

bargaining and had also concluded collective agreements. However, Turkish courts found that these agreements should be annulled because civil servants' unions should not have been recognized as having the right to conclude them. The ECtHR mentioned of several ILO and other documents even though Turkey had not signed and ratified some of them. The Grand Chamber of the Court was clear: "The Court has never considered the ECHR as the sole framework of reference" for its interpretation.⁵² According to the rules of interpretation found in the Vienna Convention on the Law of Treaties 1969, a treaty ought to be interpreted according to its object and purpose. The ECtHR stated that the *interpretation of the Convention must also take account of other rules of international law*⁵³ and read it as a living document according to present day conditions. The jurisprudence eventually hold that the right to collective bargaining is an essential element of the right to freedom of association in Article 11 of the ECHR and embedded the jurisprudence of ILO and the ESC into that right⁵⁴.

Legal protection of labour rights under the ECHR is based on the integrated approach to interpretation which reads certain social and labour rights into a traditional civil and political rights document. Mantouvalou states that this approach serves *European Court of Human Rights can contextualize human rights in the employment relation*.⁵⁵ Crucially, all the jurisprudence shows that workers have human rights which are protected in the ECHR.

2.2.2.1. Turkey's Position before the ECtHR as a State Party

Turkey became the 13th member state of the Council of Europe on 13 April 1950 and ratified ECHR in 1954.

2.2.3. Democracy and Trade Union Rights

The ILO is built on the principle in the Constitution of ILO that "*universal and lasting peace can be established only if it is based upon social justice.*"⁵⁶ Freedom of association and right to collective bargaining are the essential constituents of the social justice and democracy. Collective social rights are the bases of democracy which facilitates the democratic

⁵² Ibid, paragraph. 65

⁵³ Ibid., paragraph. 67 and 68.

⁵⁴ K.D. Ewing and John Hendy QC, *The Dramatic Implications of Demir and Baykara*, Industrial Law Journal, Vol: 39, No: 1, March 2010, p. 2.

⁵⁵ Virginia Mantouvalou, *Labour Rights in the European Convention on Human Rights*, p.555.

⁵⁶ Lee Swepston, *Promoting Social Dialogue and Respecting and Realizing Fundamental Principles and Rights at Work*, Background Paper for the Doha Forum on Decent Work and Poverty Reduction on 25-26 October 2011, p.2.

institutions and labour rights in a globalizing world. Freedom of association, for instance, is “*at the heart of democracy from the grassroots to the higher echelons of power.*”⁵⁷ Giving globalization a human face, which is expressed in the CEACR General Survey of 2012, is possible in a system which opens the door to participatory democracy. Freedom of association, right to collective bargaining and democracy are inter-dependent and closely inter-related. The relationship between those can be found in the General Survey that “*In the absence of a democratic system in which fundamental rights and civil liberties are respected, freedom of association cannot be fully developed.*”⁵⁸

2.2.3.1. Trade Unions as a Civil Society

Democracy requires freedom of association and right to collective bargaining and in the globalized world of work it is in form of trade unions. As Swepston states that “*Lack of freedom of association and right to collective bargain collectively contributes to problems of many kinds, both under the fundamental human rights instruments and even in relation to safety and health at work and labour inspection. All these are components of the Decent Work agenda, and all are closely inter-related.*”⁵⁹

Democracy and social dialogue which is closely linked with freedom of association and right to collective bargaining constitute set of human rights which is essential to the concept of social dialogue and to the workings of the ILO itself.⁶⁰ It strongly shows that trade unions are essential for the social dialogue and have the ability to put pressure on governments on behalf of the interests of the workers that they represent as a pressure group in democracies. “*Particularly, in situations where the law prohibits democratic and pluralistic alternative voices in the political sphere, trade unions often become catalyst for broader democratic developments.*”⁶¹ Becoming catalyst is likely related to trade unions’ function of being pressure group. Trade unions are not only products of democracy; they are also agents and guarantors of democracy within the wider society.

⁵⁷ CEACR General Survey of 2012, paragraph 49. [Last accessed: 25.03.2017]
http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_174846.pdf

⁵⁸ Ibid., paragraph 59.

⁵⁹ Lee Swepston, *Promoting Social Dialogue and Respecting and Realizing Fundamental Principles and Rights at Work*, Background Paper for the Doha Forum on Decent Work and Poverty Reduction on 25-26 October 2011, p. 2.

⁶⁰ Lee Swepston, *ibid.*, p.8.

⁶¹ CEACR General Survey of 2012, paragraph. 59.

Trade unions may express their demands and opinions freely and organize public meetings which help workers to raise their voice about the policies and laws that concern them while they are also contributing to democracy, social development and protection of the rights.⁶² Therefore, “*to express publicly their opinion regarding the government’s economic and social policy*”⁶³ is a part of this relationship between democracy and trade union rights.

As Swepston states that “*this set of human rights is essential to the workings of the ILO.*”⁶⁴ Since, ILO is built on the principle that no lasting peace without social justice, they are also contributing for a democratic institutions in the world. Colonialism, for instance, have destroyed the democracy and human rights in the world. As Swepston reminds that “*ILO faced up to the notion that the colonial powers would not accept that workers in their colonies should enjoy the same rights as workers in independent counties. [...] By shifting its position during the Second World War, when it moved from accepting and providing a legal basis for colonial regimes to proclaiming equal rights for all in the Declaration of Philadelphia, the ILO marked a definitive break with its colonialist past and helped usher in the post-colonial world that emerged after 1945.*”⁶⁵

ILO does not only work against colonialist powers which destroys basic human rights and equality, but they also work for trade unions rights and try to raise their voices in different countries such as Poland. Rights that they have and functions of trade unions are at the heart of democracy. When a complaint on violation of freedom of association rights in Poland was received by the ILO in 1978, the Committee on Freedom of Association proposed a mission of direct contacts. In this process, Poland legally recognized the Solidarnosc but later, the Government made nervous by the growth in strength of Solidarnosc and cracked down it. Moreover, trade union activities were suspended. But finally, “*In 1990, ILO bodies were able to note the reinstatement of striking workers, the lifting of sentences for strike action and the establishment of trade union pluralism in all sectors.*”⁶⁶ This is the very

⁶² Derya Demirdizen; Kuvvet Lordođlu, “*Türkiye’de Sendika İçi Demokrasi ya da Bir İmkansızın Arayışı mı?*” 5. Sosyal Haklar Uluslararası Sempozyumu Bildiriler Kitabı, (2013), p. 225. (Internal Democracy of Trade Unions in Turkey or a Search for the Impossible?, 5th International Symposium on Social Rights)

⁶³ CFA Digest of 2006, paragraph 503., Data issued 1 November 2006, [Last accessed: 25.03.2017]

⁶⁴ Lee Swepston, *ibid.*, p.8.

⁶⁵ Gerry Rodgers, Eddy Lee, Lee Swepston and Jasmien Van Daele, *Human Rights and Rights at Work*, in The International Labour Organization and the Quest for Social Justice 1919-2009, International Labour Office Geneva (2009), p. 43.

⁶⁶ Lee Swepston, *ibid.*, p. 51.

important success of the ILO on behalf of trade unions and their existence in a democratic society.

The democratic process is irreplaceable for the trade unions. However they can be subject to both external and internal factors. The external factor means that the pressure from the external factors such as the governments or employers; while the internal factor refers to the participation of its members in decision-making process and management.⁶⁷ Trade unions are able to represent workers only if they are democratic both internally and externally.

Social dialogue and respect for fundamental principles and rights at work are important elements for the democracy and they are important goals which all member States of the ILO should achieve. Democracy and trade unions are closely linked to each other; therefore, trade unions should achieve internal democracy within a trade union and democratic states should provide democratic laws and regulation for the trade unions as well.

2.2.4. The Tools of Trade Unions

The democracy and democratic processes are the basic tools of the trade unions. There are external and internal aspects of the democracy and trade unions are subject to both factors. The external factor means that pressure from external factors such as the governments and employers This has always been and have been increasingly continue *largely to the phenomenon of globalization and internalization of labour*⁶⁸ while the internal factor is referring to internal aspects of trade union democracy *deal with institutional mechanism and processes that ensure unrestricted participation of members in the affairs of the union.*⁶⁹

2.2.4.1. Democracy

Trade unions are organized power of workers who are a disadvantaged group compared to the employers; thus they can be represented by trade unions only if trade unions are truly democratic both internally and externally.

⁶⁷ Samuel Oluranti; Kester Kehinde, *Democratic Values and the Practice of Trade Unionism in Nigeria*, (2000), [Last accessed: 26.03.2017] <http://www.ilo.org/public/english/iira/documents/congresses/regional/lagos2011/2ndparallel/session2b/democrat icvalues.pdf>

⁶⁸ Oluranti Samuel; Kehinde Kester, 'Democratic Values and the Practice of Trade Unionism in Nigeria' (2000), p.10. <http://www.ilo.org/public/english/iira/documents/congresses/regional/lagos2011/2ndparallel/session2b/democrat icvalues.pdf> [Last accessed: 01.04.2017]

⁶⁹ Ibid., p. 8.

External pressures on trade unions are generally related to anti-union discrimination which *may jeopardize the very existence of trade unions*.⁷⁰ It is very clear that no one should be “*dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities*” and “*to forbid and penalize in practice all acts of anti-union discrimination in respect of employment*.”⁷¹ There may be some trade unions that are not recognized by the employer as the legal representative of the majority of the workers.⁷² Even if they are, this principle is also valid for these trade unions. Otherwise, abolition of anti-union discrimination may be left to the mercy of the employers. Thus it is very important that governments should ensure the effective protection in compliance with international standards.⁷³ If the governments’ protections are *not accompanied by procedures to ensure that effective protection against such acts is guaranteed*⁷⁴, there is no compliance with international standards.

Prohibition of acts of interference under C98/2 is referring to independence of trade unions⁷⁵ which is essential to defend the interests of workers that they represent. This protection extends to any act of anti-union discrimination against a worker in access to employment or during employment.⁷⁶ Discriminative dismissals, aggravated cases of dismissal without cause, besides lacking in justification, also constitute a serious offense against a basic right- the right to organize as well.⁷⁷ For the application and truly implementation of the article 1 and 2 of C98, sufficient provisions and sanctions should be

⁷⁰ CFA Digest of 2006, para.769 (See 331st Report, Case No. 2169, para. 639.)

⁷¹ CFA Digest of 2006, para. 771 (See the 1996 Digest, paras. 696 and 748; and, for example, 305th Report, Case No. 1874, para. 270; 309th Report, Case No. 1925, para. 116; 316th Report, Case No. 1972, para. 708; 320th Report, Case No. 1998, para. 254; 321st Report, Case No. 2055, para. 355; 327th Report, Case No. 2125, para. 778; 330th Report, Case No. 2203, para. 808; 331st Report, Case No. 2097, para. 277; 333rd Report, Case No. 2229, para. 108; and 334th Report, Case No. 2239, para. 394.)

⁷² CFA Digest of 2006, para.776 (See the 1996 Digest, paras. 693 and 701; 316th Report, Case No. 1989, para. 194; 333rd Report, Case No. 2291, para. 917; 334th Report, Case No. 2316, para. 506; and 337th Report, Case No. 2241, para. 914.)

⁷³ CFA Digest of 2006, para.815 (See the 1996 Digest, para. 699.)

⁷⁴ CFA Digest of 2006, para.818 (See the 1996 Digest, paras. 739, 740 and 742; and, for example, 320th Report, Case No. 2034, para. 745; 324th Report, Case No. 2035, para. 574; 330th Report, Case No. 2186, para. 372; 331st Report, Case No. 2215, para. 178; 332nd Report, Case No. 2227, para. 608; 333rd Report, Case No. 2186, para. 350; 334th Report, Case No. 2222, para. 210, and Case No. 2215, para. 236; 335th Report, Case No. 2236, para. 967; 337th Report, Case No. 2395, para. 1200; and 338th Report, Case No. 2186, para. 53.)

⁷⁵ CFA Digest of 2006, para.855 (See the 1996 Digest, para. 759; 325th Report, Case No. 2068, para. 321; 329th Report, Case No. 2198, para. 683; 330th Report, Case No 2186, para. 379; 331st Report, Case No. 2185, para. 676; 334th Report, Case No. 2316, para. 506; 337th Report, Case No. 2388, para. 1355; and 338th Report, Case No. 2374, para. 509.)

⁷⁶ Lee Swepston, Hector Bartolomei de la Cruz, Geraldo von Potobsky, *International Labour Organization: The International Standards System and Basic Human Rights*, Westview Press, 1996, p. 214.

⁷⁷ A. Nurhan Süral, *Trade Union Rights Within the Context of Protection Against Anti-Union Discrimination*, Turkish Yearbook of Human Rights, Vol:11-12/1, 1990. p.101.

included in national legislation.⁷⁸ Importantly, governments have to be neutral and impartial to all trade unions and should not show any partiality in terms of political standing, tendencies etc.⁷⁹

External pressure also affects the right to collective bargaining since there are external actors on workers' choice and it undermines the power of the trade union to bargain collectively.⁸⁰ Therefore, in order to be considered democratic, trade unions should be free from interference of the employers.⁸¹ Democratic process is the very important tool of the trade unions.

It is very important to mention that democracy is not only referring to the independence from pressure. It is also related to institutional democracy and in a democratic state; trade unions and their organizations should be democratic as well. Internal aspect of the democracy with regards to trade unions is related to the transparent representation, democratic structure and the functioning of their management.⁸² Therefore, both internal and external aspects of the democracy serve the trade unions as a tool since it helps to social justice within trade unions.

2.2.4.2.Solidarity Forever⁸³

The idea of solidarity as a human rights issue helps to the revitalization of labour movement. Therefore, solidarity is the very important tool and constitutes the organized power of the workers under the roof of the trade union. As Youngdahl states that “*Fighting individually, workers lose; fighting together, workers can win. There is a reason why the lyrics to Solidarity Forever read: What force on earth is weaker than the feeble strength of one? But the union makes us strong.*”⁸⁴ Framing and considering labour rights as individual claims could limit the rights and success that they can succeed. As Compa mentions that “*The right*

⁷⁸ CFA Digest of 2006, para.862 (See the 1996 Digest, para. 764; 330th Report, Case No. 2203, para. 810; and 333rd Report, Case No. 2186, para. 358.)

⁷⁹ CFA Digest of 2006, para.341 (See the 1996 Digest, para. 305; 309th Report, Case No. 1851/1922, para. 242; and 323rd Report, Case No. 1888, para. 192.)

⁸⁰ CFA Digest of 2006, para.863 (See the 1996 Digest, para. 766; 304th Report, Case No. 1852, para. 494; and 337th Report, Case No. 2395, para. 1188.)

⁸¹ CFA Digest of 2006, para.868 (See the 1996 Digest, paras. 771 and 789; 329th Report, Case No. 2198, para. 683; 331st Report, Case No. 2217, para. 205, and Case No. 2185, para. 676; and 337th Report, Case No. 2388, para. 1354.)

⁸² Adnan Mahirogullari, *Dünyada ve Türkiye’de Sendikacılık* , 2nd edition, Ekin Publications 2013, p.22 (Trade Unionism in the World and in Turkey)

⁸³ A song written by Ralph Chaplin

⁸⁴ Jay Youngdahl, *Solidarity First: Labour Rights Are Not the Same as Human Rights*, (2009), New Labour Forum 18:1, 31-37, p.32

to organize does not exist in a vacuum. Workers can exercise their right to organize for a purpose: To enable them to fight for collective advance in a way they cannot do individually.”⁸⁵ Therefore, it is very obvious solidarity is the main tool of the trade unions and they are powerful only if they are in solidarity with each other. Since there is not liberation by itself, solidarity means that emancipation is for either all of us or none of us.

2.2.4.3. Collective Bargaining

According to the article 2 of the ILO Collective Bargaining Convention, collective bargaining includes all negotiations which take place between employers and their organizations on the one hand and workers’ organizations on the other hand for determining working conditions and terms of employment and/ or regulating relations between employers and workers. Collective bargaining is the *essential element in terms of freedom of association*.⁸⁶ It enables workers to be taken into consideration in the decision making process on the subjects that concern them in the workplace. It is also an important instrument for the social dialogue which ILO gives importance and it *contributes to the establishment of just and equitable working conditions and other benefits, thereby contributing to social peace*.⁸⁷ Good faith of the parties and the avoidance of unjustified delays are the bases of the negotiations, regarding to international standards.⁸⁸ The bargaining process may end with a collective agreement which binds parties of the agreement or a dispute which may lead to the decision for strike which is another tool of the trade unions.

The Committee on Freedom of Association has stated that the right to bargain freely with employers in respect of conditions of work constitutes the essential element in freedom of association.⁸⁹ Although the Convention 98 recognizes the trade union organization as the bargaining agent for workers, there are some cases alleging that these organizations have been marginalized in favour of negotiations between an employer and the elected representative of

⁸⁵ Lance Compa, *Solidarity and Human Rights: A Response to Youngdahl*, New Labour Forum 18/1: 38-45, p. 38.

⁸⁶ CFA Digest of 2006, para.881 (See the 1996 Digest, para. 782; 310th Report, Case No. 1928, para. 175; 311th Report, Case No. 1951, para. 220, and Case No. 1942, para. 269; 321st Report, Case No. 2019, para. 412; 327th Report, Case No. 2119, para. 253; and 338th Report, Case No. 2326, para. 450.)

⁸⁷ CEACR General Survey of 2012, para.167

⁸⁸ CFA Digest of 2006, para.937 (See the 1996 Digest, para. 816; 300th Report, Case No. 1804, para. 322; 316th Report, Case No. 1970, para. 566; 318th Report, Case No. 2009, para. 295, and Case No. 1994, para. 455; 330th Report, Case No. 2186, para. 380; 332nd Report, Case No. 2252, para. 880; 335th Report, Case No. 2311, para. 1148; and 338th Report, Case No. 2404, para. 1047.)

⁸⁹ CFA Digest of 2006, para.881 (See the 1996 Digest, para. 782; 310th Report, Case No. 1928, para. 175; 311th Report, Case No. 1951, para. 220, and Case No. 1942, para. 269; 321st Report, Case No. 2019, para. 412; 327th Report, Case No. 2119, para. 253; and 338th Report, Case No. 2326, para. 450.)

the workers.⁹⁰ Since there is not just one collective bargaining system that is compatible with the international standards, systems can grant exclusive rights to the most representative union or there are some systems where several unions in an enterprise or a bargaining unit may conclude different agreements are accepted by the ILO.⁹¹ However, if the requirement of percentage of representation to conclude a collective agreement is too high, that will be detrimental to the principle that negotiation between employers and organization of workers' should be encouraged and promoted.⁹² If the requirement is not only for the number of workers but also for the enterprises to be able to conclude collective agreements, it is not in compliance with the C98 as well.⁹³

While the distinction between the most representative unions and the minority unions is legally accepted by ILO, *this distinction should not have the effect of depriving trade union organizations that are not recognized as being among the most representative of the essential means for defending the occupational interests of their members, for organizing their administration and activities and formulating their programmes, as provided for in Convention No. 87.*⁹⁴

As it can be inferred from the CFA Digest of 2006, two criteria should be taken into consideration in collective agreements which are: *representativeness and independence*⁹⁵. Independence is not only referring the one from the employers, but also from the authorities.⁹⁶

The ILO's standards on collective bargaining aim *to ensure that working people and employers can participate in setting the conditions under which work is carried out.*⁹⁷ It is the very key element of the trade unions.

2.2.4.4.Right to Strike

⁹⁰ Lee Swepston, Hector Bartolomei de la Cruz, Geraldo von Potobsky, *International Labour Organization: The International Standards System and Basic Human Rights*, Westview Press, 1996, p. 218.

⁹¹ CEACR General Survey of 2012, para.225

⁹² CEACR General Survey of 2012, para.233 and the Swepston, de la Cruz, von Potobsky *ibid.*, p. 219.

