Global Workplace Law & Policy

From a Progressive to a Regressive Stand: the Right to Strike at the European Court of Human Rights

Merve Kutlu Mutluer (Anadolu University (Türkiye)) · Wednesday, November 27th, 2024

General Overview of European Court of Human Rights Interpretation on Article 11 of the European Convention on Human Rights

Industrial conflicts and industrial actions have long and significant effects on collective bargaining. The right to strike, a traditional type of collective action is the most effective power of trade unions and workers to promote their economic and social interests. The interpretation by European Court of Human Rights (ECtHR) of Article 11 of the ECHR (European Convention on Human Rights) has been a source of intense discussion among labour law scholars.[1] The ECHR does not include explicit recognition of the right to strike. Because of the absence of explicit recognition, the only possibility for judicial recognition of the right to strike stems from the ECtHR's interpretation of Article 11 of the ECHR. The question arises whether the existence of a specific right to form and join trade unions provides scope for the development of several corollary rights such as a right to strike which may not be considered to be inherent an aspect of freedom of association.[2] In the very first case of *National Union of Belgian Police v Belgium*[3] in 1975, the Court emphasised that trade unions should have means to protect the interest of their members, which implies that

Article 11 can be interpreted to develop a corollary right.[4] In 2007, the ECtHR's prominent case of *Dilek and others v Turkey*,[5] public sector workers who had taken part in collective actions allowed motorists to drive past toll barriers without paying. The participant was subsequently fined and had been ordered to pay damages in civil proceedings. The Court held that since the Turkish Government had not indicated whether there were other means for public servants to defend their rights and only "convincing and compelling reasons" could justify restrictions on trade union rights, there had been a violation of Article 11 of the Convention.[6] The Court did not go on further to discuss whether such action constitutes a strike, but it recognised the right to take collective action is an essential element of the right to collective bargaining and the right to organise.[7] Not much after, one of the most famous cases of the ECtHR, *Demir and Baykara v Turkey*[8], in which the Court had to decide whether to ban municipal workers from founding a trade union and to order the setting aside, with retroactive effect, of a collective bargaining agreement could violate Article 11 of the ECHR. The Convention was interpreted as a "living instrument" by the Strasbourg Court, and it developed an integrated approach, as common practices from contracting states, connected international labour and human rights instruments, and the approach of their supervisory bodies is applied to the case.[9] Drawing from the Committee of Experts on the Application of Conventions and Recommendations interpretation concerning ILO Convention No. 87, the European Social Charter, and the practice of EU member states, the Court concludes that "members of the administration of the State" cannot be excluded from the scope of Article 11 of the Convention.[10] Accordingly, there has been a violation of Article 11 of the Convention on account of the failure to recognise the right of the applicants, as municipal civil servants, to form a trade union. Once again, in *Enerji Yapi-Yol Sen v Turkey*,[11] the ECtHR was challenged to answer their approach concerning the right to strike. Similar to the *Baykara* case, the Court adopted an "integrated approach". In its examination, the Court primarily refers to the ILO Convention No. 87. Although the Convention No. 87 does not explicitly recognise the right to strike, the Court considered the interpretation given to this instrument by ILO Supervisory bodies. The Court had implicitly recognised the right to strike as an essential element of the right to trade union association, and that it should be protected under Article 11 of the Convention. A right to collective action, particularly strike action, was also discussed in the subsequent case *Saime Özcan v Turkey*. The European Court of Human Rights noted that the applicant was initially sentenced to imprisonment, which was later converted to a fine, and temporarily suspended from duty as a teacher for participating in the strike organized by a trade union (E?itim-Sen) to improve the conditions of civil servants. In this case, an integrated approach was implemented, and the Court emphasised that right to strike as an essential element of the Article 11, thereby finding a violation of Article 11.[12]

A progressive stand and the interpretation by the ECtHR are praised by labour law scholars and practitioners in these prominent cases.[13] However, since 2014 there has been an important shift in the Courts' interpretation of Article 11 and the right to strike. In 2014, in the case of *National Union of Rail, Maritime and Transport Workers v United Kingdom*[14](*RMT*) the ECtHR had to decide whether sympathy strike (secondary action) is covered by Article 11 (1) ECHR. Even though the Court affirmed that a sympathy strike was protected under Article 11, it was ruled that the UK's ban on secondary strikes did not violate the ECHR. The court classified a sympathy strike as an "*accessory rather than a core aspect of trade union freedom*"[15]. This judgement mainly resulted from that the Court gave a wide margin of appreciation to the state as to how trade union freedom may be secured.

