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Strike Bans in Turkish Law Within the Scope of Ilo Norms*

İlo Normları Kapsamında Türk Hukukunda Grev Yasakları

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ABSTRACT

The right to strike is an integral part of the democratic order as one of the most basic social and economic rights. Although it is a constitutional right, it is not an unlimited right. For this reason, its recognition and protection should be the rule, and its limitation and prohibition should be the exception. The right to strike, which is among the fundamental rights and freedoms, is an economic sanction that provides workers with bargaining power against employers through unions and is used to impose their demands on the employer. ILO (International Labor Organization) norms; These are internationally accepted principles and rules in order to observe and protect the interests of employees. Basically, the ILO; It has three objectives: ensuring social justice and universal peace, improving working conditions, and ensuring international competition equality. It is known that the right to strike and the prohibitions to strike are protected under the Convention No. 87 on Freedom of Association and Protection of the Right to Organize, which Turkey also ratified in 1993. The principles adopted by the supervisory bodies of the ILO regarding the right to strike also define the action of strike, how it can be implemented and in what circumstances it can be restricted. In this context, the strike bans imposed on some services are contrary to ILO norms. The former Collective Bargaining Agreement, Strike and Lockout Law No. 2822 was criticized for its prohibitions on the right to strike, and it was stated that it violated ILO norms. Although it was stated that attention was paid to ILO norms in the general justification of Law No. 6356, which repealed this Law No. 2822, it is seen that the regulations on strike bans are not sufficient. The aim of this study is to analyze the strike bans regulated in Turkish law within the scope of ILO norms.

Keywords:

strike,
strike bans,
ilo,
ilo norms,
right to strike.

ÖZET

Grev hakkı, en temel sosyal ve ekonomik haklardan biri olarak demokratik düzenin ayrılmaz bir parçasıdır. Anayasal bir hak olmakla birlikte rağmen sınırsız değildir. Bu sebeple tanınması ve korunması kural, sınırlanması ve yasaklanması ise istisna olmalıdır. Temel hak ve özgürlükler arasında yer alan grev hakkı işçilere, işverenler karşısında sendikaların aracılığıyla pazarlık gücü sağlayan ve işverene taleplerini kabul ettirilmesi için kullanılan bir ekonomik yaptırımdır. ILO (Uluslararası Çalışma Örgütü) normları; çalışanların yararının gözetilmesi ve korunması amacıyla, uluslararası düzeyde kabul edilen ilke ve kurallardır. ILO'nun esas olarak; sosyal adalet ve evrensel barışın sağlanması, çalışma koşullarının iyileştirilmesi, uluslararası rekabet eşitliğinin sağlanması olmak üzere üç adet amacı vardır. Grev hakkı ve grev yasaklarının, örgütün, Türkiye'nin de 1993 yılında onayladığı, Sendika Özgürlüğüne ve Örgütlenme Hakkının Korunmasına İlişkin 87 sayılı Sözleşmesi kapsamında korunduğu bilinmektedir. ILO'nun denetim organlarının grev hakkı ile ilgili olarak kabul ettiği ilkeler grev eyleminin ve nasıl uygulanacağının ve hangi hallerde kısıtlanabileceğinin tanımı da yapmaktadır. Bu bağlamda, bazı hizmetlere getirilen grev yasakları ILO normlarına aykırılık teşkil etmektedir. 2822 sayılı eski Toplu İş Sözleşmesi, Grev ve Lokavt Kanunu grev hakkına getirdiği yasaklar nedeniyle eleştirilmekte ve ILO normlarına aykırılığı dile getirilmekteydi. 2822 sayılı bu kanunu yürürlükten kaldıran 6356 Sayılı Kanunun genel gerekçesinde ILO normlarına dikkat

Anahtar Kelimeler:

grev,
grev yasakları,
ilo,
ilo normları,
grev hakkı.

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edildiği belirtilmiş olsa da, grev yasakları konusunda getirilen düzenlemelerin yeterli olmadığı görülmektedir. Bu çalışmanın amacı Türk hukukunda düzenlenen grev yasaklarının ILO normları kapsamında analiz edilmesidir.