⁹³ CFA Digest of 2006, para.956 (See the 1996 Digest, para. 854; 302nd Report, Case No. 1845, para. 514; and 306th Report, Case No. 1906, para. 553.)

⁹⁴ CFA Digest of 2006, para.346 (See the 1996 Digest, para. 309; 332nd Report, Case No. 2216, para. 908; and 337th Report, Case No. 2334, para. 1219.)

⁹⁵ CFA Digest of 2006, para.967 (See 324th Report, Case No. 1980, para. 672.)

⁹⁶ CFA Digest of 2006, para.966 (See 324th Report, Case No. 1980, para. 671.)

⁹⁷ Lee Swepston, *Human Rights and Rights at Work*, in *The International Labour Organization and the Quest for Social Justice 1919-2009*, International Labour Office Geneva (2009), ed. Gerry Rodgers, Eddy Lee, Lee Swepston and Jasmien Van Daele, p. 45.

The right to strike is one of the essential aspects of the trade union rights. It is the basic and essential right of the workers to promote and defend their economic and social interest⁹⁸ and it is an *intrinsic corollary*⁹⁹ to the right to organize. As Swepston states that “*All the relevant ILO supervisory bodies have found that the right to strike is a necessary corollary of the right to organize and bargain collectively.*”¹⁰⁰

Since it is the most visible and controversial form of collective action in case of a dispute, it is the last resort.¹⁰¹ Yet, there are serious consequences of a possible strike not only for employers, but also for the workers, their families and trade unions.¹⁰² However the first question about right to strike is whether this right exists or not. *Neither the ILO Constitution nor any ILO Convention spells out this right.*¹⁰³ As Swepston noted that “*The only statement of the right to strike in ILO Standards is in the Voluntary Conciliation and Arbitration Recommendation, 1951 (No: 92) which states in paragraph 7 that no provision it contains ‘may be interpreted as limiting, in any way whatsoever’, the right to strike.*”¹⁰⁴

Reason and content of the right to strike should be related to economic and social interests of the workers and it can also apply outside the workplace *for seeking solutions to economic and social policy questions and problems facing the undertaking which are of direct concern of the workers.*¹⁰⁵ Therefore, it is not limited to industrial disputes related to collective bargaining process.¹⁰⁶

Right to strike can be restricted by the authorities in certain conditions by suspension or other interventions. However the restriction might only be legitimate, *if the strike ceases to*

⁹⁸ CFA Digest of 2006, para.522 (See the 1996 Digest, para. 475; and, for example, 299th Report, Case No. 1687, para. 457; 300th Report, Case No. 1799, para. 207; 306th Report, Case No. 1884, para. 695; 308th Report, Case No. 1934, para. 131; 310th Report, Case No. 1928, para. 176; 316th Report, Case No. 1930, para. 365; 327th Report, Case No. 1581, para. 111; 330th Report, Case No. 2196, para. 304; 335th Report, Case No. 2257, para. 466; 336th Report, Case No. 2340, para. 645; and 337th Report, Case No. 2365, para. 1665.)

⁹⁹ CFA Digest of 2006, para.523 (See 311th Report, Case No. 1954, para. 405.)

¹⁰⁰ Lee Swepston, *Crisis in the ILO Supervisory System: Dispute over the Right to Strike*, The International Journal of Comparative Labour Law and Industrial Relations 29, no.2 (2013): 199-218. p. 199.

¹⁰¹ ILO Industrial and Employment Relations Department (DIALOGUE), ‘Labour Legislation Guide’ <<http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch5.htm>>

¹⁰² CEACR General Survey of 2012, para.117

¹⁰³ Lee Swepston, *ibid.*, p. 203.

¹⁰⁴ Swepston adds that “In addition, the Abolition of Forced Labour Convention, 1957 (No: 105), prohibits the use of forced or compulsory labour as a punishment for having participated in strikes, in article 1, subparagraph d. *ibid.*, p. 203, footnote. 10.

¹⁰⁵ CFA Digest of 2006, para.526 (See the 1996 Digest, para. 479; 304th Report, Case No. 1851, para. 280; 314th Report, Case No. 1787, para. 31; 320th Report, Case No. 1865, para. 526; 326th Report, Case No. 2094, para. 491; 329th Report, Case No. 2094, para. 135; and 331st Report, Case No. 1937/2027, para. 104.)

¹⁰⁶ CFA Digest of 2006, para.531 (See the 1996 Digest, para. 484; 300th Report, Case No. 1777, para. 71; and 320th Report, Case No. 1865, para. 526.)

be peaceful.¹⁰⁷ Temporary restriction by law until all available procedures such as negotiation, conciliation and arbitration are exhausted is accompanied by *adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at very stage*.¹⁰⁸ However, it is very important that arbitration should be independent and impartial and that the outcomes of it should not be determined before.¹⁰⁹ If both parties of the collective bargaining process request, compulsory arbitration is legally allowed.¹¹⁰

Trade union rights and the exercise of these rights try to establish job security for the workers by protecting them from discriminative dismissals or penalties as a result of taking part in a legitimate strike. Discriminatory acts are not only related to penalties or dismissals as a result of taking part in a trade union activities, compensating workers by extra bonuses just because they did not participate in the trade union activities is also a form discriminatory practices.¹¹¹

2.3.Conclusion

Trade union rights and their relation to civil liberties have been the subject of meetings of the International Labour Conference¹¹² and the ILO has adopted a number of principles and standards with a view to ensuring trade union rights in their broadest sense.¹¹³ Therefore, protection against anti-union discrimination has always been regarded as a major issue in a labour policy. For the utilization of the tools of the trade unions, national conditions have to be established. Since workers are vulnerable to the risks of anti-union acts, the tools of the trade unions should be protected by law.

Trade unions are vital for not only workers, but also society since they constitute and reflect the democracy. Their independence from the employers and authorities is essential for the effective use of the tools. Being free from the interventions of the external factors which

¹⁰⁷ CFA Digest of 2006, para.545 (See the 1996 Digest, paras. 496 and 497; and 306th Report, Case No. 1865, para. 337.)

¹⁰⁸ CFA Digest of 2006, para.549 (See the 1996 Digest, para. 500; 307th Report, Case No. 1899, para. 83, and Case No. 1898, para. 324; 309th Report, Case No. 1912, para. 364; 324th Report, Case No. 2092/2101, para. 731; and 336th Report, Case No. 2369, para. 212.)

¹⁰⁹ CFA Digest of 2006, para.569 (See 299th Report, Case No. 1768, para. 11)

¹¹⁰ CFA Digest of 2006, para.564 (See the 1996 Digest, paras. 515 and 553; 302nd Report, Case No. 1845, para. 512; 303rd Report, Case No. 1810/1830, para. 62; 307th Report, Case No. 1890, para. 372; 310th Report, Case No. 1931, para. 506; 314th Report, Case No. 1948/1955, para. 75; 333rd Report, Case No. 2281, para. 631; 335th Report, Case No. 2303, para. 1376; and 338th Report, Case No. 2329, para. 1275.)

¹¹¹ CFA Digest of 2006, para.675 (See the 1996 Digest, para. 605; and 326th Report, Case No. 2105, para. 446.)

¹¹² A. Nurhan Süral, *Trade Union Rights Within the Context of Protection Against Anti-Union Discrimination*, Turkish Yearbook of Human Rights, p.101.

¹¹³ For detailed information: ILO Publication on Protection Against Anti-Union Discrimination, Geneva, 1976.

may jeopardize to affect the choice of the workers is a crucial aspect for the freedom of association and the right to organize as well.¹¹⁴ Establishment of employer dominated trade unions or financial support to the trade unions means that these unions are under control of the employers or financial power that supports them.¹¹⁵ Such interference destroys the establishment of independent and strong trade unions.

Lack of effective protection against abusive and discriminatory acts such as anti-union discrimination is a serious problem for labor relations. Legal and economic weakness and vulnerability of the workers can be compensated with the strong and independent trade unions.¹¹⁶ Despite the emphasis of the ILO on the necessity of specific provisions with sanction in terms of trade union rights, protection against act of interference and prohibition against anti-union discrimination remain non-existent or inadequate in a large number of countries.¹¹⁷ The recognition and protection of the trade unions rights and effective use of their tools is critical to the advancement of work-related rights. As Daniel Webster who was the American politician noted in his 1830 speech for support the union of the states to form the United States that “*Liberty and Union: Now and Forever, One and Inseparable.*”¹¹⁸ Despite of the speech was for another context, it should be understood that liberty and union are one and inseparable notions for now and forever.

¹¹⁴ CFA Digest of 2006, para.786 (See 302nd Report, Case No. 1826, para. 411.)

¹¹⁵ CEACR General Survey of 2012, para.194

¹¹⁶ CEACR General Survey of 2012, para.51

¹¹⁷ CEACR General Survey of 2012, para. 196 . The case of Turkey will be examined in a later section in this respect.

¹¹⁸ <http://www.politico.com/story/2015/01/daniel-webster-this-day-in-politics-114578> [Last accessed: 01.04.2017]

3-CHAPTER 2: PROTECTION MECHANISMS ON TRADE UNION RIGHTS

At the international level, the States' role and good faith regarding to comply with the international obligations that they undertake are important for all the international mechanisms since their cooperation in ensuring the compliance with international standards in relation to their commitments is required. Although enforcement power of the international mechanisms is limited, statements and reports of the Governments allow both countries and international bodies to have a public and open explanation of the gaps between States' international obligations and their domestic policies.¹¹⁹

3.1.Existing Protection Mechanisms

Key supervisory mechanisms concerning Turkey are ILO's Supervisory Mechanism, European Convention on Human Rights and European Social Charter will be explained briefly. Since ILO mechanism is the most specific and detailed protection regarding trade union rights, its supervisory mechanism will be scrutinized. It is very important to mention that the ILO is the oldest and largest of the international standards-setting system and it has developed continuously. Therefore, their practice is being used very actively for a variety of matters.

3.1.1. ILO's Mechanism and Protection of International Labour Standards

As Swepton states that "*The International Labour Organization (ILO) operates the oldest and what may be the most thorough and effective, international mechanism for the protection of human rights.*"¹²⁰ It is very important the ILO is not only international standard setting system, but it also combines the detailed standard-setting system with the supervision, promotion and on the ground assistance.¹²¹ Therefore, ILO's supervisory mechanism is a unique system that combines technical examination by independent expert with its tripartite composition.¹²² The regular supervisory mechanism is based on two procedures: First, Committee of Experts on the Application of Conventions and Recommendations (CEACR)'s

¹¹⁹ Kari Tapiola and Lee Swepton, *The ILO and The Impact of Labour Standards: Working on the Ground After an ILO Commission of Inquiry*, Stanford Law and Policy Review Vol.21: 513 (2010), 513-527, p. 517.

¹²⁰ Lee Swepton, *The International Labour Organization and Human Rights*, in *International Protection of Human Rights: A Textbook*, 2nd revised edition, Eds: Catarina Krause and Martin Scheinin, Abo Akademi University Institute for Human Rights, 2012, 353-371, p. 353.

¹²¹ *Ibid.*, p.353.

¹²² Lee Swepton, *Human Rights Law and Freedom of Association: Development through ILO Supervision*, 137/2, *International Labour Review*, 1998.

supervision and the Conference Committee on the Application of Standards (CAS). Since ILO applies participative methods *that go well beyond what most international organizations have attempted*, supervision and promotion of implementation has been very effective.¹²³

The important characteristic of the ILO is its tripartite composition since effectiveness of the supervisory mechanism is not only based on the ILO Constitution; it is related to its tripartite composition as well. The ILO differs from other inter-governmental organizations with its tripartism.¹²⁴ Tripartism means that representatives of workers' and employers' organizations participate on an equal basis with governments in the ILO's governance structures and that the ILO promotes social dialogue on the national level. It is clear that if the trade unions are weak, this structure is not always good and beneficial for the workers' and their unions' due to their vulnerable and weak position against the employers' and the Governments. However in relation to the complaint procedures, *international workers' and employers' organizations are able to submit information to the ILO that national organizations may be too weak or too intimidated.*¹²⁵ By force of tripartite nature, the ILO's non-governmental partners have a right under Article 23 of the ILO Constitution to submit their own reports on governments' performance under a ratified convention and all these are important and key part of the supervisory process as well.¹²⁶

According to the regular supervision, CEACR examines the periodic reports of the Governments, which is firstly sent to the employers' and workers' organizations for their statements and comments, on the application of the Conventions.¹²⁷ The Committee is required to examine, with *complete impartiality and objectivity*, whether States comply with their obligations under the Constitution on standards-related matters, and in particular to *examine the degree to which the legal and factual situation complies with the terms of ratified*

¹²³ Kari Tapiola and Lee Swepston, *The ILO and The Impact of Labour Standards: Working on the Ground After an ILO Commission of Inquiry*, Stanford Law and Policy Review Vol.21: 513 (2010), 513-527, p. 517.

¹²⁴ Claude Akpovaie and Jean Jacques Oechslin, *An International Organization for Social Justice*, in *The International Labour Organization and the Quest for Social Justice 1919-2009*, International Labour Office Geneva (2009), ed. Gerry Rodgers, Eddy Lee, Lee Swepston and Jasmien Van Daele, p. 12.

¹²⁵ Kari Tapiola and Lee Swepston, *The ILO and The Impact of Labour Standards: Working on the Ground After an ILO Commission of Inquiry*, Stanford Law and Policy Review Vol.21: 513 (2010), 513-527, p. 515.

¹²⁶ Lee Swepston, *The International Labour Organization and Human Rights*, in *International Protection of Human Rights: A Textbook*, 2nd revised edition, Eds: Catarina Krause and Martin Scheinin, Abo Akademi University Institute for Human Rights, 2012, 353-371, p. 359.

¹²⁷ For detailed information see ILO, 'ILO supervisory system/mechanism' <<http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm>>

Conventions.¹²⁸ After the examination, CEACR makes comments in the observations or direct requests. Observations include the fundamental comments of the Committee on a specific Convention while the direct requests are sent directly to the Government regarding more technical and detailed questions or requests for further information. CEACR also carries out General Surveys every year on a specific theme. Therefore, CEACR is the ILO's main supervisory body and is responsible for the examination of the conformity of the legislation and the practices of the States with particular conventions.¹²⁹ After the examination, CEACR publishes the annual report which is submitted to the International Labour Conference and examined by CAS which is a tripartite body. The Conference Committee makes an annual selection from the Experts' report of about 25 cases to examine more fully, and invites the governments concerned to appear before it and to provide explanations. As a result, CAS publishes conclusions and recommendations on specific steps that Government should take or invite ILO for technical assistance.

ILO's supervisory mechanism also includes the representations, general complaints and special complaint procedure regarding the freedom of association; however, complaints are only accepted from the Governments who are State Parties as well on a relevant convention, employers' and workers' organizations. Therefore, there is a procedure to consider complaints that ILO Conventions or basic principles are not being adequately applied.

Under the Article 24 of the ILO Constitution, a representation may be filed *if a country has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party*. Representations give the right to the unions of employers' and workers' to present their allegations to the ILO Governing Body against the State Party. Allegations related to C87 and C98 are usually referred to the Committee on Freedom of Association. Under article 26 of the Constitution, a complaint may be submitted by one country against another alleging that the latter has not taken measures for the effective observance of a Convention, if both countries have ratified the Convention. As Swepston

¹²⁸ Lee Swepston, *ILO Labour Standards and General Human Rights*, p. 16.

<http://www.jeeswepston.net/Cornell.htm> [Last accessed: 01.04.2017]

¹²⁹ CEACR, (International Labour Conference, 101st Session Report III (Part4A), 2012) p.2

mentions that “*In fact, even if a state has withdrawn from the ILO but still has obligations under a Convention it ratified while a member, a complaint may be filed.*”¹³⁰

There are also Special Procedures for Complaints Concerning Freedom of Association which is the most widely used ILO petition procedure.¹³¹ These procedures were established in cooperation with the Economic and Social Council of the UN for the complaints of governments, workers’ and employers’ organizations regarding the freedom of association cases. There are two bodies that consider complaints in this area: the Governing Body’s Committee on Freedom of Association and the Fact-Finding and Conciliation Commission on Freedom of Association (FFCC). It should be noted that, *like all international complaint procedures, a Commission’s recommendations have no enforcement measures available to ensure that its recommendations are implemented.*¹³² However, compliance with the CFA’s or FCC’s recommendations is monitored by other ILO bodies.

Since international supervision mechanism relies on the contribution of all parties including States, it is very difficult to enforce parties to comply with their obligations solemnly undertaken by ratification. However, it is noted by Sweptston that *purpose of the ILO supervisory system is not simply to find violations and order that they should be corrected. “It is rather to discover through regular and sustained supervision where States have failed to implement standards fully and to work together for their implementation.”* as well.¹³³

3.1.2. European Convention on Human Rights

Turkey is a state party to the European Convention on Human Rights since 1954. Therefore Turkey is responsible in front of the supervisory and judicial body of the Convention which is the European Court of Human Rights. Turkey accepted the compulsory jurisdiction of the Court in 1987 while acceptance to receive individual application regarding the alleged violations of ECHR in 1990.¹³⁴ Judgments of the ECtHR are binding. Therefore it is an

¹³⁰ Lee Sweptston, *The International Labour Organization and Human Rights*, in *International Protection of Human Rights: A Textbook*, 2nd revised edition, Eds: Catarina Krause and Martin Scheinin, Abo Akademi University Institute for Human Rights, 2012, 353-371, p. 362.

¹³¹ *Ibid.*, p. 363.

¹³² *Ibid.* P.365.

¹³³ Lee Sweptston, *Supervision of ILO Standards*, *The International Journal of Comparative Labor Law and Industrial Relations*, Volume: 13/4, p. 327-344, 1997. p. 327.

¹³⁴ The official web-site of the Republic of Turkey, Ministry of Foreign Affairs [Last accessed: 02.04.2017] <http://www.mfa.gov.tr/insan-haklari-ve-avrupa-konseyi.tr.mfa>

important enforcement mechanism; however, its scope of trade union rights is limited, for instance it does not guarantee the right to strike.¹³⁵ With regards to collective agreements, although the ECtHR concluded that the retroactive annulment of the collective agreement was not necessary in a democratic society, but also stated that “*The binding effect of Article 11 of the ECHR does not restrict the scope for a wide variety of different legislative approaches, other than in a rather general way, at the extremes. Such variety is to be expected and is permitted by the margin of appreciation permitted to member States as regards conformity with the Convention.*”¹³⁶ Organizing collective agreements systems and granting special status to representative trade unions left to the margin of appreciation of the States, as criticized by Ewing and QC.¹³⁷

Supervisory and judiciary mechanism of the ECtHR is very important for the trade union rights; however it relies on the individual applications, rather than collective and systematical perspective on the issue.

3.1.3. European Social Charter

The European Social Charter is a Council of Europe treaty which guarantees social and economic human rights. It was adopted in 1961 and revised in 1996. The European Committee of Social Rights rules on the conformity of the situation in States with the European Social Charter, the 1988 Additional Protocol and the Revised European Social Charter. Turkey ratified the 1961 Charter on 24/11/1989.¹³⁸

The European Social Charter is the first and fundamental instrument that regulates the collective social rights in scope of the Council of Europe. As Ryan mentioned, “*It should be appreciated that it is the underdevelopment of collective labour law within the EU, which leaves such room for the Charter to have an impact in the legal and political spheres.*”¹³⁹ European Social Charter supplements the European Convention on Human Rights in terms of

¹³⁵ Schmidt and Dahlström v Sweden App no 5589/72 (ECtHR 6 February 1976)

¹³⁶ Demir and Baykara v Turkey [GC] App no 34503/97 (ECtHR 12 November 2008) , paragraph: 50.