RMT case created indignation among labour law scholars in the light of *Demir and Baykara* and other prominent cases concerning Article 11.[16] The judgment of *Norwegian Confederation of*

Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v Norway[17] in 2019, by the ECtHR is also worth to articulate the future interpretation of the ECHR Article 11. After the *RMT* case, there is uncertainty regarding whether Article 11 also encompasses non-traditional collective actions like boycotts.[18]Even though the Court accepted that the boycott in the case aimed to ensure safe working conditions[19], the ECtHR found that there had been no violation of Article 11 ECHR and state did not exceed the margin of appreciation afforded to the respondent State.

Humpert and Others v. Germany

With *Humpert*, the Grand Chamber of the ECtHR was challenged to end a longstanding confrontation with the German Federal Constitutional Court (FCC) on the prohibition against civil servants going on strike. This "deeply rooted" issue has been at the centre of discussion for many years in Germany.[20] In *Humpert*, the four applicants were state school teachers with civil servant status, and were members of the Trade Union for Education and Science. They all participated in strikes, which included a demonstration, organised by that union during their working hours to protest against the deterioration of the working conditions for teachers. Subsequently, some of the applicants were reprimanded and others were fined in disciplinary proceedings for breaching their duties as civil servants by participating in the strikes during their working hours. They all objected to the disciplinary action. The administrative courts found that the applicants had breached their professional duties by participating in strikes with reference to national law by laying down a prohibition on strike action. They appealed against those decisions, unsuccessfully, to higher administrative courts, and finally to the Federal Administrative Court. On 12 June 2018, the Federal Constitutional Court dismissed the applicants' constitutional complaints by saying the interference with the right of civil servants to freedom of association was not unreasonable. The right to strike constituted only one aspect of the right to freedom of association and "*civil servants' duty of loyalty and the "principle of alimentation" were incompatible with the right to strike*".

The ECtHR had to answer whether the absolute prohibition on the right to strike affecting all civil servants owing to their status and the disciplinary measures imposed on them for their work stoppage, which protested against working hours and remuneration, had violated their rights to freedom of assembly and association, including their right to engage in trade union activity, under Article 11. The ECtHR stated that civil servant status is thus more advantageous than contractual State employee status in Germany both legally and in terms of resulting material conditions.[21] The Court furthermore concluded that the measures taken against the applicants did not exceed the margin of appreciation afforded to the respondent State and is proportionate to the important legitimate aims pursued. Accordingly, the prohibition on strikes did not violate Article 11 of the Convention.

Comments on the Right ? to Strike and for Whom

At the first glance, the judgment gives the impression of being in harmony with the previous approaches and their consequences. Yet, the Court's approach in *Humpert* included fundamental problems on three points. First, the Court's integrated approach includes interpretation of other supervisory bodies such as the Committee on Freedom of Association (CFA), and Committee of Experts on the Application of Conventions and Recommendations (CEACR), European Committee on Social Rights and the UN Committee on Economic, Social and Cultural Rights which states the fundamental importance of the right to strike did not take into account. As it is explained since *Demir and Baykara*, the Court emphasised that there is a need to take international law into

account when interpreting the Convention. However, this turned out to be a mere statement where we cannot see any application of these standards and interpretations. Second, a broad margin of appreciation is afforded to the State on how to protect trade union freedoms, and the German national law banning strikes is regarded as necessary in a democratic society. Third, in *Humpert*, the Court also implies that the right to strike is not an essential element of the freedom of association where the right to strike could be banned in one member state and another may not. Interestingly, the Court also compared *Humpert* with *Demir and Baykara* where the Turkish Government objected that civil servants covered by a specific set of rules and status is more advantageous than contractual State employee status in several ways such as, job security, pay and working conditions, the restriction should be deemed in the margin of appreciation of the State. The ECtHR did not accept this argument in *Demir and Baykara* using an integrated approach, and more importantly accepted collective bargaining as a fundamental right of workers. However, the same argument by Germany was accepted in *Humpert*.