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INTRODUCTION

The right to strike is an integral part of the democratic order as one of the most basic social and economic rights. For this reason, its recognition and protection should be the rule, and its limitation and prohibition should be the exception.

The Collective Bargaining Agreement, Strike and Lockout Law No. 2822 was criticized for its prohibitions on the right to strike, and its violation of ILO (International Labor Organization) norms was expressed at every opportunity. In addition to the prohibitions on the right to strike, the law numbered 2822, which is claimed to be in violation of ILO norms with its many regulations, was repealed with the Law No. 6356 on Trade Unions and Collective Bargaining Agreement, which was accepted on 18.10.2012 and entered into force on 7.11.2012.

In the general rationale of Law No. 6356, it is stated that ILO norms were taken into account during the preparation phase and that the prohibitions of strikes and lockouts were limited. However, although the strike bans envisaged in the new law were limited compared to the old regulation, they did not eliminate the violation of ILO norms.

1. RIGHT TO STRIKE

The right to strike was first accepted as a right in our legislation with the Constitution of 1961 (Narmanlıoğlu, 1990: 38; Aktay et al., 2013: 591). After the adoption of the 1982 Constitution, the right to strike was banned altogether. With the Collective Bargaining Agreement Strike and Lockout Law No. 2822, which was repealed by Law No. 6356, the right to strike was re-established, but strike bans were imposed on a significant part of business lines.

The right to strike is a social right to force the employer to obtain a certain benefit (Başbuğ, 2012: 213). Article 54 /I of our Constitution defines the constitutional recognition area of the strike, in other words, the aspects that will not be limited even by law. Accordingly; “During the conclusion of a collective bargaining agreement, workers have the right to strike if a dispute arises. The procedures and conditions of the exercise of this right and the employer's application for a lockout, as well as their scope and exceptions, are regulated by law."Based on this provision, we see that the Constitution recognizes the right to strike only for workers. For this reason, there can be no mention of a constitutional right to strike for those who are not workers (Sur, 2011: 396; Narmanlıoğlu, 1990: 55). In this regard, the concept of a worker should be determined in accordance with the provision of article 2 / I, sentence 1 of the Labor Code No 4857 (Tunçomağ et al., 2003: 461). In addition, since the strike is accepted in disputes arising during the conclusion of a collective bargaining agreement, there will be no constitutional right to strike in the absence of any collective bargaining process in response.

Strike, as a means of labor struggle, can be defined as the collective and adhering to a decision of workers to quit their job in order to obtain their wishes, expressing their intention not to perform the employment contract for a temporary period (Narmanlıoğlu, 1990: 54; Tuncay, 2010: 282; Cengiz et al., 2011: 213). Article 58/1 of law No. 6356 defines a strike as the termination of work by employees by agreeing between them or in accordance with a decision made by an organization not to work collectively for the same purpose in order to decelerate activity at work by not working collectively or to significantly disrupt it according to the nature of the work. The right to strike, which is dec basic rights and freedoms, is an economic sanction that provides workers with bargaining power through trade unions in the face of employers and is used to get the employer to accept their demands (Uçkan et al., 2004: 208).

2. THE CONCEPT OF A LEGAL STRIKE

Article 58/II of Law No. 6356 defines a legal strike. Accordingly, in case of a mismatch during the process of collective bargaining, workers ' working conditions in order to maintain and enhance the economic and social situations, in accordance with the provisions of this law is called legal strike strike. According to this definition, a strike for a reason other than a dispute arising during a collective bargaining meeting may be called a lawless strike (Güney et al., 2014: 259). Depending on the regulation in the law, we can list the elements of a legal strike in the form of compliance with the professional purpose, based on the decision of the labor union, workers leaving work collectively, finding a dispute of collective interest, peaceful means have been tried, compliance with other requirements set out in the law.