¹³⁷ K.D. Ewing* and John Hendy QC, *The Dramatic Implications of Demir and Baykara*, Industrial Law Journal, Vol. 39, No. 1, March 2010, p.27

¹³⁸ Official Web-site: [Last accessed: 02.04.2017]

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804928a5>

¹³⁹ Bernard Ryan, *The Charter and Collective Labour Law*, in Tamara Hervey and Jeff Kenner (eds), Economic and Social Rights under the EU Charter of Fundamental Rights (2003, Hart), pp 67-90. p.90.

collective social rights.¹⁴⁰ European Committee on Social Rights also accepts collective complaints by the social partners and NGO's. However Turkey did not accept the related Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (Treaty No:158).¹⁴¹

¹⁴⁰ Council of Europe, 'European Committee of Social Rights (ECSR)' http://www.coe.int/t/democracy/migration/bodies/ecsr_en.asp [Last accessed: 02.04.2017]

¹⁴¹ http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/158/signatures?p_auth=dgHsPdEJ

4-CHAPTER 3: TRADE UNION RIGHTS IN TURKEY AND ITS REFLECTION IN THE TURKISH CONSTITUTIONS

Constitutionalizing collective social rights, especially trade union rights, has typically referred to the goal of securing and guaranteeing the recognition of trade union rights as fundamental human rights at the national level.¹⁴² Constitution-making can be described as an opportunity to create political institutions based on human rights and its recognition.¹⁴³ Therefore, many human rights advocates also want to broaden the prevailing conception of fundamental rights to include social rights with a collective dimension as well.¹⁴⁴ Constitutionalizing collective social rights in the legal sources is important since constitutions set limits on the legitimate use of state power and its discretion on fundamental rights. Constitutions are intended to standardize principles and rights which are guarantees of the fundamental rights in itself. It provides a level of fixity outside of politics which is very important for implementation and security of the fundamental rights as they shall not be left to the mercy of actual politics and conjuncture.

The political and administrative process experienced by Turkey since the establishment of the Republic is a constitutional process narrow sense as well. The political changes and developments in society have been finally reflected in the constitutions and the reflections of collective social rights.¹⁴⁵ 1961 Constitution played a major role in development of collective social rights in particular trade union rights in Turkey. Before the 1961 Constitution, there were no legal developments in terms of promotion of social justice and social development. Moreover, there were no comprehensive constitutional approaches for social rights. The 1961 Constitution included a separate section about social and economic rights which are not only individual claims because of Article 53 of the Constitution which extended of the economic and social duties of the state. Therefore, the state was under the duty to materialize those rights as a part of its positive obligations.

Although the 1961 Constitution strengthened judicial power, safeguarded fundamental rights and freedoms and recognized the economic and social rights embodied in

¹⁴² Judy Fudge, *Constitutionalizing Labour Rights in Europe*, in *The Legal Protection of Human Rights: Sceptical Essays*, 2011, Oxford University Press, 244-267, p. 244.

¹⁴³ Ergun Özbudun and Ömer Faruk Gençkaya, *Democratization and the Politics of Constitution-Making in Turkey*, CEU Press, p. 2.

¹⁴⁴ David Harvey, *A Brief History of Neo-Liberalism*, Oxford University Press, 2005, p. 178-182.

¹⁴⁵ Muzaffer Sencer, *From the Constitution of 1961 to the Constitution of 1982*, *Turkish Yearbook of Human Rights*, Vol.7-8, 15-72, 1986, p.15.

other contemporary constitutions to Turkish citizens as a response to their democratic and social expectations, in the period following 1961, the political parties which came into power, failed to mobilize the principles set forth in the Constitution.¹⁴⁶ There were increasingly effective and organized demands of and opposition from, various sections of society who were benefitting from extensive rights and freedoms; however, political parties and politicians began to hold the Constitution responsible for these demands and prevailing socio-political chaos. The social problems aggravated by the economic and political crisis during the years in the period of following 1961 leads to an atmosphere of chaos in Turkey.¹⁴⁷ Finally, this environment of the Turkey has led to the 12 September 1980 military coup d'état and National Security Council made a new Constitution of 1982 which is still in force.

This chapter analyzes the historical roots and the current nature of the constitutional guarantees regarding trade union rights in Turkey. Since the Constitution of 1982 strongly reflects the authoritarian, statist and tutelary mentality of its military founders, it established a number of tutelary institutions designed to check the powers of the trade unions and to narrow down the space for trade unionists and civilians. In this chapter, Turkey's constitutional developments will be briefly explained and it will be comparatively asserted that political cleavages played a predominant role in regarding constitutional guarantees with regard to trade union rights.

4.1.The 1961 Constitution and its Approach to the Trade Union Rights

The National Unity Committee took over power and intended on a return to civilian rule through a new and democratic Constitution. Undoubtedly, the 1961 Constitution marks a real turning point from the perspective of historical evolution in the transformation of labour relations from an individual to a collective level and particularly from an oppressive and prohibitive approach to liberal and granting free trade union rights in the democratic atmosphere.¹⁴⁸ The 1961 Constitution was not the first legal source that recognized the right to form labour unions. Although, the right to form labour unions, which is one of the three fundamental elements of collective social rights, was recognized by the 1947 Law and although there were two important articles in the Turkish Code of Obligations under the

¹⁴⁶ Ibid., p. 16.

¹⁴⁷ Muzaffer Sencer, *12 September and Its Aftermath: From the Perspective of Human Rights*, Turkish Yearbook of Human Rights, Vol: 9-10, 1988, 49-58, p. 49.

¹⁴⁸ Mesut Gülmez, *The Trade Union Rights in the 1961 Constitution*, Turkish Public Administration Annual, Vol:12/1, p.175.

heading of Collective Contracts relating to collective bargaining, since the prohibition of strikes was in effect and labour disputes were settled by compulsory arbitration, this right and recognition did not lead to the development and operation of worker-employer relations at the collective level in regarding trade union rights as well.¹⁴⁹ Therefore, the 1961 Constitution was unique that regulated the relations as to transform them to a collective social level, rather than individual claims by means of a democratic approach which is strongly based on giving extensive social and political rights and freedoms to all individuals. It means that the 1961 Constitution provided constitutional guarantee for the major elements of the trade union rights. As Gülmez stated that *“It is in the 1961 Constitution that for the first time, economic and social rights are given a place along with the rights of the individual and the political rights in the system of fundamental rights and it is emphasized that one of the characteristics of the State is its being a social state.”*¹⁵⁰ It is very important to mention that the 1961 Constitution stipulated in Article 2 that the Turkish Republic was a social state and the approach of the 1961 Constitution to human rights was also requiring adoption of social rights as well. Article 10 of the Constitution adopted a positive liberty about the nature of human rights and according to this provision the duty of the state in relation to protection of human rights is not only negative (not to interfere) , but also positive (to provide) as well.

4.1.1. Freedom of Association in the 1961 Constitution

The 1961 Constitution set forth that the social state aims to protect individuals who are socially and economically at a low status. Those are especially workers and public servants who are dependent upon other people in the work they do. The State had a duty of enabling every individual to enjoy fundamental rights and freedoms extensively. According to the Article 10, *“The state shall remove all political, economic and social obstacles that restrict the fundamental rights and freedoms of the individual in such a way as to be irreconcilable with the principles embodied in the rule of law, individual well-being and social justice. The State prepares the conditions required for the development of the individual’s material and spiritual existence.”* The 1961 Constitution established a pluralist political order for the exercise of national sovereignty by including other authorized organs along with parliament which is composed of deputies elected in the general elections. By means of this, it rooted in the view that in the area of fundamental rights and freedoms, *freedom is the rule and the*

¹⁴⁹ Ibid., p. 176.

¹⁵⁰ Ibid., p. 176.

*restriction is the exception.*¹⁵¹ It is implied that the individual has to be protected even against the State. As a consequence of this approach, the 1961 Constitution gave trade union rights constitutional guarantee in their main principles and left a relatively extensive and free area to the political parties in power to regulate these rights and freedoms in detail. However, they shall not trespass the given framework and impair the essence of fundamental rights.¹⁵²

The 1961 Constitution made a distinction between the “worker” and “employee”. The term of employee was broad than worker since it also includes civil servants. While the term of employee was referring to both workers and civil servants; the term of workers only means workers other than civil servants. Therefore, the 1961 Constitution largely granted to both employees and employers the right to form trade unions and their higher bodies, to join them as members and to resign from such membership freely without having to obtain prior authorization. On the other hand, there was an important legal distinction between “worker” and “public servants not having the qualifications of workers” in the 1961 Constitution as well. The group of “public servants not having the qualifications of workers” forming another section of the employees is to be done by law according to the article 46 of the Constitution. Consequently, the legal framework of the rights of public servants to establish trade unions is to be designated by law in conformity with general provisions and essence relating to fundamental rights and freedoms as well. It should be also noted that the regulation, administration and functioning of trade unions and higher bodies should not be in conflict with democratic principles in the Constitution on the right to establish trade unions.

Moreover, the 1961 Constitution did not restrict the trade union rights by setting forth that the aim of establishing trade unions was to protect and develop economic and social rights and interests of workers in their fields of work. In other words, the 1961 Constitution did not limit the trade unions activities to the fields of their work like the 1982 Constitution did. As this will be explained in later chapter¹⁵³, the 1982 Constitution did not allow exercise of the freedom of association and the trade union rights outside professional aims such as political aims. The specific wish to have the right to form trade unions restricted to professional aims in the Constitution is a rigid regulation binding upon legislative power as

¹⁵¹ Ibid., p.176.

¹⁵² İbrahim Kaboğlu, *Anayasa'da Sosyal Haklar: Alanı ve Sınırları*, in the *Anayasal Sosyal Haklar (Avrupa Sosyal Şartı, Karşılaştırmalı Hukuk ve Türkiye)*, Legal Publishing, 2012, p.43. (*Social Rights in the Constitution: Scope and Limitations, in the Constitutional Social Rights: European Social Charter, Comparative Law and Turkey*)

¹⁵³ Chapter 3/ Part b.

well as a solution without a legal basis which as has been frequently observed in the past, it enables political parties in power to accuse trade unions of pursuing political aims and of going beyond their professional aims.¹⁵⁴ Moreover, trade unions professional activities cannot be easily distinguished from the politics as well since demands have also political nature in itself.

The 1961 Constitution also included the principle of multiplicity of trade unions and stated that the right to form trade unions could only be restricted by democratic principles.¹⁵⁵

The 1961 Constitution set forth that it was a constitutional right for all employees to establish trade unions. There were only some restrictions for certain types of public servants due to the specifications of the work they perform, have to be subject to specific provisions. It cannot be right for ambassadors, judges, governors, officers to act in complete freedom with respect to forming trade unions. This specific restriction is just because of the speciality of the work they perform. The regulation of this matter has been left to the preferences of the law maker.¹⁵⁶

Although the 1982 Constitution broadly restricted trade union activities, the 1961 Constitution has a more advanced and liberal approach in principle than the 1982 Constitution. It is very important to mention that imposing any conditions in the nature of absolute prohibitions on political activities in the Constitution might mean withholding certain rights in this field recognized to not only employees but also employers in all democracies. As it is stated in the process of preparation of the 1961 Constitution, *“If it is stated that labour unions should engage in professional activities, it might then be seen, from an opposite viewpoint, as a general prohibition on political activities. If we include in the Constitution the condition that the labour unions cannot engage in political activities and if we do not allow the political activities of labour unions to be regulated by law, then we will seriously prevent the development of labour unions in the future, and will limit the freedom of labour unions unnecessarily.”*¹⁵⁷ It is very important to remember that labour unions constitute a political power as well due to the mass they represent. They are not less important

¹⁵⁴ Mesut Gülmez, *ibid.*, p.181.

¹⁵⁵ Kazım Öztürk, *İzahlı, Gerekçeli, Anabelgeli ve Maddelere Göre Tasnifli Bütün Tutanakları ile T.C. Anayasası, Temel Metinler*, v.1., Türkiye İş Bankası Kültür Yayını, Ankara 1966, pp.21-83. (Justified Official Reports of the Turkish Constitution)

¹⁵⁶ Rüşan Işık, *Sendikal Haklar: Tanınması ve Kanuni Sınırları*, Ankara, Sevinç Publishing, 1962, s.73. (Trade Union Rights: Recognition and Legal Limitations)

¹⁵⁷ Mesut Gülmez, *Ibid.*, p.189.

than political parties in this respect.¹⁵⁸ Therefore, restrictive rules to the aims of establishing labour unions in the Constitution could lead to the destruction of the freedom of labour unions and it leads to the dissolution of exercise of the freedom of association. In advanced and liberal essence of the 1961 Constitution, trade unions were recognized as constitutional institutions which are based on the principle of freedom of association.

4.1.2. Collective Bargaining in the 1961 Constitution

The 1961 Constitution gave the pre-dominant role to the collective social rights in the atmosphere of freedom and plural democracy in parallel with the modern world.¹⁵⁹ It adopted the term of social justice with the intents of equality, anti-colonial perspective and social peace in the decent conditions as well. Within this framework, the concept of safeguarding freedoms on which the 1961 Constitution is based is valid in principle for the rights to collective bargaining. The right to collective bargaining to employees entitled civil servants as well, to exercise this right. Recognition of the right to bargain collectively for all employees was an important development that protected the individuals who are socially and economically low status.

The 1961 Constitution which set forth a legislative framework favorable to the growth of trade unions was an important milestone and turning point in the history of labour relations.¹⁶⁰ Among the social provisions introduced were the right to unionization and the right to collective bargaining. The 1961 Constitution led to a new Labour Act, Unions Act and The Collective Labour Agreements, Strikes and Lockouts Act. The modern understanding of unionization in Turkey started with the 1961 Constitution which was influenced by the French Labour Law. Therefore they were more consistent with the international and contemporary standards.¹⁶¹ The broad ban on the political activities of trade unions and prohibition the direct and indirect interference of employers in their establishment and dissolution were softened within the legal framework.¹⁶² Under these circumstances, trade unions were able to conclude collective agreements at the work place and sectoral level. The right to strike was also

¹⁵⁸ Ibid., p. 191.

¹⁵⁹ Cahit Talas, *Sosyal Haklar ve Türk Anayasalarında Sosyal Hakların Evrimi*, in the Turkish Yearbook of Human Rights, Vol: 3-4, 1982, p. 38. (*Social Rights and Its Evolution in the Turkish Constitutions*)

¹⁶⁰ Nurhan Süral, *Introduction*, in a Flexibilisation and Modernisation of the Turkish Labour Market, Edited by Prof.Dr Roger Blanpain, Guest editor Frans Pennings, Nurhan Süral, 2006, p.5.

¹⁶¹ Adnan Mahiroğulları, *Dünyada ve Türkiye'de Sendikacılık*, Ekin Publishing, p. 154. (Trade Unionism in the World and in Turkey)

¹⁶² Article 17 of the Trade Unions Act No. 274, 15 July 1963.

permitted in case of failed negotiations or the infringement by employers on collective agreements.

According to article 47 of the Constitution, workers were entitled to bargain collectively and to conclude collective agreement in their relations with their employers. The Constitution also entrusted legislative power both with the regulation of the rights of employers and the use of the right to strike and its exceptions. Although the right to lockout for employers was discussed in the Process of the Preparation, the term of “lockout” was not mentioned in the Constitution. The Constitution Commission did not consider strike and lockout as the same in value, that the aim of collective social rights was to protect the economically weak, whereas lockout had no such requirement or qualification and there was no necessity to provide constitutional guarantee for it as a human right.¹⁶³ Moreover, explicitly granting the right to conclude collective agreements only to workers, not to employers, strengthened the power of workers against employers since they are not equal in nature. If such guarantee would be given, this meant taking back by one hand what was given by the other.¹⁶⁴ The 1961 Constitution did not find it necessary to give constitutional guarantee to lockout as a human right against the one to strike.

The 1961 Constitution was undoubtedly comprehended much better as granting constitutional guarantee to the right to bargain collectively.¹⁶⁵ Compared to the previous and following regulations, the 1961 Constitution constituted *a very favorable climate for the development of trade unionism* and the right to bargain collectively.¹⁶⁶ The 1961 Constitution bring the new spirit prevailing in Turkey in terms of collective bargaining. In this well-unionized area and compared with the four years after the 1961 Constitution, the wages were increased in the years of relatively unrestricted and constitutional right to bargain collectively.¹⁶⁷

4.1.3. The Right to Strike in the 1961 Constitution

¹⁶³ Kazım Öztürk, *İzahlı, Gerekeçeli, Anabelgeli ve Maddelere Göre Tasnifli Bütün Tutanakları ile T.C. Anayasası, Temel Metinler*, v.1., Türkiye İş Bankası Kültür Yayını, Ankara 1966, pp.21-83. (Justified Official Reports of the Turkish Constitution)

¹⁶⁴ Bülent Tanör, *Anayasa Hukukunda Sosyal Haklar*, May Press, 1978, p. 278. (Social Rights in Constitutional Law)

¹⁶⁵ Mesut Gülmez, *Ibid.*, p.198.

¹⁶⁶ Dudley Jackson, *The Political Economy of the Collective Bargaining: The Case of Turkey*, 16/9 British Journal of Industrial Relations, 1971, p.73.

¹⁶⁷ *Ibid.*,p.77, Table 6.

The right to strike was recognized in the Turkish Constitutional History in the 1961 Constitution for the first time. Beforehand, it was ignored and then it was criminalized as a crime in the Labour Act in 1936, just same as the 1947 Workers' and Employers' Trade Unions Act.¹⁶⁸

According to the Article 47 of the 1961 Constitution, workers were entitled to right to strike in their relations with their employers. Although the 1961 Constitution restricted the exercise of this right to professional aims, it also set forth that it could not be used for political purposes. Due to the 1961 Constitution used the term "workers", a part of people employed in the public sector could be deprived of this right in the 1961 Constitution. Although the scope of the right to strike could be narrowed, it is still advanced improvement comparing to the 1982 Constitution.

Without restricting the right to form labour unions to professional aims in order to avoid dissolution of trade unionism¹⁶⁹, the legislator imposed further conditions and restrictions on the exercise of right to strike. This is because the Commission prepared the 1961 Constitution regarded the right to strike was generally as an economic and social right as a right necessitated by the democratic system.¹⁷⁰ However this was considered that there are some differences stemming from the right to strike's nature. Due to the fact that strike is a force which reinforces peace in industry and serves to have work contract or collective agreement implemented¹⁷¹, there were some prohibitions in regarding exercise of the right to strike. The 1961 Constitution narrowed the scope of the right to strike with professional aims. Moreover, civil servants were not under no circumstances entitled to the right to strike.

The 1961 Constitution is based on the principle that protection was for those who are economically and socially weak. Since strike and lockout had not been considered as equal or parallel, the 1961 Constitution made distinction between those in the legal regulations. They were not as the same in value, the aim of the right to strike was to protect the economically weak, whereas lockout had not been regarded under constitutional guarantee.

¹⁶⁸ Erhan Tural, *Türk Hukukunda Grev Hakkı ve Uluslararası Belgelerde Görünümü*, TAAD Journal, Vol: 4/15, 2013, p. 434. (The Right to Strike on Turkish Law and Its View of in the International Document)

¹⁶⁹ Mesut Gülmez, *ibid.*, p.184.