Humpert signals a disappointing turn for the ECtHR which had been a leading supervisory body that ameliorated labour law discourse. The core of the *Humpert* ruling concerns a ban on strikes by civil servants. The Court relies mainly on the governments' argument that the working conditions of civil servants are better in other countries, and it could justify the ban on right to strike. The Court has relied on justifications that appear to be unprecedented in its case law on the right to strike, and could lead to similar justifications being used in countries where the right to strike is banned or severely restricted. The right to strike is an essential element of the right to collective bargaining and the right to organise. Conditions of employment cannot justify a serious restriction or prohibition of the right to strike for a category of workers. Allowing the state a wide margin of appreciation in protecting trade union rights can lead to the denial or severe restriction of workers' fundamental rights. While the State should have a margin of appreciation to protect rights, the Court must assess this carefully. Finally, it should be recalled that one of the reasons for the birth and existence of labour law is that the parties do not have equal bargaining power in setting working conditions. Historically, trade unions were formed by economically weaker workers to redress this inequality, so that workers could have a lasting influence on industrial relations. The right to strike, a traditional form of collective action, is the most effective way for trade unions and workers to "make their voices heard", especially with the growth of the global market and multinational and transnational companies. As the Court emphasises in its judgments, the Convention is a "living instrument" and should be interpreted in the light of current conditions.

References

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[2] Dorssemont F., *The Right to Take Collective Action in the Council of Europe: A Tale of One City, Two Instruments and Two Bodies, King's Law Journal*, 27(1), 2016, 68.

[3] *National Union of Belgian Police v Belgium* (4464/70) 27 October 1975.

[4] Dorssemont, F.,16

[5] ECtHR, *Dilek and others v Turkey*, (74611/01, 26876/02 and 27628/02) 28 April 2008.

[6] *Dilek and others v Turkey*, para. 65.

[7] See Dorssemont, F.,16

[8] ECtHR, *Demir and Baykara v. Turkey*, (34503/97) 12 November 2008.

[9] See, *Demir and Baykara*, para. 147-152.

[10] *Demir and Baykara*, para. 107, 168.

[11] ECtHR, *Enerji Yapi-Yol Sen v Turkey*, (68959/01) 21 April 2009.

[12] ECtHR, *Saime Özcan v Turkey*, (22943/04) 15 September 2009.

[13] Dorssemont, F.,*The Right to Form and to Join Trade Unions for the Protection of His Interests under Article 11 ECHR: An Attempt "to Digest" the Case Law (1975–2009) of the European Court on Human Rights. European Labour Law Journal*, 1(2), 2010, 185-235. and see Ewing, and Hendy, 2010.

[14] ECtHR, *National Union of Rail, Maritime and Transport Workers v United Kingdom* (31045/10) 08 April 2014.

[15] *National Union of Rail, Maritime and Transport Workers v. United Kingdom*, para. 77, 87.

[16] There are also other cases where interpretation of the ECtHR on overall protection of the right to strike is found inconsistent. See; Novitz, T., *Iceland & Russia –To Protect the Right to Strike or Not? The Question Before the European Court of Human Rights in app no 2451/16 Association of Academics v Iceland and app no 44873/09 Ognevenko v Russia, Comparative Labor Law & Policy Journal, 15, 2019.* .Barrow C., *RMT v. United Kingdom [2014]: The European Court of Human Rights Intimidated into Timidity or Merely Consistent in its Inconsistency?, European Human Rights Law Review*, 3, 2015, 277. Bogg A. and Ewing K.D., *The Implications of the RMT Case, Industrial Law Journal*, *43*, 2014, 221-252.

[17] ECtHR, *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v Norway*, App. No. 45487/17, 10.06.2021.

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[19] *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v Norway*, para. 86.

[20] See Lörcher, K. (2024). '*Roll-Back' for the Right to Strike? The ECtHR Justifies the Ban for Civil Servant Teachers in Germany to Go on Strike. International Labor Rights Case Law*, *10*(2), 206-211.

[21] ECtHR, *Humpert and Others v. Germany*, (59433/18, 59477/18, 59481/18 and 59494/18) 14

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This entry was posted on Wednesday, November 27th, 2024 at 6:00 am and is filed under European Convention on Human Rights, Freedom of Association, Right to Strike, Trade Union
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