The reason for the decision to strike should be to take into account the professional needs of the union's members. If a decision is made to strike for other reasons than professional need, this will not be a legal strike. Political strikes, general strikes, solidarity strikes are considered illegal (Günay, 2004: 452; Aktay et al., 2013: 597). Because the purpose of such strikes is not to protect or improve the economic and social situation of workers and their working conditions, these strikes are covered by Article 58 of the Law. it will not be possible to reconcile it with the concept of a legal strike regulated in the article (Caniklioğlu, 2013: 70).

Law No. 6356 has always recognized the principle of the parties' union in relation to the collective labour agreement order and in relation to the collective labour struggle (Aktay et al., 2013: 598). Accordingly, a trade union that is not a party, that is, does not obtain the authority of a collective bargaining agreement in the manner provided for by Law, is not a trade union party and will not be considered in transactions (Çifter, 2001: 7). In the same way, the union with the authority to collective bargaining agreement will be able to take a strike decision and implement it as a party union (Aktay et al., 2013: 598).

This situation is compatible with the principle that the worker's side can only be a labor union in collective bargaining, as expressed in the doctrine (Çelik, 2013: 609). Indeed, according to our law, since the strike is a right that is resorted to in case of disagreement in collective bargaining, only the union, which is a party to the collective bargaining, can take the decision to strike. Therefore, any organization other than the union, confederation, association etc. A strike carried out in accordance with its decision will be considered illegal (Günay, 1999: 720).

The characteristic feature of the strike is that it is collective (Sur, 2011: 406). A strike is not considered a strike if a single worker leaves the job in protest, and may lead to disciplinary action or even termination of the employment contract, if necessary. On the other hand, leaving the job of a single worker in the workplace, following a union decision, should constitute a strike, since it has a collective nature in its essence (Reisoğlu, 1967: 254). Although the strike is a collective action in its nature, there is no obligation for all or a certain majority of the workers in the workplace to quit their jobs (Narmanlıoğlu, 1990: 59; Çelik, 2013: 609).

According to article 64/I; Leaving the job means stopping the job and leaving the workplace of the workers. Staying at the workplace without working, for example "sitting strike", does not comply with the legal definition, therefore, it is not considered a legal strike in terms of our law (Çelik, 2013: 609). According to the law, for a dismissal to be considered a strike, it must be done “with the aim of significantly disrupting the work according to the nature of it”. Considering that the purpose of significant disruption, depending on the nature of the work, can only be realized with a relatively long stoppage, it would be appropriate not to consider very short-term stoppages as strikes.

There must be a period in which the legal process has passed and a collective labor dispute arising as a result of this between the parties (Akyiğit, 2005: 518). This conflict is a conflict of interest. When there is a conflict of rights, it will not be possible to go on strike. In cases of conflict of rights, only the means of filing a lawsuit and seeking rights prescribed by law can be applied (Günay, 1999: 720). However, it is possible to go on strike in case of collective interest disputes.

In order for the union, which has the authority to make a collective bargaining agreement, to decide on a strike, it must first have tried a peaceful solution. It is essential that the collective bargaining stage of the labor union against the employer's union or the non-union employer has failed to yield any results and then has passed the mediation stage indicated in the Law (Tunçomağ et al., 2003: 320). Considering the regulation in the law, a strike made without complying with this process will not be considered a legal strike.

In order for a strike to be legal, the decision to strike must be taken and put into effect in accordance with the other conditions specified in Law No. 6356, in addition to the factors we have listed. First of all, the strike decision is immediately announced by the party taking the decision in the workplace, workplaces and businesses. The purpose of this is to ensure that workers and employers know that there will be a strike in the workplace (Aktay et al., 2013: 599). Pursuant to Article 60/5 of the Law No. 6356, the date on which the strike decision will be implemented is submitted to the notary public and a copy to the competent authority to be notified to the other party by the party who took the decision. The implementation date is also immediately announced by the party taking the decision at the workplace or workplaces. According to Article 60/4; The right to strike, which did not start on the notified date, is forfeited, and if the strike decision is not implemented in due time, the certificate of authorization is no longer valid.