¹⁷⁰ T.C. Temsilciler Meclisi Tutanacak Dergisi, v.2, 1961, Temsilciler Meclisi, S.Sayısı: 35, (Turkish Republic, House of Representatives Official Report Journal, vol.2, 1961)

¹⁷¹ T.C. Temsilciler Meclisi Tutanacak Dergisi, v.2, 1961, Temsilciler Meclisi, S.Sayısı: 35, (Turkish Republic, House of Representatives Official Report Journal, vol.2, 1961)

The 1961 Constitution tried to recognize and include all the fundamental rights and freedoms and collective social rights recognized by modern and democratic societies as extensively as possible.¹⁷² In comparison with the 1924 Constitution, the former Constitution of the Turkish Republic and the 1982 Constitution, the current Constitution of the Turkish Republic which is in force, the 1961 Constitution was more advanced and more hopeful owing to the innovations it contains.¹⁷³ Especially in the years that followed the suspension of the democratic and progressive approach based on social peace and human rights relating to the labour unions, the 1961 Constitution was still undoubtedly comprehensive and democratic by granting constitutional guarantee to the trade unions and workers' rights. The three basic elements of the collective social rights, the right to form labour unions, the right to collective bargaining and the right to strike, was recognized under constitutional guarantee for the first time. It is obvious that the 1961 Constitution was based on and equipped with social rights and freedoms not only from the individual perspective, but also at the collective level.¹⁷⁴

It is very important to mention that the 1961 Constitution was satisfying, proposed and asked for the addition of rules that would take the rights relating to labour unions to a more advanced stage. The Constitution made a distinction between employee who is weaker than employer and political parties and the general outlines and principles of the 1961 Constitution would guarantee the exercise of the trade union rights against political parties in power that had not digested these rights and freedoms.¹⁷⁵

4.1.4. Position of Trade Unions and Politics in 1960s

Turkey was not a country which is completely accustomed to trade unions and collective social rights. As discussed in the process of the preparation of the 1961 Constitution, the Constitution Commission stated that *"Since the trade unions' rights, especially in societies like ours which are completely unaccustomed to it, can only be recognized with certain conditions and restrictions."*¹⁷⁶ This is because Turkey was newly founded country and there

¹⁷² The Draft Sketch of the Sub-Commission

¹⁷³ Mesut Gülmez, *ibid.*, p.185.

¹⁷⁴ Bülent Tanör, *İki Anayasa:1961-1982*, Beta Publishing, 1986. (Two Constitution: 1961-1982)

¹⁷⁵ Mesut Gülmez, *Sendikal Hakların Uluslararası Kuralları ve Türkiye*, TODAİ Publishing, 1988. (The International Principles of the Trade Union Rights and Turkey)

¹⁷⁶ T.C. Temsilciler Meclisi Tutanacak Dergisi, v.2, 1961, Temsilciler Meclisi, S.Sayısı: 35, (Turkish Republic, House of Representatives Official Report Journal, vol.2, 1961)

was not heritage from the Ottoman Empire in terms of trade unions and workers' organizations.¹⁷⁷

As Orhan Tuna mentioned that “*Although the emergence of trade unions in Turkey can be traced back to the beginning of the twentieth century, as a result of various adverse factors it would not be unreasonable to say that the country does not have a well-entrenched trade union movement.*”¹⁷⁸ There were not trade unions or workers' organizations in between 1913 and 1919. Although there were some trade unions in the period of 1919 and 1922, they were all closed down.¹⁷⁹ In 1947, the Republican People's Party and later also the Democrat Party, tried to found party-affiliated trade unions by establishing and financing employee agencies. In this way, the unionisation of the workforce was actively supported. In the February of the same year (1946), the first Law on Trade Unions was finally adopted; however, it did not include the right to strike and other collective social rights as well.¹⁸⁰ There were already seventy trade unions and trade union federations at that time. Up to that time, the first trade union was founded in Turkey for the first time. However Confederation of Turkish Workers' Unions, Turk-Is, which was founded in 1952, were closely controlled by government policy. The Government tried to control trade unions by way of regulations and institution that they established.

Trade union movement has gained new momentum in Turkey, particularly with the enactment of the 1961 Constitution.¹⁸¹ The 1961 Constitution enhanced and paved the way for trade unions and collective social rights by granting them constitutional guarantee.¹⁸² Many programmatic and ideological statements were incorporated into the constitution. Therefore, the state and the Constitution were entrusted with economic, social and especially collective social rights¹⁸³ including land reform, social security regulations and trade unions' rights. According to the Article 40 of the 1961 Constitution, the State shall act in accordance with the requirements of social objectives as a social state. After the enactment of the 1961 Constitution, trade unions began to make themselves as pressure groups. Various

¹⁷⁷ Yıldırım Koç, *Türkiye’de İşçi Sınıfı ve Sendikacılık: Düünden Bugüne*, Kaynak Publishing, 2013. p.54. (Working Class and Trade Unionism in Turkey: From Yesterday to Today)

¹⁷⁸ Orhan Tuna, *Trade Unions in Turkey*, International Labour Review; 1964, Vol. 90 Issue 5, 413-431, p.413.

¹⁷⁹ Yıldırım Koç, *ibid.*, p.55.

¹⁸⁰ Manfred Wannöffel, *Trade unions in Turkey: Past, Present and Future Developments*, Journal for Labour and Social Affairs in Eastern Europe, 1/1/2011, Vol. 14, Issue 4, p. 545-569, p.548.

¹⁸¹ Orhan Tuna, *Trade Unions in Turkey*, International Labour Review; 1964, Vol. 90 Issue 5, 413-431, p.416.

¹⁸² Yıldırım Koç, *ibid.*, p.59.

¹⁸³ Ergun Özbudun and Ömer Faruk Gençkaya, *Democratization and the Politics of Constitution Making in Turkey*, CEU Press, 2009, p.17.

psychological, legal and social characteristics inherent in this Constitution have had their impact on Turkish trade unionism.¹⁸⁴

After the adoption of the 1961 Constitution, the Law on Trade Unions No. 274 and the Law on Wage Agreements, Strikes and Lockouts were adopted in 1963. Consequently, a modern labour movement developed in 1965, which frequently used the newly-established right to strike and abandoned the controlled-union policy of Turk-Is. The result was that a number of trade unions left the federation in 1967 and founded an alternative federation, the Confederation of Revolutionary Workers' Unions, DISK.¹⁸⁵ Meanwhile, trade union campaigns became more and more radical between 1967 and 1970 under favour of extensive rights and freedoms of the 1961 Constitution. The 1960s represented milestone and turning point in the Turkish history. Economic growth, and particularly industrial growth, was very rapid in the 1960s.¹⁸⁶ Between 1960 and 1970 the Gross Domestic Product (GDP) index rose from 63.6 to 110.5, while the index of industrial GDP rose even more sharply from 45.0 to 113.5. In the same period, manufacturing workplaces more than doubled. By 1970, 173,000 workers, 20 percent of the industrial workforce, worked in factories employing more than 1,000 workers. The impact of these developments on the working class was great. The 1960s witnessed the transformation of a young and inexperienced working class into a highly organized sector. The number of unionized workers increased in leaps and bounds, reaching the one- million mark at the end of the decade.¹⁸⁷ Strikes involved larger numbers of workers and were more pro-longed, particularly in the late 1960s and throughout the 1970s.

Under the circumstances of liberty and democracy, international contacts provided union leaders with new opportunities to establish relations with international organizations, thus getting acquainted with them and observing their structural characteristics. As a result union leaders, impressed by the structure of trade unions in the Federal Republic of Germany, launched substantial reforms in the structural organization of Turkish trade unions.¹⁸⁸ However the economic and increasingly political crisis of the late 1960s culminated in the

¹⁸⁴ Orhan Tuna, *Trade Unions in Turkey*, International Labour Review; 1964, Vol. 90 Issue 5, 413-431, p.430.

¹⁸⁵ Manfred Wannöffel, *Trade unions in Turkey: Past, Present and Future Developments*, Journal for Labour and Social Affairs in Eastern Europe, 1/1/2011, Vol. 14, Issue 4, p. 545-569, p.549.

¹⁸⁶ Table 5th in the Ronnie Margulies and Ergin Yildizoglu, *Trade Unions and Turkey's Working Class*, Middle East Research and Information Project, MERIP Reports, No. 121, State Terror in Turkey (Feb., 1984), pp. 15-21, p.18.

¹⁸⁷ Table 6th in the Ronnie Margulies and Ergin Yildizoglu, *Trade Unions and Turkey's Working Class*, Middle East Research and Information Project, MERIP Reports, No. 121, State Terror in Turkey (Feb., 1984), pp. 15-21, p.18.

¹⁸⁸ Orhan Tuna, *Trade Unions in Turkey*, International Labour Review; 1964, Vol. 90 Issue 5, 413-431, p.416.

military takeover of March 1971. It was the end of the ten year period of liberty and democracy. The results of the military interventions were bans on the trade unions, prohibition of strikes, arrest of the some DİSK's trade-unionists, prohibiting left-wing trade unions and controlling rest of the organizations.¹⁸⁹

Between 1973 and 1980, Turkey was by governed changing coalition governments and riots which culminated in civil war-like situations arose.¹⁹⁰ However, the labour movement gained new momentum between 1975 and 1980, fighting for new rights and becoming more and more political and militant. Since the 33rd government, formed after the 1971 attempt at a coup d'etat, was incapable to stabilize country; throughout this period, unionization proceeded rapidly. DISK, in particular, was involved in a number of struggles and resistances, many of them openly political in nature. Working class morale and confidence remained high: in 1974, a record number of workers were on strike.¹⁹¹ Since the military government was unable to establish stable and coherent regime, contradictions and riots resulted in parliamentary chaos and failure.¹⁹²

Under these circumstances, Turkey had witnessed another military coup d'etat of 12 September 1980. Shortly after the 12 September 1980 coup d'etat, the National Security Council abolished the 1961 Constitution and closed down three opposition union confederations DISK, HAK-IS and MISK. TURK-IS which was controlled by State was not shut down but it could not engage in trade union activity, DISK was outlawed and its leaders were imprisoned and prosecuted with the death penalty.¹⁹³ Hundreds of democratic trade unionists were arrested and tortured in prison in this period; while a large number of DISK-union members died under the military dictatorship in the 1980s. In contrast, members of state-controlled Turk-Is were not persecuted. The different treatment of trade unionists in membership of Turk-Is and DISK strains the relationship between members of the two federations up to the present day. The DISK ban, which was not repealed until 1992, saw the

¹⁸⁹ Ronnie Margulies and Ergin Yildizoglu, *Trade Unions and Turkey's Working Class*, Middle East Research and Information Project, MERIP Reports, No. 121, State Terror in Turkey (Feb., 1984), pp. 15-21, p.17.

¹⁹⁰ Manfred Wannöffel, *Trade unions in Turkey: Past, Present and Future Developments*, Journal for Labour and Social Affairs in Eastern Europe, 1/1/2011, Vol. 14, Issue 4, p. 545-569, p.549.

¹⁹¹ Ronnie Margulies and Ergin Yildizoglu, *Trade Unions and Turkey's Working Class*, Middle East Research and Information Project, MERIP Reports, No. 121, State Terror in Turkey (Feb., 1984), pp. 15-21, p.17.

¹⁹² *Ibid*, p.17-18.

¹⁹³ Ali Rıza Büyüklü, *Trade Unions in Turkey : An Analysis of Their Development, Role and Present Situation*, 1994, p.170. [Unpublished PHD Thesis submitted to Warwick University]

number of individual trade unions decline under the new Law on Trade Unions.¹⁹⁴ The 1982 Constitution which was formed after 1980 coup d'état is still largely in effect with some amendments after its enactment.

In 1982, the new constitution drafted by the generals' Consultative Assembly laid down basic principles of industrial relations and trade union activity. Articles 51 to 54 banned "political aims" and "political activity" for trade unions, and forbid links between unions and political parties which easily lay the groundwork for anti-union discrimination. The liberal, democratic and freedom-granting approach of the 1961 Constitution was seen responsible for the chaotic and instable socio-political circumstances; although the governments could not even provide order and harmony as a real responsible of the chaos.¹⁹⁵ In this way, Turkey moved on to the 1980 military regime in which the purpose of establishing public order and the 1961 Constitution was superseded by a new Constitution which strengthened executive power against judiciary and legislative organs.

4.2.The 1982 Constitution and its Approach to Trade Union Rights

The process instance which let Turkey to move on the 1980 military coup d'état was the 1971 military intervention. Owing to the competition between individual trade unions and the trade union federations, the number of strikes increased significantly.¹⁹⁶ The economic and political crisis of the late 1960s resulted in the military intervention and takeover of March 1971. As Wannöffel stated that "The ten-year period of liberty and democracy ended in 1971."¹⁹⁷ Military intervention led to the prohibition on strikes and some other trade union rights as well as prohibition on left-wing trade unions and organizations.¹⁹⁸ While the 1961 Constitution was considered to carry the main responsibility for the chaos, anarchy and terror, politicians did not take responsibility and calumniated as "it was oversized for Turkey."¹⁹⁹ However in the period following 1961, the political parties in power, having failed to

¹⁹⁴ Manfred Wannöffel, *Trade unions in Turkey: Past, Present and Future Developments*, Journal for Labour and Social Affairs in Eastern Europe, 1/1/2011, Vol. 14, Issue 4, p. 545-569, p.549.

¹⁹⁵ Muzaffer Sencer, *From the Constitution of 1961 to the Constitution of 1982*, Turkish Yearbook of Human Rights, p.17.

¹⁹⁶ Manfred Wannöffel, *Trade unions in Turkey: Past, Present and Future Developments*, Journal for Labour and Social Affairs in Eastern Europe, 1/1/2011, Vol. 14, Issue 4, p. 545-569, p.549.

¹⁹⁷ Ibid, p.549.

¹⁹⁸ Ronnie Margulies and Ergin Yildizoglu, *Trade Unions and Turkey's Working Class*, Middle East Research and Information Project, MERIP Reports, No. 121, State Terror in Turkey (Feb., 1984), pp. 15-21, p.17.

¹⁹⁹ Altan Öymen, "The 1961 Constitution was abolished because of it was oversized for Turkey" Radikal Newspaper, 16.09.2007, Last accessed: 20.04.2017.

<http://www.radikal.com.tr/yazarlar/altan-oymen/1961-anayasasi-bu-elbise-bize-bol-geliyor-diye-degistirildi-825943/>

mobilize the principles set forth in the Constitution, *began to hold the 1961 Constitution responsible for the prevailing socio-political chaos of the times*²⁰⁰. Moreover the leading motive towards the 12 September 1980 military coup d'etat was the civil war-like situations, political and economic crisis as well as the political inability to establish a coherent and stable regime.²⁰¹ Between 1973 and 1980, Turkey saw changing coalition governments and riots. The social problems aggravated by economic and political crisis during the years prior to 1980, gradually created an atmosphere of chaos since they could not be solved by taking necessary measures. It was the convenient environment led to the 12 September military coup d'etat.²⁰²

During the period initiated by the 12 September movement; democracy, political parties, trade unions activities and daily life were suspended and all democratic institutions, trade unions, organizations were terminated with its rules.²⁰³ The 12 September 1980 coup d'etat led to a military dictatorship that lasted approximately nine years.²⁰⁴ During this period, organizations, trade unions and especially the Federation of Revolutionary Trade Unions (DISK) were suppressed. Hundreds of democratic and leftist trade unionists have been not only arrested but also tortured in prison; while a large number of DISK-Union members died under the military dictatorship in the 1980s. However, there was a different treatment between trade unions because of their political affiliations.²⁰⁵ Members of state-controlled Türk-İş were not persecuted. The different treatment of trade unionists in membership of Türk-İş and Disk tenses the relationship between those to up to the present day.

International Confederation of Free Trade Unions (ICFTU)²⁰⁶ carried some of these cases to the ILO and sent its representatives to some domestic trials as observers in Turkey. After the coup and afterwards, the ILO expressed its *grave concern at the seriousness of allegation about complaints as the death, arrest and imprisonment of trade unionists, the*

²⁰⁰ Muzaffer Sencer, *From the Constitution of 1961 to the Constitution of 1982*, Turkish Yearbook of Human Rights, p.16.

²⁰¹ Manfred Wannöffel, *Trade unions in Turkey: Past, Present and Future Developments*, Journal for Labour and Social Affairs in Eastern Europe, 1/1/2011, Vol. 14, Issue 4, p. 545-569, p.549.

²⁰² Muzaffer Sencer, *12 September and Its Aftermath: From the Perspective of Human Rights*, TODAİ Human Rights Law Journal, 1988, p.49.

²⁰³ Muzaffer Sencer, *12 September and Its Aftermath: From the Perspective of Human Rights*, TODAİ Human Rights Law Journal, 1988, p.49.

²⁰⁴ Manfred Wannöffel, *Trade unions in Turkey: Past, Present and Future Developments*, Journal for Labour and Social Affairs in Eastern Europe, 1/1/2011, Vol. 14, Issue 4, p. 545-569, p.549.

²⁰⁵ Ibid, 550.

²⁰⁶ ICTFU was dissolved in 2006 and it formed International Trade Union Confederation (ITUC): <https://www.ituc-csi.org/?lang=en>

*banning of a very large number of trade unions, in particular two of the Turkish Trade Union Confederations and the Federation of Revolutionary Trade Unions (DISK), to the freezing of their assets and the suspension of the right to strike in a case before Committee on Freedom of Association.*²⁰⁷

During these times, due to legislative power has been exercised by the Constituent Assembly; it has specified that the main aim was to draft a new Constitution.²⁰⁸ This law is still largely in effect today and limits the rights and freedoms of the trade unions, workers and trade unionists as well.²⁰⁹ *The liberal constitution of the 1961 was replaced by a new constitution granting extensive power to military.*²¹⁰ In 1982, the new Constitution was adopted and then the new Law on Trade Unions (No:2821 and 2822) entered into force. The Confederation of Revolutionary Workers' Unions (Disk) were banned which was not repealed until 1992 and it leads to the number of individual trade unions decline under the new Law on Trade unions.²¹¹

Due to the hostile external environment, anti-democratic provisions of the new Constitution and military dictatorship, trade unions especially those who are dissident have been facing serious problems and pressure in Turkey from 1980s to today. Trade unions and trade union rights have been influenced and rasped by prolong economic recession and social problems, as well as the military dictatorship against democracy. Therefore, the year of 1980 represents an important turning point of cleavage from the previous positive developments in the context of trade union rights.

4.2.1. Freedom of Association in the 1982 Constitution

The relationship between constitution and the trade union rights are very visible in Turkey.²¹² Since the Constitution draw a frame for the trade union rights especially freedom of association, right to strike and right to collective bargaining, the difference between the

²⁰⁷ Committee on Freedom of Association, Interim Report No: 207: March 1981, Case No: 999-Turkey, Complaint Date: 17 September 1980.

²⁰⁸ Muzaffer Sencer, *12 September and Its Aftermath: From the Perspective of Human Rights*, TODAİ Human Rights Law Journal, 1988, p.49

²⁰⁹ Manfred Wannöffel, *Trade unions in Turkey: Past, Present and Future Developments*, Journal for Labour and Social Affairs in Eastern Europe, 1/1/2011, Vol. 14, Issue 4, p. 545-569, p.549.

²¹⁰ Ibid.,p.550.

²¹¹ Ibid.,p.549.

²¹² Ayşe Buğra; Fikret Adaman, Ahmet İnsel, *Çalışma Hayatında Yeni Gelişmeler ve Türkiye'de Sendikaların Değişen Rolü*, Research Report on Boğaziçi University Social Policy Forum, 2005, p.52. (The New Developments in the Life of Work and Changing Role of the Trade Unions)

framework of the 1961 Constitution and the 1982 Constitution is quite clear. As it can be seen from the provisions that they have, the 1982 Constitution have rasped and blunted the constitutional guarantee for the trade union rights which were recognized by the 1961 Constitution. It is because state elites and military power played a predominant role in the making of the 1982 Constitution which reflected the authoritarian, statist and tutelary mentality of its military founders.²¹³ The military founders of the Constitution had no trust in civilian politicians. Thus they designed a constitution that would limit the area of civilian and democratic trade union rights as much as possible. Under the first and original version of the Constitution, all civil society organizations including trade unions other than political parties were banned from engaging political activities. Trade unions were not allowed to support or receive support from political parties or to engage in joint action among themselves.²¹⁴

The very first attack to the trade union rights was emerged as 24 January 1980 Decisions which taken to open Turkish economy to the international markets in order to fight high inflation and unemployment.²¹⁵ However it resulted in the adoption of the neo-liberal policies and left to the workers without sufficient protection against unjustified dismissals by the employers to decrease the labour costs.²¹⁶

The legal basis for the activities of trade unions were established and regulated in the Law on Trade Unions of 1983 under the military dictatorship.²¹⁷ Freedom of association is regulated by the Article 51 of the 1982 Constitution which states that every employer and employee is granted the right to establish associations and umbrella associations, without prior notice in order to fulfill their duty to protect the economic and social rights and interests of their members. However, as it can be seen from the provision, not all workers and even not all employees are permitted to join trade unions.²¹⁸ Therefore, certain civil servants and all public employees, specifically those working with the police and security forces are not permitted to unionise at all. Ironically, although the 1982 Constitution granted some of the

²¹³ Ergun Özbudun, *Turkey's Search for a New Constitution*, Insight Turkey Vol:14/2012, p.39.

²¹⁴ Ibid., p.41.

²¹⁵ Zivi Y. Hershlag, *The Contemporary Turkish Economy*, Routledge Publishing, p.38-44.

²¹⁶ Rüya Gökhan Koçer, *Trade Unions at Whose Service? Coercive Partnerships and Partnership in Coercion in Turkey's Metal Sector*, 14/3 Industrielle Beziehungen: Zeitschrift für Arbeit, Organisation und Management, 2007, p.250.

²¹⁷ Manfred Wannöffel, *Trade unions in Turkey: Past, Present and Future Developments*, Journal for Labour and Social Affairs in Eastern Europe, 1/1/2011, Vol. 14, Issue 4, p. 545-569, p.550.

²¹⁸ Manfred Wannöffel, *Trade unions in Turkey: Past, Present and Future Developments*, Journal for Labour and Social Affairs in Eastern Europe, 1/1/2011, Vol. 14, Issue 4, p. 545-569, p.550.

employees to the freedom of association, they did not give the right to collective bargaining and right to strike.

New Act on Trade Unions (Act No: 2821) and Collective Agreement, Strike and Lock-Out (Act No: 2822) which were adopted in 1983, not only included a provision regarding the prohibition of the acts of interference by the employers' and workers' organizations in the internal matters of each other. Much more restrictive and anti-democratic laws and regulations were adopted compared to the 1961 Constitution.²¹⁹ Such as a double threshold system is one of the most important challenge and anti-union discrimination in the workplace for the trade unions which is still in force. This system requires that trade unions should ensure the requirement of the representation of 10% of the all workers in the sector and for the second requirement, more than 50% of the workers in the workplace level.²²⁰ The system of double threshold is the top level of the neoliberal policies of the 1980s authoritarian conditions in Turkey which make trade unions eligible for the employer domination.²²¹

Article 52 of the Turkish Constitution stipulated that trade unions must not pursue political goals, support or be supported by political parties. Moreover, unionists who hold the trade union office are banned to be a member of the executive committee of a political party. Although this prohibition was repealed in the 1995 Amendments, it shows the mentality of the Constitution and its regime to suppress the demands for rights.

It can be seen that the Turkish legal and political system is full of the anti-union discrimination which is implied or explicit. Discriminative dismissals just because of the trade union membership, aggravated cases of dismissal without cause besides lacking in justification are serious offences against a basic right that is right to organize and freedom of association.²²² For instance, workers must be registered by a public notary if they want to become a member of a trade union. The same rule which only serves to be written in blacklists of the employers applies when workers want to leave from a trade union. Moreover

²¹⁹ Korkut Boratav, *Türkiye İktisat Tarihi: 1908-1985*, 1st Edition, Gerçek Publishing, February 1988, p.85-120. (Turkey's History of Economics: From 1908 To 1985)

²²⁰ Yıldırım Koç, *Türkiye'de Sendikacılık: Sorunlar ve Çözüm Önerileri*, in the book *Türkiye'de Sendikal Kriz ve Sendikal Arayışlar*, 2007, p.162. (Trade Unionism in Turkey: Problems and Solution Offers in the book *Crisis of the Trade Unions in Turkey and Search for Trade Unions*)

²²¹ Rüya Gökhan Koçer, *Trade Unions at Whose Service? Coercive Partnerships and Partnership in Coercion in Turkey's Metal Sector*, 14/3 *Industrielle Beziehungen: Zeitschrift für Arbeit, Organisation und Management*, 2007, p.249.

²²² A. Nurhan Süral, *Trade Union Rights Within the Context of Protection Against Anti-Union Discrimination*, *Turkish Yearbook of Human Rights*, p.101.

and interestingly, only employees with social insurance are permitted to become a member of a trade union. These requirements severely limit the pool of potential trade union members because of the labour market and trade unions structure in Turkey.²²³

Under the first and original version of the Constitution, civil servants and public officials were not entitled to the freedom of association. After twenty years, civil servants are permitted to form trade unions with the 2001 Constitutional Amendments; however, they had not the right to negotiate collective agreements until 2010.²²⁴ After the 2010 Constitutional Amendments, public officials and civil servants are finally entitled to right to collective agreement with some exceptions such as the high level bureaucrats.²²⁵ Members of the military, the police and private security personnel are not permitted to become members of a trade union.²²⁶

The activities of the trade unions are limited to the problems that can result from the implementation of wage agreements which strictly limit the activities and freedom of the trade unions. Moreover, after every business quarter, trade unions are required to write a balance sheet for the Minister for Labour and Social Security. Therefore, joining a union is bureaucratically cumbersome and risky²²⁷; workers are at the mercy of the employer. The employer is immediately informed and there is no stipulation in the regulations against discriminative dismissal for trade union membership.

Since Turkey signed and ratified the Convention Concerning Termination of Employment at the Initiative of the Employer, 1982 (No: 158)²²⁸, supplemented by the

²²³ Manfred Wannöffel, *Trade unions in Turkey: Past, Present and Future Developments*, Journal for Labour and Social Affairs in Eastern Europe, 1/1/2011, Vol. 14, Issue 4, p. 545-569, p.550.

²²⁴ İbrahim Kaboğlu, *Anayasa'da Sosyal Haklar: Alanı ve Sınırları*, in the Anayasal Sosyal Haklar (Avrupa Sosyal Şartı, Karşılaştırmalı Hukuk ve Türkiye), Legal Publishing, 2012, p.51. (*Social Rights in the Constitution: Scope and Limitations, in the Constitutional Social Rights: European Social Charter, Comparative Law and Turkey*)

²²⁵ İbrahim Kaboğlu, *Anayasa'da Sosyal Haklar: Alanı ve Sınırları*, in the Anayasal Sosyal Haklar (Avrupa Sosyal Şartı, Karşılaştırmalı Hukuk ve Türkiye), Legal Publishing, 2012, p.53. (*Social Rights in the Constitution: Scope and Limitations, in the Constitutional Social Rights: European Social Charter, Comparative Law and Turkey*)

²²⁶ Manfred Wannöffel, *Trade unions in Turkey: Past, Present and Future Developments*, p.550. refers and with reference to, Nazlı Caba (2007) *Übernahme der Arbeitsrechtlichen Aspekte des Acquis Communautaire (Kapital 19) durch die Türkei, Probleme der Umsetzung der ILO-Überinkommen Nr.87, Über die Vereinigungsfreiheit und den Schutz des Vereinigungsrechtes und Nr.98 Über die Anwendung der Grundsätze des Vereinigungsrechtes und des Rechtes zu Kollektivverhandlungen in der Türkei*, Ruhr-Universität Bochum, Fakultät für Sozialwissenschaft, Diplomarbeit.

²²⁷ Ronnie Margulies and Ergin Yıldızoglu, *Trade Unions and Turkey's Working Class*, Middle East Research and Information Project, MERIP Reports, No. 121, State Terror in Turkey (Feb., 1984), pp. 15-21, p.20.

²²⁸ It was signed and ratified by Turkey in 1995. Therefore it is still in force.

Recommendation Concerning Termination of Employment at the Initiative of the Employer, 1982 (R.166), Turkey should try to establish job security for the workers by protecting them from discriminative dismissals. However *discriminative dismissals just because of the trade union membership constitute a serious problem that restricts trade union right to a great extent since the 1982 Constitution.*²²⁹ Due to the insufficient protection envisaged for the workers against anti-union discrimination, the trade union rights in particular the freedom of association cannot be enjoyed by the workers at the regional level.

4.2.2. Collective Bargaining in the 1982 Constitution

In 1982, the new constitution drafted by the generals' consultative assembly laid down basic principles of trade union activities. Articles 51 to 54 ban "political aims" and "political activity" for trade unions and ironically forbid links between trade unions and political parties. Once the constitution was approved and entered into force, the state-controlled Turkish Confederation of Employers Associations (TİSK) argued that the rights and wage levels gained by the previous rounds of the collective bargaining during the 1961 Constitution exceeded those guaranteed by the new 1982 Constitution.²³⁰ To redress this alleged "excess", the Law 2821 on Trade Unions, Collective Bargaining, Strikes and Lockouts was regulated in 1985.

Although the right to collective bargaining is recognized as a constitutional right in the article 53 of the 1982 Constitution, its scope was strictly limited as well. Not only some procedural and practical challenges, but also wording of the article was very narrow in comparison with the article 47 of the 1961 Constitution. While the workers were entitled to the right to collective bargaining in the 1961 Constitution, the 1982 Constitution includes the employers as well. In the past, it was the right for the workers, who are always disadvantageous group against the employers, at the present time employers' are included for the right to collective bargaining.

The law governing the relationship between employers and workers is established by the 1982 Constitutional regime under the military dictatorship. The law on trade unions²³¹ was governing wage agreements and it contained detailed regulations on the implementation,

²²⁹ A. Nurhan Süral, *Trade Union Rights Within the Context of Protection Against Anti-Union Discrimination*, Turkish Yearbook of Human Rights, p.104.

²³⁰ Ronnie Margulies and Ergin Yildizoglu, *Trade Unions and Turkey's Working Class*, Middle East Research and Information Project, MERIP Reports, No. 121, State Terror in Turkey (Feb., 1984), pp. 15-21, p.20.

²³¹ Law Number: 2822

conclusion and the termination of wage agreements. The double threshold system is one of the most important challenges to be able to conclude collective agreement in the regime which is established by the 1982 Constitution. According to the double threshold system, in order to be able to sign a collective agreement, the trade unions must represent at least 51% of the employees of the company and 10% of the employees of the sector concerned. It made collective agreements impossible and made trade unionists eligible for the employer domination. For example, the trade union Birleşik-Metal İş (United-Metal workers) conducted wage negotiations for those companies in the metalworking industry in which it is organized. Under the pressure from the metalworking employer federation (MESS) and with the consent of the employer-state controlled trade union Türk-Metal, it was collectively agreed that salaried employees cannot be organized in a union, so the collective agreements apply only to wage-earning employees.²³²²³³ Moreover, workers whose collective agreement was not concluded yet were entitled to 70% wage increase shortly after the adoption of the 1982 Constitution.²³⁴ It causes fading of the collective agreement since if it is concluded; increase in the salary will be taken back.

When the suspension of the trade union activity was lifted, Türk-İş which is employer and state controlled trade union was the sole and unchallenged trade union to be able to conclude collective labour agreement.²³⁵ Because *the new Unions Law has made unionization impossible outside of Türk-İş*, the question will be how the half a million or more members of dissident trade union The Confederation of Revolutionary Workers' Unions-DİSK will re-organize and obtain their vested rights.²³⁶ That threshold which is still in force is the very important and effective breaking point for the collective agreement and its enjoyment by the workers. This practice can be easily considered as a one face of the anti-union discrimination as well.

Last but not least, according to the article 53 of the 1982 Constitution, it is strictly forbidden to have more than one collective agreement in the same workplace at the same

²³² Manfred Wannöffel, *Trade unions in Turkey: Past, Present and Future Developments*, Journal for Labour and Social Affairs in Eastern Europe, 1/1/2011, Vol. 14, Issue 4, p. 545-569, p.551.

²³³ Salaried employees mean that while-collar workers; while wage-earning employees mean that blue-collar workers in this respect.]

²³⁴ Yıldırım Koç, *Türkiye'de İşçi Sınıfı ve Sendikacılık: Dünden Bugüne*, Kaynak Publishing, 2013, p.70. [Working Class and Trade Unionism in Turkey: From Yesterday to Today]

²³⁵ Ronnie Margulies and Ergin Yildizoglu, *Trade Unions and Turkey's Working Class*, Middle East Research and Information Project, MERIP Reports, No. 121, State Terror in Turkey (Feb., 1984), pp. 15-21, p.20.

²³⁶ Ronnie Margulies and Ergin Yildizoglu, *Trade Unions and Turkey's Working Class*, Middle East Research and Information Project, MERIP Reports, No. 121, State Terror in Turkey (Feb., 1984), p.31.

time. Clauses governing collective agreement process in the 1982 Constitution include provisions and articles which restricts the scope of the collective agreements. Trade union membership is further discouraged by the article 9 that all workers, whether they are union members or not, are able to benefit from the outcome of the collective bargaining.

The 1982 Constitution aimed to reduce the organizational capacity of the trade unions and to prevent collective bargaining remained much more limited.²³⁷ All the provisions and discourages by the Constitution, these legal arrangements caused less number of workers to be covered by collective agreement. Threshold policy and the limitations for unions to have the authority for collective bargaining were also misused and it leads to the decline both the rate of unionized workers and the rate of workers under collective bargaining agreement.²³⁸ All these show that the constitutional recognition of the right supplemented by the wording of the article does not mean the constitutional guarantee for the right as well. Since the limitations will easily cause the misuse of the recognized right at the same time.²³⁹

4.2.3. Right to Strike in the 1982 Constitution

The law restricts the establishment of new trade unions and constrains the right to strike. The right to strike is limited to workers and article 54 of the 1982 Constitution stipulates that the right to strike is only limited to disputes arises during the collective bargaining process. Law 2822/1983 defined the right to strike and illegal strikes in detail. It stated that workers can only go on a strike in the cases of disagreements in the collective bargaining process and for professional reasons.²⁴⁰ Therefore it is strictly forbidden to strike actions, general strikes, the strikes for political purposes, sympathy strikes and work stoppages.²⁴¹ Since strike is the most

²³⁷ Özgün Sarımehmet Duman, *Deunionisation and Suppression of Collective Agreement*, p. 107, in *The Political Economy of Labour Market Reforms: Greece, Turkey and Global Economic Crisis*, Palgrave Macmillan Publishing, 2014.

²³⁸ Özgün Sarımehmet Duman, *Deunionisation and Suppression of Collective Agreement*, p. 112, in *The Political Economy of Labour Market Reforms: Greece, Turkey and Global Economic Crisis*, Palgrave Macmillan Publishing, 2014.

²³⁹ İbrahim Kaboğlu, *Anayasa'da Sosyal Haklar: Alanı ve Sınırları*, in the *Anayasal Sosyal Haklar (Avrupa Sosyal Şartı, Karşılaştırmalı Hukuk ve Türkiye)*, Legal Publishing, 2012, p.53-55. (*Social Rights in the Constitution: Scope and Limitations, in the Constitutional Social Rights: European Social Charter, Comparative Law and Turkey*)

²⁴⁰ Özgün Sarımehmet Duman, *Deunionisation and Suppression of Collective Agreement*, p. 113, in *The Political Economy of Labour Market Reforms: Greece, Turkey and Global Economic Crisis*, Palgrave Macmillan Publishing, 2014.

²⁴¹ İbrahim Kaboğlu, *Anayasa'da Sosyal Haklar: Alanı ve Sınırları*, in the *Anayasal Sosyal Haklar (Avrupa Sosyal Şartı, Karşılaştırmalı Hukuk ve Türkiye)*, Legal Publishing, 2012, p.52. (*Social Rights in the Constitution: Scope and Limitations, in the Constitutional Social Rights: European Social Charter, Comparative Law and Turkey*)

effective and material weapon of workers²⁴², these arrangements deprive the workers' rights against employers. It also excluded trade unions and workers without the authority to have collective bargaining from strike process.

Another important restriction on the right to strike is occupational and workplace constraints. According to the articles 29 and 30, the following are occupations in which workers cannot strike: *The rescue services, including life and property, funeral services, water, electricity, gas, coal, natural gas, oil exploration, extraction, refining and distribution services, public sector, fire-fighting, street cleaning, garbage removal and transport including land, sea and air services.* Moreover, the right to strike cannot be enjoyed in the following workplaces: *vaccine and serum producers, hospitals, clinics, sanatoriums, dispensaries, chemistries and other places related to health services, institutions of education and child care, homes for elderly, cemeteries, workplaces operated by the Ministry of Defence, the High Command of the Gendarmerie and the Coast Guard.* Expansion of the scope of the ban on strikes weakened the workers in the struggle and their rights. According to the strike ballot principle, *workers were ineligible to go on a strike if a strike ballot was taken with the application of one fourth of workers at a workplace and an absolute majority was not attained in the strike ballot.*²⁴³ All these restrictions made it almost impossible to execute the right to strike.

Besides these, there are some procedural restrictions and bans such as suspension or conduct of those who go on a strike. Article 33 recognized the cabinet's authority to postpone strikes for up to 60 days where public health or national security is threatened. In 1980, *for instance*, a similar clause was misused to postpone a strike in a soft drinks manufacturing company.²⁴⁴ National Security Council Law²⁴⁵ defined *national security as protecting and safeguarding constitutional order, national wealth and integrity and all interests at the international level including political, social, cultural and economic files as well as its conventional law against all domestic and foreign threats.* Therefore, any strike could be

²⁴² Özgün Sarımehtmet Duman, *Deunionisation and Suppression of Collective Agreement*, p. 113, in *The Political Economy of Labour Market Reforms: Greece, Turkey and Global Economic Crisis*, Palgrave Macmillan Publishing, 2014.

²⁴³ Özgün Sarımehtmet Duman, *Deunionisation and Suppression of Collective Agreement*, p. 114, in *The Political Economy of Labour Market Reforms: Greece, Turkey and Global Economic Crisis*, Palgrave Macmillan Publishing, 2014.

²⁴⁴ Ronnie Margulies and Ergin Yildizoglu, *Trade Unions and Turkey's Working Class*, Middle East Research and Information Project, MERIP Reports, No. 121, State Terror in Turkey (Feb., 1984), pp. 15-21, p.20.

²⁴⁵ Number 2945/1983.

considered as the violation of national security and postponed considering the comprehensive and broad content of this concept.²⁴⁶

In contrary to the 1961 Constitution and its provisions²⁴⁷, Law 2822²⁴⁸ which is established by the 1982 Constitution regime eliminated the possibility to restart a strike once it was postponed. According to the Nuri Çelik, the prohibition regime replaced by the *cooling down mechanism*.²⁴⁹ A total of 27 strike suspension decrees were issued between 1983 and 2007, influencing more than 600 workplaces and businesses.²⁵⁰ Since the workers was prevented from using the right to strike, suspension of strikes turned into a *systematic violation of the right to strike*.²⁵¹

Finally, the law regulates the conduct of workers who exercise the right to strike. A trade union must announce a strike at least six days before. No more than two pickets are allowed outside a workplace and *those are not allowed to erect a hut, shack or tent in the vicinity*.²⁵² The union is held responsible for any damage to machinery or premises sustained during the strike.