3. STRIKE BANS

The law No. 2822, which was repealed by law No. 6356, contained regulations that greatly increased and expanded the prohibitions in force during the 1961 Constitution period. In addition, they were grouped in separate articles in accordance with the nature of the strike bans in the law. 29 of law No. 2822. jobs for which there is a permanent ban on strikes in Article 30. article 31 of the Article states that the ban on strikes is permanent in workplaces and finally. in its article, temporary strike bans were issued.

Law No. 6356, adopted on 18.10.2012 and published in the official gazette on 7.11.2012, and the scope of the strike bans contained in law No. 2822 have been narrowed down. during the period of Law No. 6356 and Law No. 2822, some of the jobs and workplaces that caused criticism were excluded from the scope of the strike ban (Güney et al., 2014: 261). Jobs that are prohibited in the Law No. 2822; rescue of life and property, funeral and burial works; water, electricity, coal gas, lignite production that feeds thermal power plants, natural gas and oil drilling, production, liquidation, distribution, petrochemical works whose production starts with naphtha or natural gas, bank and notary services, fire brigades carried out by public institutions, urban sea, land and railway and other rail mass passenger transportation services. In addition, a ban on strikes in aviation services was also imposed by Law No. 6321 of 31.5.2012. In the Law No. 2822, strikes were also prohibited in some workplaces. Excluding drug manufacturing establishments, which manufactures the vaccine Institute, Hospital, Clinic, sanatorium prevantoryum, such as a dispensary, pharmacy, and health-related establishments; education and training institutions, child-care and nursing homes; cemeteries and Gendarmerie General Command and Coast Guard Command and the Ministry of National Defense strike was not able to run directly at workplaces.

The two articles (art. 29 and 30) regulating the businesses and workplaces where strikes are prohibited in Law No. 2822 are regulated in article 62, with the addition of temporary strike bans, in Law No. 6356. In this context, notary services, education and training institutions, child care places and nursing homes, health-related workplaces outside the hospital (e.g. pharmacies) and aviation services added to Article 29 with Law No. 6321 in 2012 were excluded from the scope of the strike ban. Banking services and urban public transportation services included in article 62/1 of Law No. 6356 were also excluded from the scope of the strike ban with the decision of the Constitutional Court published in the Official Gazette on 11.11.2015.

4. CONTINUOUS STRIKE BANS

As in the law No. 2822, in the law No. 6356, strikes are prohibited in the rescue of life and property. According to the nature of the job, if there is a life and property rescue job, those who do this job are forbidden to strike (Mollamahmutoğlu, 1993: 67). If the job of saving lives and property is the main job of the workplace, the

entire workplace will be covered by the ban; but if it is an auxiliary job, there will be a strike ban limited to only these workers (Aydemir, 2001: 135).

As in the law No. 2822 on funeral services and cemeteries, it is forbidden to strike in the law No. 6356. No difference has been observed between the decommissioning of the services in question by the public or private sector.

This regulation is also in parallel with the regulation contained in law No. 2822. the relevant regulation in the law No. 2822 was as follows ”Water, electricity, air gas, lignite production feeding thermal power plants, natural gas and oil drilling, production and liquidation, distribution, production of nafta or petrochemical works starting from natural gas".It is seen that lignite production jobs feeding thermal power plants have been removed from the scope of regulation. These works are subject to a ban on strikes, regardless of whether they are carried out by public organizations or private individuals (Centel, 2013: 9). In addition, since Law No. 6356 mentions city network water, there is no ban on strikes in terms of establishments that store water and offer it for sale in bottles or bottles. In addition, the prohibition contained in the Law on the business of natural gas contained in the Law No. 2822 was not included in the Law No. 6356.

This regulation is in parallel with the law numbered 2822. In order for this ban to be implemented, the relevant workplaces must be operated "directly" by the Ministry of National Defense, the Gendarmerie General Command and the Coast Guard Command. Therefore, it is not the quality of the work that is important here. In other words, it is not focused on whether it is related to national security or not. For example, the fact that it is directly operated by the Ministry of National Defense is sufficient for this workplace to be included in the scope of the ban (Caniklioğlu, 2013: 304).