Taking all these factors into account, it should be noted that the rate of implementing strike decisions and enjoyment of the right to strike has been low in Turkey. It is because *Turkey's working class has suffered serious economic problems*²⁵³, unemployment and fear of unfair dismissal. According to the report/ survey operated by the Boğaziçi University²⁵⁴, among the answers given to the question of “Why you are not a member to the trade union?” is by a long way *fear of being fired from work*.²⁵⁵

²⁴⁶ Bülent Tanör, *Türkiye'nin İnsan Hakları Sorunu*, BDS Publishing, 1990, s.174. [The Problem of Human Rights in Turkey]

²⁴⁷ Law 275/1961

²⁴⁸ Law 2822/1982

²⁴⁹ Nuri Çelik, *İş Hukuku Dersleri*, Beta Publishing, 2008, p.105. [Labour Law Lessons]

²⁵⁰ Nuri Çelik, *İş Hukuku Dersleri*, Beta Publishing, 2008, p. 105-109. [Labour Law Lessons]

²⁵¹ Nuri Çelik, *İş Hukuku Dersleri*, Beta Publishing, 2008, p. 128. [Labour Law Lessons]

²⁵² Ronnie Margulies and Ergin Yildizoglu, *Trade Unions and Turkey's Working Class*, Middle East Research and Information Project, MERIP Reports, No. 121, State Terror in Turkey (Feb., 1984), p.31.

²⁵³ Ronnie Margulies and Ergin Yildizoglu, *Trade Unions and Turkey's Working Class*, Middle East Research and Information Project, MERIP Reports, No. 121, State Terror in Turkey (Feb., 1984), p.20.

²⁵⁴ Ayşe Buğra; Fikret Adaman, Ahmet Insel, *Çalışma Hayatında Yeni Gelişmeler ve Türkiye'de Sendikaların Değişen Rolü*, Research Report on Boğaziçi University Social Policy Forum, 2005, p.13. (The New Developments in the Life of Work and Changing Role of the Trade Unions)

²⁵⁵ According to the survey, 36% of the workers suffer from fear of dismissal just because of the union membership, *ibid* Survey, table:3.

In this light, the current passivity and de-unionisation of the workers should be considered as a part of the anti-democratic constitutional regime. Even if the right to strike is recognized, the Government can suspend the strike for 60 days on the basis of the applicable legal provisions. These provisions made workers and their rights eligible and open to the control and manipulation of governments and employers. Moreover, the right to strike for the public officials and civil servants are not recognized in the Constitution and its laws. According to the İbrahim Kaboğlu, totally deprivation of the right to strike for the public officials does not comply with the democratic regime and international standards as well.²⁵⁶

Last but not least, it should also be taken into consideration that while the 1961 Constitution did not recognize and include the right to lock-out; the 1982 Constitution disregards the asymmetrical relationship between workers and employers by putting the right to lock-out in the Constitution as if it is the response for the right to strike. However the right to lock-out of the employers is just a strike breaker action, since the working class is at a socially and economically lower status. The 1961 Constitution Commission did not consider strike and lockout as the same in value, that the aim of collective social rights was to protect the economically weak, whereas lockout had no such requirement or qualification and there was no necessity to provide constitutional guarantee for it as a human right.²⁵⁷ Notwithstanding the 1982 Constitution regime was established by its military founders and employers. Law 2822/1983 entitled the capital with the right to lockout as a response to the right to strike and enshrined that employers can lockout if any disagreement arises during collective bargaining process and workers who are member of the trade union go on a strike. All the arrangements and provisions caused to make strike process even more difficult by prohibiting for job guarantee and other procedural guarantees for the strikers. This mechanism put plainly the right to strike non-functional and ineffective.²⁵⁸

4.2.4. Position of Trade Unions and Politics in 1980s

During the period initiated by the 12 September 1980 military regime, all kinds of civil organizations and trade union activities were annihilated. In the same period thousands of

²⁵⁶ İbrahim Kaboğlu, *Anayasa ve Toplum*, Ankara: İmge Publishing, 2000, p. 55-58, [The Constitution and Society]

²⁵⁷ Kazım Öztürk, *İzahlı, Gerekçeli, Anabelgeli ve Maddelere Göre Tasnifli Bütün Tutanakları ile T.C. Anayasası, Temel Metinler*, v.1., Türkiye İş Bankası Kültür Yayını, Ankara 1966, pp.21-83. (Justified Official Reports of the Turkish Constitution)

²⁵⁸ Özgün Sarımehtem Duman, *Deunionisation and Suppression of Collective Agreement*, p. 115, in *The Political Economy of Labour Market Reforms: Greece, Turkey and Global Economic Crisis*, Palgrave Macmillan Publishing, 2014.

people, whether they are guilty or innocent, *have been detained with the pretext for being members of illegal organizations or leftist trade unions.*²⁵⁹ They are held responsible for the anarchy and chaos hence *most of them have been kept under custody for months by being subject to torture or maltreatment, which was ordinary interrogation practice and arrested thousands of them have been deprived of their freedom for years for being tried or being convicted by doubtful and partial juridical sentences.*²⁶⁰ Under these circumstances, trade union positions and elbow room were very narrow since most of them were lifted and their activities were prohibited. In this sense, *it is evident that trade unions and unionists were left to the mercy of the military government, the conservative governments and employers.*²⁶¹ Trade unionists were subject to the restrictive labour legislations as the main cause of the deteriorating trade union situations in Turkey.

The 12 September 1980 military regime which held responsible for the chaos prior to 1980 the 1961 Constitution “*which could not render it possible for State bodies to be established and to functions as required and the unrestricted utilization of the rights and freedoms acknowledged by this Constitution*”²⁶² with this underlying motive, they made regulations in the 1982 Constitution that comprised of modifications in the field of rights and freedoms. With the 1982 Constitution, the separation of powers which was the main guarantee for the rights and freedoms and the check-balance system between these separate powers has been rasped and blunted in favour of the executive. *It opens the ways for arbitrary actions of the governments have been paved.*²⁶³

During this period, anti-democratic legislations, de-politicisation of public life and de-unionisation appeared to be the main framework of the political system and regime.²⁶⁴ Shortly after the 12 September 1980 military coup d’etat, the military regime abolished the 1961 Constitution due to the reasons explained above. Three Confederations, DİSK, Hak-İş, MİSK, were closed down and the Confederation of Revolutionary Workers’ Unions (Disk) was out-lawed and its leaders imprisoned and prosecuted with the death penalty. Following

²⁵⁹ Muzaffer Sencer, *12 September and Its Aftermath: From the Perspective of Human Rights*, Turkish Yearbook of Human Rights, Vol: 9-10, 1988, 49-58, p. 50.

²⁶⁰ Halit Çelenk, *12 Eylül ve Hukuk*, Onur Publishing, 1988, p.98-114. [12 September and Law]

²⁶¹ Ali Rıza Büyüüksü, *Trade Unions in Turkey : An Analysis of Their Development, Role and Present Situation*, 1994, p.170. [Unpublished PHD Thesis submitted to Warwick University]

²⁶² Muzaffer Sencer, *12 September and Its Aftermath: From the Perspective of Human Rights*, Turkish Yearbook of Human Rights, Vol: 9-10, 1988, 49-58, p. 51.

²⁶³ Halit Çelenk, *12 Eylül ve Hukuk*, Onur Publishing, 1988, p.98-114. [12 September and Law]

²⁶⁴ Ali Rıza Büyüüksü, *Trade Unions in Turkey : An Analysis of Their Development, Role and Present Situation*, 1994, p.170. [Unpublished PHD Thesis submitted to Warwick University]

the adoption of the 1982 Constitution, workers and trade unions rights were deprived and the military coup in 1980 had also introduced the new broad ban on becoming a member to an association. Pressure on the working class has increased from the second half of the 1990s and the economic crisis has been viewed as opportunities to suppress and reduce the organizational capacity of the workers again.²⁶⁵

In this sense, changing and reshaping the structure and guarantees of the trade union rights in general was one of the key goals of the 1980 military dictatorship.

4.3.A Comparative Analysis between the Two Constitutions and Conclusion

The enforcement power and legal guarantee is mostly related to constituting trade union rights into the Constitutions. Constituting process must be carefully designed since it will help to eradicate material inequality, poverty and importantly social-class problems. As Katharine G. Young stated that the term “*constituting labour rights*” means that making them effective within a legal system, not only as constitutional guarantee but also for the enforcement mechanism when they are violated.²⁶⁶

The 12 September 1980 coup d’etat and regime that military established is not over yet. As Murat Sevinç stated that since the law which are enacted by 12 September military regime is still in force²⁶⁷, effects of antidemocratic military regime and coup d’etat still play a vital role in the Turkish political and legal system as well as the regular life. Since the 1982 Constitution have rasped and blunted the trade union rights in Turkey, the trade unions are not able to exert sufficient pressure on the government and the employers. Both trade unions enjoyed the right to conclude collective agreements rarely with great difficulty²⁶⁸ and workers can rarely enjoyed the right to be member of trade unions and follow-up rights. The great difference between the 1961 Constitutional regime and the 1982 Constitutional regime can be seen by trade unions rights. As Bülent Tanör concluded that “*The 1982 Constitution is based on the different ground of democratic Western Constitutions. Reason for being of the 1961 Constitution was to limit the monarchical power and to institutionalize the democracy within*

²⁶⁵ Özgün Sarımeahmet Duman, *Deunionisation and Suppression of Collective Agreement*, p. 115, in *The Political Economy of Labour Market Reforms: Greece, Turkey and Global Economic Crisis*, Palgrave Macmillan Publishing, 2014.

²⁶⁶ Katharine G. Young, *Constituting Economic and Social Rights*, Oxford University Press, 2012, p.6

²⁶⁷ Murat Sevinç, *Türkiye'nin Anayasa İmtihani: Cumhurbaşkanlığı-Başkanlık Tartışması*, İletişim Press, 2017, p. 40. [The Constitutional Test of Turkey: The Debate on Presidential and Parliamentary System]

²⁶⁸ Özgün Sarımeahmet Duman, *Deunionisation and Suppression of Collective Agreement*, p. 123, in *The Political Economy of Labour Market Reforms: Greece, Turkey and Global Economic Crisis*, Palgrave Macmillan Publishing, 2014.

the country. For the first time with the 1980 coup d'etat, the driving force of the politics of constitution-making is not to reinforce the freedom and democracy, rather it is based on to strengthen the authority and the state."²⁶⁹ It can be easily deduced from the fact that the 1982 Constitution preserves the employers and state against the workers and protects the state against its citizens.²⁷⁰ Moreover, trade union activities were prohibited to trade unions and politics were forbidden to political parties.

According to the data of the Organization for Economic Cooperation and Development (OECD), the trade union rate and density of the unionized workers of the Turkey have fallen starting with the 1971.²⁷¹ Turkey was the last country among the OECD Countries according to the unionization rate.²⁷² This is because the politics of de-unionization of the workers and suppression of the trade unions are comprehensive and systematic in Turkey in particular after the 1982 Constitution. Hence the working class cannot organize under the trade unions; trade unions have not managed to effectively utilize the trade union rights.

The 12 September 1980 regime gave the state the opportunity for the suppression most organized workers' unions and exclusion them from the decision-making process and politics by making them de-politicized and criminalized. Therefore, the law governing the trade union rights results in the limitation of the power of the workers and it also eroded the collective nature of the trade union rights by making them as rights merely formality. Neo-liberal and employer controlled policies of post-1980 conditions in Turkey created the proper and convenient conditions for the erosion of the trade union rights²⁷³ and pressure on trade unions in practice despite the international commitments to the ILO C87 and 98.

²⁶⁹ Bülent Tanör, *İki Anayasa: 1961-1982*, Beta Press, 1986, p.97. [Two Constitution: 1961-1982]

²⁷⁰ Murat Sevinç, *Türkiye'nin Anayasa İmtihani: Cumhurbaşkanlığı-Başkanlık Tartışması*, İletişim Press, 2017, p. 40. [The Constitutional Test of Turkey: The Debate on Presidential and Parliamentarian System]

²⁷¹ To look at the unionization rates of the countries: https://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN#. The detailed analysis for Turkey is available: https://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN# Moreover, according to the latest and recent data, Turkey is the last country with the %6 of the unionization rate while the Sweden got first place with the %67.3 of the unionization rate.

²⁷²The new with the title of "Turkey got the last place in regard to unionization" <http://www.hurriyet.com.tr/turkiye-en-kotu-sendikalasma-orani-ile-oecd-sonuncusu-27468300>

²⁷³ Rüya Gökhan Koçer, *Trade Unions at Whose Service? Coercive Partnerships and Partnership in Coercion in Turkey's Metal Sector*, 14/3 Industrielle Beziehungen: Zeitschrift für Arbeit, Organisation und Management, 2007, p.250.

5- CHAPTER 4: STATE AND CLASS IN TURKEY: HISTORY OF STRUGGLE

This chapter includes some views and historical realities which established the Modern Turkish Republic. By the help of relationship between state and class in Turkey, factors that might affect the trade union rights and class struggle can be understood more thoroughly. From the establishment of the Turkish Republic to the struggle between state and class, this chapter will try to give a general view about the relationship between class compromise, state and law. The establishment of Turkish Republic deserves particular attention because it offers clear illustration for the evolvement of the collective social rights which derive from policies and legal basis in Turkish Politics.

5.1.Establishment of the Modern Turkish Republic

The establishment of the Modern Turkish Republic period is subdivided basically between²⁷⁴:

- 1918-1922: A period in which the Turkey was re-established through a war of independence.
- 1922-1926: A critically important date when the Turkish Republic was established in 1923 and then structure of state was changed by the abolishment of the Ottoman Empire
- 1926-1945: The one-party state was established with the notion of Kemalism
- 1945 – today: The gradual and unfinished transition to multi-party democracy

The three main periods are important to understand the policy about the trade unions and class in Turkey. The years between the 1923 and 1931 were a period of intensive effort to foster private sector and create a national bourgeoisie by way of legal incentives and protectionist measures. It was followed by a policy of industrial development between the 1932 and 1945; and finally *an attempt to use public funds and foreign aid for the creation of a new entrepreneurial class having strong ties with international capitalism* after 1945.²⁷⁵

During these years, capitalism is continuing to re-shape the employment relations in general. This system by allowing state and foreign capital to mobilize the resources has had

²⁷⁴ This subdivision is basically done by historian Erik Jan Zürcher, *Turkey: A Modern History*, I.B.Tauris Press, 2004, p. 4.

²⁷⁵ Mümtaz Soysal, *The Policy of Mixed Industrial Enterprises in Turkey and its Socio-Political Consequences*, Development and Change, May 1970, Vol.1, Issue 2, pp.18-28, p. 18.

some favorable influence on the business and employers.²⁷⁶ However it affected negatively to the workers and trade unions since they were unable to compete with state-controlled private capital.

The emergence of the working class as a force on Turkey's political climate rooted in the years since World War II. The organized expression of working class and trade unions also appeared in these years.²⁷⁷ As mentioned before, both these developments were closely related to the process of rapid industrialization as well as the neo-liberal policies. Due to the rising number of the factories and rate of the employment, industrial working class has been growing in Turkey since then.²⁷⁸

Until the 1947, three separate legislations adopted respectively in 1925, 1936 and 1938 forbid the establishment of professional organizations and those based on a social class. The single party state was based on the *Kemalist fiction of a "classless-casteless unified society" which showed paternalistic interest in the problems of working class*²⁷⁹ while it cloaked the existence of classes in society. Disallowance of self-organizations of workers was based on this anti-class perspective of single-state party. In 1947, the government adopted a new Unions Law which allows trade unions but not recognizing the right to strike.²⁸⁰ Moreover there were some practical reasons to remove a ban on establishment of trade unions in the Turkish History. These were *Turkey's attempt to take its place in the postwar free world; the government's aim to win support to the first general election under the new Turkish Republic and finally pre-empt and control any risk of self-organization and unionization of works.*²⁸¹ However it should be noted that the number of unionized workers shortly after the 1947 Law was the 52.000. Only ten years later, it was the 300.000. According to the Mesut Gülmez, the 1947 Law was the turning point for the history of labour relations in

²⁷⁶ Mümtaz Soysal, *The Policy of Mixed Industrial Enterprises in Turkey and its Socio-Political Consequences*, Development and Change, May 1970, Vol.1, Issue 2, pp.18-28, p. 25.

²⁷⁷ Ronnie Margulies and Ergin Yildizoglu, *Trade Unions and Turkey's Working Class*, Middle East Research and Information Project, MERIP Reports, No. 121, State Terror in Turkey (Feb., 1984), p.15.

²⁷⁸ Ronnie Margulies and Ergin Yildizoglu, *Trade Unions and Turkey's Working Class*, Middle East Research and Information Project, MERIP Reports, No. 121, State Terror in Turkey (Feb., 1984), p.15.

²⁷⁹ Ronnie Margulies and Ergin Yildizoglu, *Trade Unions and Turkey's Working Class*, Middle East Research and Information Project, MERIP Reports, No. 121, State Terror in Turkey (Feb., 1984), p.16.

²⁸⁰ Law Number: 5018

²⁸¹ Aziz Çelik, *Vesayetden Siyasete Türkiye'de Sendikacılık: 1946-1967*, İletişim Publishing, 2010, p. 192-260. [From Tutelage to the Politics: Trade Unionism in Turkey, 1946-1967] ; Ronnie Margulies and Ergin Yildizoglu, *Trade Unions and Turkey's Working Class*, Middle East Research and Information Project, MERIP Reports, No. 121, State Terror in Turkey (Feb., 1984), p.16.

Turkey and he called this period as a “*transition from the repressive mindset to the legal recognition.*”²⁸²

The late 1960s was a time of the increasing unionization of the masses as the visible class struggle in Turkey.²⁸³ In the meantime, there was a considerable increase in unionization. The impact of these developments on the working class was considerably important. According to the table of the Ministry of Labour, there were 295.710 unionized workers in the 565 trade unions in 1963; ten years later, it was 2.658.393 million in the 637 trade unions.²⁸⁴ Turkey witnessed the *transformation of a young and in-experienced working class into a highly organized sector.*²⁸⁵

Unfortunately, the development of trade unionism in Turkey was hit by the military coup d’etat. Following the military coup in 1980, the power of the military was used to suppress all political parties and trade unions and to *introduce a new economic policy, aimed at exported growth and a free internal market by cutting wages and subsidies of workers.*²⁸⁶

5.2.A Close Look from Marxist Theory

Marxist theory defines classes and it is based on the conflicted class interests which can never compromise since different classes have different interests by their nature. Erik Olin Wright, one of the contemporary Marxists, calls the term of class compromise as an “*illusion.*”²⁸⁷ This is because class conflict finds its roots in the different interests of the employers and workers. In a capitalist system, employers own the tools of production and make profit out of the services of workers who are able to use these tools and then produce goods and services for a wage that it determined by the employers. The Marxist theory examines this production mechanism and it concludes that this system of production leads to exploitation of workers and alienation of workers from product that they produced. Hence the trade union rights are

²⁸² Mesut Gülmez, *Bir İnsan Hakkı Olarak Sendika Hakkı Konusunda Türkiye’de Yasaklıktan Yasal Tanımaya Geçiş: 1947 Yasası*, TODAİ İnsan Hakları Yıllığı, Vol:3-4/1, p.76. [Trade Union Rights as a Human Rights in Turkey: A Transition from the Repressive Mindset to the Legal Recognition: The 1947 Law, in the TODAİ Human Rights Law Review Vol: 3-4/1]

²⁸³ Ali Rıza Büyüklü, *Trade Unions in Turkey: An Analysis of Their Development, Role and Present Situation*, 1994, p.62. [Unpublished PHD Thesis submitted to Warwick University]

²⁸⁴ Table VI, By transfer from Ronnie Margulies and Ergin Yildizoglu, *Trade Unions and Turkey's Working Class*, Middle East Research and Information Project, MERIP Reports, No. 121, State Terror in Turkey (Feb., 1984), Table: VI

²⁸⁵ Ronnie Margulies and Ergin Yildizoglu, *Trade Unions and Turkey's Working Class*, Middle East Research and Information Project, MERIP Reports, No. 121, State Terror in Turkey (Feb., 1984), p.17.

²⁸⁶ Erik Jan Zürcher, *Turkey: A Modern History*, I.B.Tauris Press, 2004, p. 5.

²⁸⁷ Erik Olin Wright, *Working-Class Power, Capitalist Class Interests and Class Compromise*, American Journal of Sociology, Volume 105, Number 4, January 2000, p.957.

vital for the workers since they are the power of the workers which can influence the production mechanism and employers' positions as well. The Marxist theory also stated that the root of the all social and economic conflicts stems from the fundamental conflict between classes.²⁸⁸

In Marxist terms, society consists of different classes and the whole society must fall apart into two classes –*those of property owners and of propertyless workers*²⁸⁹. Society also witnesses the conflict between these classes. However the term of class is not basically defined by how much income one earns or how much wealth one owns. Class can be understood in terms of *one's relationship to the means of production*.²⁹⁰ According to the Wright, capitalists can be defined as those people who own and control the capital used in production and workers can be understood as all employees excluded from such ownership and control.²⁹¹ Class structure can be viewed in this definition and they are mutually exclusive categories by their nature. Moreover, Wright added the “*middle class*²⁹²” to the list since it was invisible in the traditional Marxist understanding.

In contrary to the Marxist view, there are some approaches which assume that the workers and employers might possibly have common interests. Although it is criticized by Marxists²⁹³ since it represents anti-class antagonism, the identity of class is still exists in liberal democracies as a part of the democracy.²⁹⁴ Another approach is that the trade unions can be considered as a “strategic mid-level actors” which can influence employers and play a mediator role between the conflicting classes.²⁹⁵ However, as Wright stated that, the class compromises *would always be fragile and vulnerable to the attack and for capitalists'*

²⁸⁸ Jan Paluski, *Anti-Class Analysis: Social Inequality and Post-Modern Trends' Alternative Foundations of Class Analysis*, 2011, p.181-183.

²⁸⁹ Karl Marx, *Transitional Writings, From Economico-Philosophical Manuscripts of 1844*, in The Portable Karl Marx, ed. Eugene Kamenka, Penguin Books, p.131.

²⁹⁰ Alan J. Spector, *Class Structure and Social Change: The Contradictions of Class Relations in Advanced Capitalist Society*, Sociological Inquiry, Vol:65, No: 3-4, November 1995, p.329.

²⁹¹ Erik Olin Wright, *Working-Class Power, Capitalist Class Interests and Class Compromise*, American Journal of Sociology, Volume 105, Number 4, January 2000, p.961.

²⁹² Erik Olin Wright, *Class Counts: Comparative Studies in Class Analysis*, Cambridge University Press: Paris, 1992.

²⁹³ Erik Olin Wright, *Working-Class Power, Capitalist Class Interests and Class Compromise*, American Journal of Sociology, Volume 105, Number 4, January 2000, p.961.; Çağlar Keyder, *Türkiye'de Devlet ve Sınıflar*, İletişim Press, 1989, p. 12. [*The State and Classes in Turkey*]

²⁹⁴ Jan Paluski, *Anti-Class Analysis: Social Inequality and Post-Modern Trends' Alternative Foundations of Class Analysis*, 2011, p.186.

²⁹⁵ Barbara J. Fick, *Not Just Collective Bargaining: The Role of Trade Unions in Creating and Maintaining a Democratic Society*, 12/4 Working USA, p. 259-260.

*interests would always be served by taking advantage of opportunities to undermine workers' power.*²⁹⁶

In order to more deeply understand the social conflicts and exploitation of the workers, trade unions should be seen as a vital model to include the workers into the society. Since trade unions represent workers, the anti-union discrimination should be removed by the State. Otherwise, the workers would be excluded from the production relationship which they produced with their own labor power. It was not simply the alienation; it is deeply social problem that has easily been turned to the opportunity for the capitalism. Since capitalism, quotes from the Marx, lies in the fact that *worker can maintain himself as a physical subject only in so far as he is a worker and that only as a physical subject is he a worker.*²⁹⁷

The concept of alienation should be emphasized in this respect since it clarifies the relationship between workers and products in a capitalist society.

*“The alienation of the worker in his object is expressed within the laws of political economy thus: the more the worker produces, the less value, the less dignity he has; the better shaped his product, the more mis-shapen the worker; the more civilized his object, the more barbaric the worker; the more powerful the work, the more powerless the worker; the more intelligent the work, the more witless the worker, the more he becomes a slave of nature.”*²⁹⁸

A close look from the Marxist theory enables to understand the exploitative nature and structure of the capitalist society. Alternatively, structural power of the capitalism can be balanced with the associational power of the workers.²⁹⁹ As an organizing model, trade unions aim to strengthen the workers with the skills of solving their own problems and provide

²⁹⁶ Erik Olin Wright, *Working-Class Power, Capitalist Class Interests and Class Compromise*, American Journal of Sociology, Volume 105, Number 4, January 2000, p.977.

²⁹⁷ Karl Marx, *Transitional Writings, From Economico-Philosophical Manuscripts of 1844*, in The Portable Karl Marx, ed. Eugene Kamenka, Penguin Books, p.135.

²⁹⁸ Karl Marx, *Transitional Writings, From Economico-Philosophical Manuscripts of 1844*, in The Portable Karl Marx, ed. Eugene Kamenka, Penguin Books, p.135.

²⁹⁹ Beverly Silver, *Forces of Labor: Workers' Movements and Globalization since 1870*, Cambridge University Press, p.13-16.; Erik Olin Wright, *Working-Class Power, Capitalist Class Interests and Class Compromise*, American Journal of Sociology, Volume 105, Number 4, January, 2000, p. 957-1002.

unionized and institutionalized support to defend their rights.³⁰⁰ Therefore, trade union rights and the associational power of the workers should be constitutionally guaranteed in order to strengthen and to protect workers who are economically and socially weak. Marxist theory shows that law is not safe from the class relations and working class situation.

5.3. Conclusion

The approach and the policy should be repeated that the trade unions represent workers; most importantly the workers are represented by the trade unions.³⁰¹ ILO also emphasizes that “*the fundamental and permanent mission of the trade union movement is the economic and social advancement of the workers.*”³⁰² The workers constitute the majority of the population and they hold the labor and productivity in the world. Since they are powerful when they are unionized, increased power of the workers provides to make pressure on the employers to obtain their deserved rights. Wright importantly stated that *capitalist-class interests are best satisfied when the working class is highly dis-organized, when workers compete with each other in an atomized way and lack significant forms of associational power.*³⁰³

Since *the class struggle is still the driving mechanism*³⁰⁴, there is no lasting peace without social justice³⁰⁵ which cannot be accomplished without class struggle and trade union rights of workers. An organized power of the workers is central for promoting democracy.³⁰⁶ Social justice and social peace are not erectable notions which can be easily substituted. They are always somewhere in a society. As Joan Baez sings, “*We shall overcome/ We will walk hand in hand/ We shall live in peace/ We are not afraid today*”³⁰⁷

³⁰⁰ Ayşe Buğra; Fikret Adaman, Ahmet İnsel, *Çalışma Hayatında Yeni Gelişmeler ve Türkiye’de Sendikaların Değişen Rolü*, Research Report on Boğaziçi University Social Policy Forum, 2005, p.52. (The New Developments in the Life of Work and Changing Role of the Trade Unions)

³⁰¹ Ayşe Buğra; Fikret Adaman, Ahmet İnsel, *Çalışma Hayatında Yeni Gelişmeler ve Türkiye’de Sendikaların Değişen Rolü*, Research Report on Boğaziçi University Social Policy Forum, 2005, p.50. (The New Developments in the Life of Work and Changing Role of the Trade Unions)

³⁰² ILO, Resolution Concerning the Independence of the Trade Union Movement, International Labour Conference, 35th session, 26 June 1952, General Introduction, paragraph 1, for more information see: Digest of 1985, paragraph 352. http://white.lim.ilo.org/qvilis_world/english/infobd/1_anexoi.html [Last accessed: 29.04.2017]

³⁰³ Erik Olin Wright, *Working-Class Power, Capitalist Class Interests and Class Comprromise*, American Journal of Sociology, Volume 105, Number 4, January, 2000, p. 959.

³⁰⁴ Alan J. Spector, *Class Structure and Social Change: The Contradictions of Class Relations in Advanced Capitalist Society*, Sociological Inquiry, Vol:65, No: 3-4, November 1995, p.335.

³⁰⁵ The ILO Constitution Preamble

³⁰⁶ Barbara J. Fick, *Not Just Collective Bargaining: The Role of Trade Unions in Creating and Maintaining a Democratic Society*, 12/4 Working USA, p. 251.

³⁰⁷ The song of Joan Baez, *We shall over come*, written by Pete Seeger.

6- CHAPTER 5: COUNTRY ANALYSIS ON TURKEY

This chapter tries to provide information about the development and the history of trade unionism in Turkey, the constitutional amendments with the current domestic law, ILO's country profiles and comparison to the international legal obligations.

6.1. History of Trade Unionism in Turkey

The history of trade unionism in Turkey can be subdivided into three periods: 1947-1963; 1963-1980 and 1980 until today. This division was made in conformity with the constitutional periods since the constitutional history of Turkey draw a frame for the trade unions' history in Turkey as well.

The first period was between the dates 1947 when trade unions rights were firstly recognized and 1963 when the amendments were made accordingly the 1961 Constitution. Until the 1947, three separate laws, enacted in 1925, 1936 and 1938 had banned the establishment of class-based and professional organization in particular trade unions.^{308 309}

Prohibition of the establishment of class-based organisations including trade unions was lifted by the amendments of the Trade Unions Act³¹⁰ in 1947. The Trade Unions Act allowed the establishment of trade unions without recognizing the right to strike. Firstly trade unions were established and then the Confederation of Turkish Trade Unions was formed in 1952.³¹¹ Although the prohibition was lifted by this Act, during the emergence of capitalism, the state had attempted a paternalistic interest in labour relations and state tried to control over trade unions and labour movements by using some paternalistic methods.^{312 313} Although Turkey was the member of the ILO since 1932; Turkey was not able to send representative of trade unions to the ILO Conferences due to the inexistence of such unions.

³⁰⁸ Ali Rıza Büyüklü, *Trade Unions in Turkey: An Analysis of Their Development, Role and Present Situation*, 1994, p.43. [Unpublished PHD Thesis submitted to Warwick University]

³⁰⁹ Yıldırım Koç, *Türkiye'de İşçi Sınıfı ve Sendikacılık: Dünden Bugüne*, Kaynak Publishing, 2013. p.57. (Working Class and Trade Unionism in Turkey: From Yesterday to Today)

³¹⁰ Number: 1947/ 5018.

³¹¹ Yıldırım Koç, *Türkiye'de İşçi Sınıfı ve Sendikacılık: Dünden Bugüne*, Kaynak Publishing, 2013. p.57. (Working Class and Trade Unionism in Turkey: From Yesterday to Today)

³¹² Adnan Mahiroğulları, *Dünyada ve Türkiye'de Sendikacılık*, p.154. Ekin Press, 2013, (Trade Unionism in the World and in Turkey)

³¹³ For example, the ruling party of the one-party system in Turkey was the CHP which found a state-controlled "Bureau for Workers" to check trade unions and labour movements in Turkey. See Yıldırım Koç, *Türkiye'de İşçi Sınıfı ve Sendikacılık, Dünden Bugüne*, [Working Class and Trade Unionism in Turkey, From Yesterday to Today] p. 57.

Soon after that the adoption the 1947 Act, the 1961 Constitution came into force which granted trade unions' rights at the constitutional level for the first time. The 1963 New Trade Unions Act (no:274) followed the 1961 Constitution and content of these laws enhanced and paved the way for the scope of the trade unions rights in Turkey.³¹⁴ They not only lift the broad ban on the trade unions, they also prohibited the direct or indirect, internal or external interference of employers in establishment, administration and activities of the trade unions.³¹⁵ Under this constitutional guarantee, the trade unions can represent the workers, conclude collective agreements and enjoy the right to strike in case of failed negotiations despite the broad bans and limitations on the right to strike. The 1960s and 1970s can be described as a “rise of Turkish trade unionism³¹⁶.”

The third period in the history of trade unionism in Turkey is post-1980 until today. There were some attacks on trade unions emerged in 12 September 1980 military coup d'etat. During this period trade unions were closed, there was not resistance from labour movement since they were already suppressed and even arrested. It is very clear that Turkey is still ruled by the laws of 1980 regime. It is not only because the 1982 Constitution was not abolished, it is because political parties always tries to amend this constitution in compliance with their political interest rather than lifting its all anti-democratic nature by constituting new Constitution which can abolish the gap between international standard and current domestic law in Turkey.

6.1.1. Current Constitutional Situation and Domestic Labour Law

The current law and legal system in terms of labour relations is based on the 1982 Constitution and the Trade Unions and Collective Labour Agreements Act³¹⁷ of 2012 in Turkey. In this chapter, we will analyze the new special act and statutes which was enacted during the European Union Negotiation Process in 2000s.

The highest law in the hierarchy of norms is the Constitution. As mentioned before, the current constitution Turkey was prepared by the military after the military coup d'etat. Although the first and original version of the constitution was very anti-democratic and

³¹⁴ Yıldırım Koç, *Türkiye'de İşçi Sınıfı ve Sendikacılık: Düünden Bugüne*, Kaynak Publishing, 2013. p.57. (Working Class and Trade Unionism in Turkey: From Yesterday to Today)

³¹⁵ Article 17 of the Trade Unions Act, No:274, 15 July 1963.

³¹⁶ Ali Rıza Büyüklü, *Trade Unions in Turkey: An Analysis of Their Development, Role and Present Situation*, 1994, p.54. [Unpublished PHD Thesis submitted to Warwick University]

³¹⁷ Act No: 6356.

authoritarian in terms of fundamental rights; there were some amendments at least to comply with the international standards. Article 51-54 of the Constitution of Turkey guarantees the freedom of association, the right to collective bargaining, the right to strike and the right to lock-out. Not only norms and provisions which directly regulates the freedom of association are important, but also article 90 of the Constitution imposes an important duty on a state that “*In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.*”³¹⁸ This provision was added into a constitution in 2004, therefore, international convention such as C87 and C98 have direct effect on the Turkey as well as the ECHR. Hence they are not auxiliary; they are totally complementary part of the domestic legal system in Turkey.

Trade Unions and Collective Labour Agreements Act³¹⁹ includes special provisions in terms of labour relations and it was adopted not too long ago, in 2012. All these amendments were made during the discussions regarding Turkey’s accession to the EU.³²⁰ The Act regulates the procedures on the establishment, administration and activities of trade unions, principles of the collective agreements and strikes. One of the most important anti-democratic provisions of the Act is the prohibition on the activities of the trade unions other than the sector they were established in. The Act importantly guarantees and enshrines the principle of free establishment of trade unions without a previous permission and freedom of workers regarding to be or not to be a member of a trade union. However workers should use *e-Government*³²¹ system when they want to become a member or change their trade union or leave from the membership. In this way, employers are simultaneously informed about the membership situation of the workers. It constitutes serious problem in terms of trade union membership since the workers expressed that their first dis-motivation to be member of a trade union was the e-Government system which makes black-list possible for them.³²²

³¹⁸ Official Translation of the Turkish Constitution, https://global.tbmm.gov.tr/docs/constitution_en.pdf [Last accessed: 03.05.2017]

³¹⁹ Act no: 6356

³²⁰ Theo Nichols and Ali C. Taşiran, *Turkish Trade Unionists and Turkey’s Membership of the European Union*, International Review of Applied Economics, Vol:28, No. 5, 2014, Routledge Print, pp.650.

³²¹ E-Government is the electronic offering of services normally rendered to citizens by the Government.

³²² Ayşe Buğra; Fikret Adaman, Ahmet İnel, *Çalışma Hayatında Yeni Gelişmeler ve Türkiye’de Sendikaların Değişen Rolü*, Research Report on Boğaziçi University Social Policy Forum, 2005, p.13-30. (The New Developments in the Life of Work and Changing Role of the Trade Unions)

Anti-union discrimination and blacklisting workers due to their trade union membership are still very widespread in Turkey. According to the article 25 of the Trade Union Act although if there is a dismissal of a worker as a result of trade union membership, burden of proof is on the employer; however if dismissal is based on different reasons the worker should prove it. Since employers will not claim that the termination of labour contract is due to the trade union discrimination, the workers are obliged to prove they are fired because of the trade union membership.³²³

In terms of collective agreements, the double-threshold system is still important barrier for trade unions' representations. Under the current legislations, the percentage is lowered to 1% for the representation of the all workers engaged in the given branch of activity and more than half of the workers in the workplace and 40% of the workers in the whole enterprise.

With regards to the right to strike, the Act has broad limitations for it. The article 58 of the Act, it defines a lawful strike which is only related to collective agreements. The prohibition on general, political, sympathy or solidarity strikes still continues. Moreover Council of Ministers has the right to suspend even a lawful strike for 60 days if it is against the public health or national security. The right can be easily misused due to *vagueness of the scope of the public health or national security*³²⁴.

6.1.2. ILO's Reports and Country Profiles

Due to the article 90 of the Turkish Constitution, ILO's ratified conventions are part of the Turkish legal system.

There are some allegations that the police attend meetings and interfere with the meetings by using violence and undue interference.³²⁵ The Committee emphasized that they *observes with concern the allegations of important restrictions placed on freedom of speech and assembly of trade unionists*³²⁶ in Turkey. They requested from the government to *take all*

³²³ A. Nurhan Süral, *Trade Union Rights Within the Context of Protection Against Anti-Union Discrimination*, *Turkish Yearbook of Human Rights*, p.101.

³²⁴ Bülent Tanör, *Türkiye'nin İnsan Hakları Sorunu*, BDS Publishing, 1990, s.174. [The Problem of Human Rights in Turkey]

³²⁵ CEACR Observation, C-87, Turkey, (100th Session, 2011)

³²⁶ CEACR Observation, C-87, Turkey, (100th Session, 2011), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0:NO:13100:P13100_COMMENT_ID.P11110_COUNTRY_ID.P11110_COUNTRY_NAME.P11110_COMMENT_YEAR:2331273,102893,Turkey,2010 [Last accessed: 04.05.2017]

*necessary measures to ensure a climate free from violence, pressure or threats of any kind so that workers and employers could fully and freely exercise their rights under the convention.*³²⁷

In terms of anti-union discrimination, CEACR requested the Government “to indicate the procedure that applies for the examination of complaints of anti-union discrimination in the public sector and to provide statistical data showing progress made in addressing effectively allegations of acts of anti-union discrimination and interference both in the public and private sectors (number of cases brought to the competent bodies, average duration of proceedings and remedies imposed).”³²⁸³²⁹

With regards to collective bargaining and its procedural requirement of double threshold system, ILO has repeated its concerns and CAS observed that this is a one of the important form of violation of freedom of association.³³⁰ As CAS mentioned that Turkey is the only country where sectoral threshold was necessary to conclude collective agreement and moreover “as a result of the 3 per cent threshold at sectoral level, 28 out of 51 unions could lose their competence certificate. That meant that 5.1 million workers covering 6 per cent of the labour force would not be able to find a union able to sign a collective agreement.”³³¹

In the sense of the right to strike, article 58 of Act No. 6356 of the Turkish Code put broad ban on strikes and defines the lawful strike which makes strikes other than related to collective agreements’ can easily be considered illegal. The Committee had observed that this provision restricted lawful strikes to disputes during collective bargaining negotiations and had requested the Government *to indicate the manner in which protest action, sympathy strikes and other means of legitimate industrial action are protected in line with the 2010 constitutional amendment. As the Government refers generally to the practical application of this section, the Committee once again requests it to indicate specifically the manner in which the above forms of action are protected.*³³² As an ILO member, Turkey ratified related

³²⁷ Ibid.

³²⁸ CEACR Observation C-98, Turkey, (100th ILC Session, 2011).

http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2698949,102893,Turkey,2011

³²⁹ CEACR Observation, C-98 Turkey, (98th ILO Session, 2009)

³³⁰ Individual Case, (CAS), C-98 Turkey, (102nd ILC Session, 2013)

http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3131789 [Last accessed: 05.05.2017]

³³¹ Ibid.