Law No. 6356 had exactly included the ban on strikes in the fire brigade and urban public transport services carried out by public institutions, which was also included in the Law No. 2822. Urban public transportation services mentioned in the regulation were canceled with the decision of the Constitutional Court published in the Official Gazette on 11.11.2015 and excluded from the scope of the strike ban. Fire services carried out by public institutions are within the scope of the ban on strikes.

The ban on strikes in hospitals differs in scope from the law no. 2822. In Law No. 2822, there was a general strike ban in workplaces related to health. Accordingly, strikes were prohibited in establishments producing vaccines and serums, and in health-related workplaces such as clinics, sanatoriums, preventoriums, dispensaries and pharmacies, excluding workplaces producing drugs. With the regulation numbered 6356, the strike ban stipulated in health-related workplaces was limited to hospitals.

In addition, it is understood from the wording of the text of the article that the ban on strikes brought with hospitals is also limited to hospitals operated by public institutions (Güney et al., 2014: 263). Even though the ban on strikes has been lifted in establishments producing vaccines and serums and health-related workplaces such as clinics, sanatoriums, preventoriums, dispensaries and pharmacies, if these strikes affect general health, the Council of Ministers continues to postpone the strike pursuant to article 63.

5. TEMPORARY STRIKE BANS

In the Law No. 2822, it was stated that in case of war, a decision could be made that strikes and lockouts could not be held during general or partial mobilization. However, this regulation is not included in the Law No. 6356. However, since the duties of the martial law commander in the Martial Law No. 1402 are to stop the use of the powers of strike and lock-out permanently or to put him on leave (article 3/1-f), it does not matter that there is no provision in the Law No. 6356 on this issue (Caniklioğlu, 2013: 305). In a state of martial law, a strike may be temporarily or permanently prohibited.

Pursuant to paragraph 2 of Article 62 of Law No. 6356, the Council of Ministers may prohibit strikes in workplaces where it deems necessary, provided that it remains in effect during the continuation of such natural events that significantly affect the general life. A similar prohibition was also included in the Law No. 2822.

The Council of Ministers has the discretion to decide which of the workplaces in the region where "natural events that significantly affect the general life take place" will be prohibited. Likewise, the Council of Ministers always has the opportunity to lift this ban for the workplaces it has banned (Akyiğit, 2005: 533).

Regarding the temporary strike bans imposed due to natural events that significantly affect the general life, according to Article 62/2, it is possible to continue the strike practice within 60 days from the lifting of the ban, provided that the other party is notified six working days before. However, according to the Law No. 2822, it was necessary to apply to the Supreme Arbitration Board within six working days after the six months of this prohibition (Kabakçı, 2004: 142).

This ban, which is considered within the scope of the temporary strike ban and included in the article 63/3, was arranged in parallel with the regulation in the law no. 2822. The purpose of the regulation is to protect people traveling from the negative effects of strikes and lockouts and to ensure safety in these vehicles (Kabakçı, 2004: 138).

According to the regulation in the second paragraph of Article 63 of the Law No. 6356; Strikes and lockouts cannot be made in sea, air, rail and land transportation vehicles that have not completed the journey they started at their domestic destinations.

The ban on means of transport is limited to the duration of the journey. The concept of "destination" in the law refers to the arrival at the port or station where it started its journey in Turkey in trips abroad, and the final destination of the vehicle envisaged for that voyage in domestic voyages (Kabakçı, 2004: 138). Stations, piers or ports visited during the journey cannot be accepted as destinations and strikes cannot be made at these places (Güney et al., 2014: 265).

6. ILO NORMS AND STRIKE BANS

ILO[1] norms; These are internationally accepted principles and rules in order to observe and protect the interests of employees.

The ILO, which was established in 1919 with the Versailles Peace Agreement signed in order to find social reform solutions for the increasing problems after the First World War and to ensure the implementation of these reforms at the international level, has an important role in determining international labor standards (Uçkan, 2002: 5).

The ILO has three main objectives: ensuring social justice and universal decency, improving working conditions, ensuring equality of international competition. According to the ILO Constitution, the inability of any country to adopt the humanitarian conditions of labor will be an obstacle for other countries that want to improve the situation in their own countries (Uçkan, 2002: 6).