³³² Direct Request (CEACR) - adopted 2015, published 105th ILC session (2016)

Conventions. Since it is bound by the ILO Conventions; Turkey should fulfill its requirements. Moreover, according to the article 90 of the Turkish Constitution, these conventions are binding for the executive and administrative organs as well.³³³ For that matter, there is no appeal procedure to the *Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional.*³³⁴

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0:::P13100_COMMENT_ID:3255742[Last accessed: 05.05.2017]

³³³ Prof. Dr. Can Tuncay, *87 Sayılı ILO Sözleşmesi ve Türkiye'nin Uyumu*, p. 81, in the ILO Norms and Turkish Labour Law, Kamu-İş Kamu İşverenleri Sendikaları Press, 1997, Ankara, [Convention No: 87 of the ILO and Turkey's Compliance]

³³⁴ Article 90 of the Turkish Constitution

7- CHAPTER 6: ANALYSIS, RECOMMENDATIONS AND POSSIBLE SOLUTIONS FOR SOCIAL JUSTICE

Freedom of association and the right to organize and bargain collectively are fundamental human rights which has a major impact on employment relations and living conditions, as well as on the development and progress of economic and social welfare of the countries. The ILO Constitution also recognized the principle of freedom of association for all lawful purposes. Freedom of Association and Protection of the Right to Organize Convention, 1948 (C87) also stated that “*Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorization.*”³³⁵ Not only C87, but also C98 Right to Organize and Collective Bargaining Convention, 1949 stated that “*Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.*”³³⁶ Hence freedom of association and protection of the right to organize are fundamental and vital for peace, democracy and freedom.

As ILO repeated that “*freedom of association is the conditio sine qua non of the tripartism that the Constitution of the ILO enshrines in its own structures and advocates for member States: without freedom of association, the concept of tripartism would be meaningless.*”³³⁷ Workers and employers have the right to establish and to join organizations of their choice to promote and defend their interests, and to negotiate collectively with the other party. They should be able to do this freely, without interference by the other party or the State. Freedom of association is a fundamental human right and the rights to organize and to bargain collectively are enabling rights that make it possible to promote democracy, labour market governance and decent conditions at work. As Karen Curtis stated that “*without freedom of association in all walks of life, democracy is merely an illusion.*”³³⁸ If the democratic, peaceful society and social justice is the goal, providing workers good wages and better working conditions should be targeted as well. If this be so, workers have right to

³³⁵ Article 2, C87.

³³⁶ Article 2, C98.

³³⁷ Freedom of Association Booklet, ILO, p.1.

[http://www.law.lu.se/WEBUK.nsf/\(MenuItemByDocId\)/ID6505179376BCD485C1257DAA004C9ADF/\\$FILE/digestofdecisions.pdf](http://www.law.lu.se/WEBUK.nsf/(MenuItemByDocId)/ID6505179376BCD485C1257DAA004C9ADF/$FILE/digestofdecisions.pdf) [Last Accessed: 01.05.2017]

³³⁸ Karen Curtis, *Democracy, Freedom of Association and the ILO*, p.89.

express their own voice effectively and actively without pressure. It is grounded in freedom of association and protection of the right to organize and follow-up rights.

Freedom of association and right to organize play an important role in the establishment and development of the peace and democracy. Political will and governmental steps should be taken into consideration at the national level. Universal Declaration of Human Rights also recognized right to form and to join trade unions for the protection of interests.³³⁹ As one of the primary safeguards of the workers, freedom of association and right to organize should be effectively enjoyed by the workers. Since there is an imbalance between workers and employers/ governments in terms of economic and social power, workers should be supported by the organizations and associations. Getting together, establishing associations and right to organize makes workers' voices perceptible, visible and hearable. Protection of the workers against powerful actors of the working relationship should not only be left to will of the employers or governments. When the demands of workers are fair but governments and employers are unwilling to protect, respect and provide them, freedom of association and right to organize will protect workers which are already organized for their demands and rights. Freedom of association and right to organize provides workers to take steps together and to defend their rights and demand them as one voice. When governments and employers want to down the voice of the workers and try to make imperceptible, freedom of association and right to work will be equalizer and protection mechanism for the workers.

Recognition of freedom of association and right to organize are important examples to understand the case of Turkey. Every 1st May –the International Labour Day- is prohibited by the government and workers cannot be able to meet in the Taksim Square which has symbolic meaning after the Bloody Sunday³⁴⁰ in 1977. Even this symbolic example shows that Turkey has a long way to go in terms of freedom of association and the right to organize.

It is very important to mention some of the fundamental national legislations. The 1982 constitution and related laws drafted immediately after the 12 September Military intervention reflects an antidemocratic perception in which individual freedoms are viewed as a threat to the continuity of the state. Constitution, Law on Political Parties, Law on Trade Unions, Foundations Law, Associations Law, Law on Meetings Demonstrations, Labour Law

³³⁹ UDHR, article 23.

³⁴⁰On the 1st May 1977 in the celebrations of the International Labour Day in Taksim Square, 34 people had been killed and 126 persons had been injured as a result of an attack which source is still couldn't identified today.

and others clearly display how civil society is seen as a potential threat and should be kept in order. The socio-psychological environment created by the 12 September military intervention generated and spread the fear that any kind of organization will inevitably lead to lawlessness and anarchy and that organized individuals will unavoidably divide into separate political camps leading to severe polarization. Hence associations have been viewed as establishments, if left alone, would engage in harmful activities and therefore should be subject to certain limitations. Since 2000, there have been major changes in the laws regarding civil society and freedom of association. New Association Law has been coded taking account of EU accession process³⁴¹, ILO's observations and the level of importance given to democratization during this period. However, many organizations and trade unions were still facing difficulties and sanctions. Due to this reason, it became necessary to develop a monitoring mechanism. Although freedom of association is worded in article 51 of the 1982 Turkish Constitution and right to organize is enshrined in article 34 of the Constitution, government and administrative bodies still put pressure on trade unions and workers.

Employees have the right to form unions and higher organizations, without prior permission, and they also possess the right to become a member of a union and to freely withdraw from membership, in order to safeguard and develop their economic and social rights and the interests of their members in their labour relations. In compliance with the Labour Law, union membership or participation of union activities shall not constitute a valid reason for termination of labor contract.³⁴² Although Turkey had ratified Convention No: 87 and Convention No: 98 the law enforcement should be examined since the practice in the field is not consistent with conventions which ratified by Turkey and national legislations which recognized freedom of association and right to organize.

Barriers to freedom of association and right to organize still constitute an important threat for the workers who try to raise their voices against government and employers who exploit them. The violent intervention by the police regarding the sit-in protest in support of 56 members of the Confederation of Public Employees' Trade Unions (KESK), the arrest of 91 workers in April 2014 and the detention of more than 140 demonstrator in the 1st May had

³⁴¹ Theo Nichols and Ali C. Taşiran, *Turkish Trade Unionists and Turkey's Membership of the European Union*, International Review of Applied Economics, Vol:28, No. 5, 2014, Routledge Print, pp.650-668; Manfred Wannöffel, *Trade unions in Turkey: Past, Present and Future Developments*, Journal for Labour and Social Affairs in Eastern Europe, 1/1/2011, Vol. 14, Issue 4, p. 545-569.;

³⁴² Turkish Labor Law, Article 18.

reported with concern in the Observations of Committee of Experts in 2014 regarding Convention No: 87³⁴³.

There are also some examples of termination of the labor contract which employers give union membership or participation of union activities of the workers as an excuse, contrary to related law and provisions. Turkey was brought before the European Court of Human Rights as regards to freedom of association and right to organize.³⁴⁴ The Court has repeatedly found Turkey guilty especially in party closure. One of the cases is related to teacher who disciplined for taking part in national strike action organized by her trade union.³⁴⁵ Another one is related to a person who was dismissed because he displayed trade union's poster in support of the annual 1 May Worker's Day demonstration in areas other than the designated notice boards.³⁴⁶ Tüm-Haber-Sen and Çınar v. Turkey case specifically important in this respect because Court noted that the State must respect trade union and guarantee its effective exercise.³⁴⁷ It is clear that freedom of association and right to organize still don't be ensured by the government and judicial organs. It shows that legal instruments are not enough to promote application of the fundamental workers' rights and enforcement mechanism is still needed in Turkey to ensure application of related law.

Observation (CEACR) - adopted 2015, published 105th ILC session (2016) is concerned with the freedom of association and protection of the right to organize. In terms of civil liberties, the Committee notes that five leaders of trade unions representing a wide range of workers, charged with inciting the public to illegally assemble and demonstrate, were acquitted by the Criminal Court of First Instance.³⁴⁸ Serious allegations of numerous dismissals, harassment, retaliatory action, arrests and police assaults against the Confederation of Public Employees' Trade Unions (KESK) and its members for the exercise of legitimate trade union activity are also called attention by ILO. Right of workers, without distinction whatsoever, to establish and join organizations is enshrined article 2 of the Convention. ILO mentioned that the Government should ensure that senior public employees, magistrates and

³⁴³ http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3189640:NO [Last accessed: 01.05.2017]

³⁴⁴ These cases are mentioned in the beginning which are Demir and Baykara v. Turkey; Kaya and Seyhan v. Turkey; Şişman and Others v. Turkey; Tüm Haber Sen and Çınar v. Turkey; Saime Özcan v. Turkey

³⁴⁵ Kaya and Seyhan v. Turkey, Application No: 30946/04.

³⁴⁶ Şişman and Others v. Turkey, Application No: 1305/05.

³⁴⁷ Tüm Haber Sen and Çınar v. Turkey, Application No: 28602/95.

³⁴⁸ http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3255738 [Last accessed: 01.05.2017]

prison guards are afforded their basic rights to organize which are not recognized before. Right of workers' organizations to organize their activities and formulate their programmes is enshrined in article 3 of the Convention. Moreover, ECHR found Turkey guilty of disregarding trade union rights. The ECHR announced that they will ask for a judicial control regarding censor and admonishment penalties in Turkey.³⁴⁹ Due to a lack of constitutional and judiciary control mechanisms and guarantees, workers cannot obtain their fundamental rights of trade unions' rights.³⁵⁰ It is very important to mention one of the Turkish Constitutional Court Decisions which stated that a strike in a glass-making company for 60 days on the grounds found that it was disruptive to public health and national security. Observation noted that decision which considered strike as an action against national security was in breach of the trade union rights guaranteed by article 51 of the Turkish Constitution.

Turkey can be defined as an example which prohibits right to strike of workers to workers. Although right to strike is "*intrinsic corollary to the right to organize protected by the Convention No: 87*³⁵¹" and also guaranteed in the Constitution of Turkey, it can't be used effectively in Turkey. Although there is a competence of governments to suspend strikes for 60 days if it is considered as a threat against national security and public health, this competence is for exceptional situations which require exceptional measures. However it is used beyond the purpose and strikes in metal industry which were organized by United Metal Workers had banned in 30 January 2015. The strikes in the glass and mining sectors were also banned with the same reason^{352, 353}

Although trade union rights should be enjoyed free from government interference, freedom of association and right to organize cannot be enjoyed by workers and workers' unions isolated from the dialogue with the serious allegations of dismissals, harassment. Observations, reports, comments and supervisory bodies of the ILO play an important role to put a pressure on the government and promote fundamental principles and rights in Turkey. Ensuring application of the law and recognition of the workers and their trade union as an actor for the dialogue indisputably will open the democratization process for the Country.

³⁴⁹ Saime Özcan v. Turkey, Application No: 22943/04, Kaya and Seyhan v. Turkey, Application No: 30946/04]

³⁵⁰ "Turkey was found guilty of disregarding trade unions' right": <http://bianet.org/biamag/english/117119-echr-turkey-guilty-of-disregarding-union-s-rights> [Last accessed: 02.05.2017]

³⁵¹ Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, para.523, See 311th Report, Case No. 1954, para. 405.

³⁵² <http://www.equaltimes.org/the-right-to-strike-only-exists-on?lang=en#.VT-kpbuJjIV> [Last accessed: 02.05.2017]

³⁵³ <http://www.industrial-union.org/turkey-metal-strike-ban-still-in-place> [Last accessed: 02.05.2017]

Freedom of association and right to organize is the key point of the democracy and social justice. ILO tries to establish a better peaceful world and its unique tripartite composition provides to hear voices of the workers and unions. The Committee once again and tirelessly repeated and requested from Government that to take measure to ensure a climate free from violence, pressure or threats that workers and employers can fully and freely exercise their rights under the Convention. These requests and enforcement mechanism have a great impact on Turkey's political climate and government positions which is already taken on behalf of workers' rights in the employment relations to promote their social and economic well-being.

7.1.Comparative Analysis between National Legislation and International Standards: The Issue on Compliance of Turkey on the Question of Freedom of Association

The ILO Declaration on Social Justice for a Fair Globalization states that the freedom of association and the effective recognition of the right to collective bargaining are particularly significant for ILO' s four strategic objectives which are; (i) *create greater opportunities for women and men to secure decent employment and income;* (ii) *enhance the coverage and effectiveness of social protection for all;* (iii) *strengthen tripartism and social dialogue;* and (iv) *promote and realize standards and fundamental principles and rights at work*³⁵⁴. Freedom of association is crucial point for democracy and social peace. It should be noted that the most important executive practitioner for the freedom of association are the States as a member the ILO. Therefore, the ILO can require from the Governments to comply with their commitments. Since Turkey ratified Convention No: 87 in 1993 and Convention No: 98 in 1952 the law enforcement should be examined since the practice and the implementation in the field are not in consistency with what Turkey had undertaken when ratifying the Conventions.

The Observations of Committee of Experts in 2014 had reported that they concerned the threat of civil liberties, important restrictions on freedom of association of trade unionists including the violent intervention by the police regarding the sit-in protest in support of 56 members of the Confederation of Public Employees' Trade Unions, the arrest of 91 workers in April 2014 and the detention of more than 140 demonstrator in the 1st May constituted

³⁵⁴The ILO Declaration on Social Justice for a Fair Globalization 2008.
http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf

threat for the freedom of association in regarding Convention No:87³⁵⁵. Moreover, in the same report, the Committee requests from the government to ensure that senior public employees, magistrates and prison guards enjoy their basic rights to organize in scope of Article 2 of the Convention that the basic right to form and join organizations of their own choosing belongs to all workers "*without distinction.*"

The Committee's comments also concerned the issue of representation. In a related case, the CFA noted regarding the Case No: 2537³⁵⁶ which is the representation against the Government alleged by Yapi-Yol Sen under Article 24 of the ILO Constitution concerning the allegation about the Government had violated Convention No: 87 "*by unilaterally amending the branches of activity according to which public employees' trade unions may be established, so that the complainant automatically lost members and encountered consequent financial difficulties.*" The Committee emphasized that where the Ministry of Labour and Social Security of Turkey had modified and changed the branch of activity classification on the basis of questionable criteria and the acts of the Government are violating the right of public employees to join trade union of their own choice in addition to a "*serious interference in trade union activities including the right of trade unions to elect their own representatives and organize their administration.*"

As mentioned above, the Government obliges workers to use e-State electronic system which allows employers to be able to control union-membership of workers. The Observation of Committee of Experts in 2014³⁵⁷ asked that the ILO be informed how the requirement for publication of forms to apply or withdraw for the membership to a trade union via e-State affects the workers in particular who cannot use the e-State system and especially the workers in the informal economy. Committee also requested from the Government to leave the decision to the workers to publish their membership status in e-State instead of making it compulsory since the current domestic law might cause "*a serious risk of*

³⁵⁵Observation (CEACR) - adopted 2014, published 104th ILC session (2015) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3189640:NO

³⁵⁶Report No. 347 of the Committee on Freedom of Association, Case No. 2537 -- *Representation against the Government of Turkey presented by Yapi-Yol Sen under article 24 of the ILO Constitution alleging non-observance by the Government of Turkey of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)*

³⁵⁷ Observation (CEACR) - adopted 2013, published 103rd ILC session (2014): *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3149786:NO

exposure of trade union members, or workers wishing to become trade union members, to reprisals and anti-union discrimination, contrary to the Convention.”³⁵⁸ The data collection on anti-union discrimination in both private and public sectors are requested from the Government as well due to the lack of detailed statistics on the subject.

As it can be seen, although there are important legal improvement and compliance on paper, the violations and lack of compliance are still important problem in Turkey. Freedom of association can only be protected if organizations are independent to be formed and workers are free to choose their organizations. There are important obstacles which prevent to the enjoyment of the freedom of associations such as double-threshold system, e-State gate system, and representation problems and importantly lack of political will to make democratic amendments. Therefore, freedom of association cannot be freely enjoyed by workers. The rates of the trade union density in Turkey from 2002 to 2012 show the outcome of the anti-union perspective which can be observed in the employment sphere: 25.1% in 2002, 22.3% in 2003, 20.0% in 2004, 16.8% in 2005, 14.3% in 2006, 12.3% in 2007, 10.7% in 2008, 10.2% in 2009, 8.9% in 2010, 7.8% in 2011 and 7.0% in 2012 and 6.3% in 2013³⁵⁹.

The ILO warned the Government of Turkey with regards to the legislation and law which are not in conformity with international standards and Turkey’s commitments as an ILO member. Political climate and lack of political will which prevents the enjoyment of freedom of association are important issues in Turkey. ILO also observed that “*discrepancies between the legislation and practice*”³⁶⁰ is noted. ILO had emphasized that it is not enough to enshrine the articles and principles of the Conventions to the domestic law; it should be also applied in practice.³⁶¹

³⁵⁸ *ibid.*

³⁵⁹ https://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN

³⁶⁰ Individual Case (CAS) C87-Turkey (99th ILO Session, 2010)

³⁶¹ *ibid.*

8- CONCLUSION

Collective social rights as human rights are recognized in the Constitutions as a result of labour struggles. Trade unions are still playing an important role to materialize and make actual these rights.³⁶² The organized power of the workers demonstrates that labour patterns and taboos in Turkey can make progress with international standards as a result of equal representation of the workers in labour relations. Active participation of workers and employers is required as well as governments' representation. As a law maker body, governments should promote the trade unions' rights of the workers while workers and employers should actively participate in determining process. Even though non-governmental constituents may put pressure on governments in respect to promote rights, governmental decisions and ratifications are still needed. Political will is essential both for enacting the right legislation and for proper implementation of the law.

The constitutional history of Turkey can show the historical development of the trade unionism as well. Since they are strongly inter-related, the Turkish constitutional history makes labour history visible. The issue of how the workers enjoy or rather are not able to enjoy the collective social rights which are guaranteed by the positive law including national and international level is the central point of this thesis. The collective social rights and its relations with the Constitutional guarantees were emphasized on the principles of indivisibility, integrity and inter-dependency. The evolution of the collective social rights within a constitutional history shows that not only constitutional guarantees but also fully implementation of these rights is also required. If collective *social rights* do not be recognized as human rights, *social unrighteousness* will be emerged immediately after.³⁶³

Consequently, the most powerful voice of the workers can be heard when they are organized. As Marx stated that “workers of all countries, unite!”³⁶⁴

³⁶² Lee Swepston, *Crisis in the ILO Supervisory System: Dispute over the Right to Strike*, 29/2, International Journal of Comparative Labour Law and Industrial Relations, 2013, p. 200.

³⁶³ Mesut Gülmez, *Bir İnsan Hakkı Olarak Sosyal Haklar ve Sosyal Haksızlıklar*, 1st International Social Rights Symposium in Akdeniz University, 2009, p.4. (Social Rights as Human Rights and Social Unrighteousness)

³⁶⁴ Karl Marx, *Manifesto of the Communist Party 1848*, in *The Portable Karl Marx*, ed. Eugene Kamenka, Penguin Books, p.241.

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