Regarding the working conditions of the ILO Constitution; regulation of working hours, determination of daily and weekly maximum working hours; the recruitment process of workers, the fight against unemployment; securing wages and conditions that will ensure a minimum standard of living; reducing the effects of damage that may arise from work accidents and occupational diseases; protection of women, youth and children; dissemination of social security; securing trade union freedoms; development of vocational and technical education; protecting the rights of migrant workers; ensuring the principle of equal pay for equal work and similar measures (Güney et al., 2014: 266). The ILO has issued many contracts and recommendation decisions for these purposes.

It is known that the right to strike and the prohibitions to strike are protected under the Convention No. 87 on Freedom of Association and Protection of the Right to Organize, which Turkey also ratified in 1993.

[1] International Labor Organization: It is an organization established with the aim of developing and advancing standards in the labor laws and practices in this field in countries. It is headquartered in Geneva, Switzerland.

The principles adopted by the supervisory bodies of the ILO regarding the right to strike also define the action of strike, how it can be implemented and in what circumstances it can be restricted. The Trade Union Freedom Committee has determined that workplace occupations, slowing down and working by rules are acceptable forms of action if done nonviolently (Ünsal, 2011: 423).

The ILO Committee on Freedom of Association recognizes that a strike can be prohibited or limited in two situations. The first of these are essential services that, if interrupted, will endanger the life, personal safety, or health of the whole or part of the population. The second is the public services in which public officials who exercise authority on behalf of the state work (Caniklioğlu, 2013: 300).

According to the report published by the ILO Committee on Freedom of Association in 1996; radio-television, mining, petroleum, general transportation, ports, refrigeration, banking, hotels, computer services, construction, shops, automotive, parks, aircraft repair, metal industry, food supply and distribution, government printing houses, education, public alcohol, salt and urban transportation, tobacco monopolies, postal and mint services were not considered as essential services and it was stated that they could not be included in the scope of the strike ban (Güney et al., 2014: 267). In its report, the Freedom of Association Committee described hospitals, electricity generation and distribution services, city water network services and telephone services as essential services.

According to the ILO Committee on Freedom of Association report; Rescue of life and property, hospitals, electricity generation, distribution services, city water network services, which are regulated under the prohibition of strikes by Law No. 6356, are among the basic services, and the prohibition of strikes does not constitute a violation of ILO norms. Because services are vital services that can cause serious damage to the society if they are cut off.

Funeral works and cemeteries, natural gas production, distribution and petrochemical works, which are regulated within the scope of the prohibition of strikes with the new law no. 6356, are not clearly stated in the relevant report, since they cannot be considered in the definition of "vital service, which in case of interruption, the society can suffer serious damage", which is the basic service criterion. not essential services (Özveri, 2012: 170). In this context, the strike bans imposed on these services are contrary to ILO norms.

The former Collective Bargaining Agreement, Strike and Lockout Law No. 2822 was criticized for its prohibitions on the right to strike, and it was stated that it violated ILO norms. Although it was stated that attention was paid to ILO norms in the general justification of Law No. 6356, which repealed this Law No. 2822, it is seen that the regulations on strike bans are not sufficient.

CONCLUSİON

Although the right to strike is a constitutional right, it is not an unlimited right. While the strike was brought as a right and secured, it was also subject to some prohibitions and limitations.

According to the ILO supervisory bodies, only strikes in public offices and essential services can be restricted. The basic services here are those of vital nature, which, if interrupted, could cause serious harm to the society. However, although its scope has been narrowed according to the old law, the ban on strikes against service branches that are not within the scope of basic services in the new law no. 6356 continues to exist in violation of ILO norms.

Funeral works and cemeteries in the new law no. 6356, natural gas, oil production, liquidation and distribution and petrochemical works starting from naphtha or natural gas; According to the report published by the ILO Committee on Freedom of Association in 1996, it is one of the services that cannot be considered within the scope of basic services, and the strike bans imposed on these services are in violation of ILO norms.

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