POSTPONEMENT OF LEGAL STRIKES

IN TURKISH LABOUR LAW

BY THE GOVERNMENT

Prof. Dr. Ufuk AYDIN

Anadolu University - TURKEY

Introduction

After some bans and restrictions on the right to strike, major changes happened in 1963 in Turkish Labor Relations. The period starting in 1963 can be defined as a period of "*free collective bargaining with the right to strike*." Following the military coup d'etat in 1960, a new constitution was put into effect with a referendum in 1961. The new Constitution of 1961[1] established almost all of the collective labor rights including the right to organize trade unions, the right to bargain collectively and the right to strike as well. The Parliament passed two new acts in 1963 following this supreme legislation: Trade Unions Act No. 274 and Collective Agreements, Strikes and Lock-Outs Act (CASL Act) No. 275.[2]

Not surprisingly, this era witnessed the formation of some new organizations of both employees and employers.[3] The new Labor Act No. 1475 came into force in 1971. The Act was harmonious with the collective labor laws No. 274 and No. 275 but kept the paternalistic philosophy of the traditional Turkish Labor Relations System.

Inflation in economy and growing political instability affected the Turkish industrial relations in the late 70s. In 1977 and 1979 there were very high levels of wild strike activity. More than 1,3 million work days were lost due to strikes during seven months of the year 1980. By September 1980, a horrifying surge of economic, social and political violence by the

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[1] See Official Journal, date: 20.07.1961, no: 10859.

[2] For a very detailed analysis of Turkish Industrial Relations System see Toker DERELİ, **Labor Law and Industrial Relations in Turkey**, Mentes Kitapevi, Kluwer Law International Publ., İstanbul, 1998. pp. 35-41.

[3] In 1962, The Turkish Confederation of Employer Associations TİSK, (www.tisk.org.tr); in 1967 Confederation of Progressive Trade Unions of Turkey DİSK, (www.disk.org.tr) were established and TÜRK-İŞ (the first trade unions confederation of Turkey, www.turkis.org.tr) received the government permission to become the member of international organizations.

extremist partisans of both left and right compelled the army to intervene the government. Prior to this intervention the new military regime suspended the unions' activities and banned strikes. Secondly, the Generals' National Security Council put an Act No. 2364 in effect, which was named "*Reactivation of Expired Collective Agreements in Cases of Social Necessity*".

Another period of Turkish Industrial Relations, *the Post 80s' Era* began with the 1982 Constitution which was put into force by a referendum in 1961. While the process was the same, the two constitution's views about social rights were totally different where the latter was so restrictive. In May 1983, this new era of industrial relations gained two instruments; Trade Unions Act No. 2821 and Collective Agreements, Strikes and Lock-Outs Act (CASL Act) No. 2822 which replaced the Acts No. 274 and 275 respectively[4].

The main aims of these two new Acts were to eliminate the abuses and malfunctioning aspects of the previous system. They were the response acts of the 80s. But this aim created new abuses and malfunctioning practices. For example, the Act No. 2822 put new restrictions onto the right to strike, expanded the scope of the compulsory arbitration, imposed certain limitations on union membership, and instituted behavior penalties to the violators. The Acts also placed major restrictions on the political activities of unions.[5]

Another characteristic of these two Acts was the prescription of mediation and the detailed regulations on strike and lock-out activities. According to the Act No. 2822, strikes and lock-outs must be called by competent parties; conducted in conformity with the law and have a work-related purpose. The Act considers general strikes, sympathy actions and politically motivated strikes illegal. It also accepts work slowdowns, sit-ins and similar activities like these illegal.[6]

The Act No. 2822 of 1983 compared to the Act No. 275 of 1963, expanded the scope of strike restrictions. Strikes and lock-outs were not permitted during a state war or full /

[4] See, Official Journal, date: 7.5.1983, no: 18040 for the Acts No. 2821 and 2822.
[5] This was amended in 1997; and the prohibition of political activity on unions ended. See Official Journal, date: 28.6.1997, no: 23033.
[6] See DERELİ, pp. 43-46; for details see Ufuk AYDIN, **From the Taft-Hartley Act to Turkish Industrial Relations--Postponement of Legal Strikes: A Legal Borrowing Case**, Comparative Labor Law and Policy Journal, Vol.25, Issue 3, Spring 2005.

partial mobilization; and the exercise of the right to strike may be prohibited in case of a major disaster. What was more, a lawful strike or lock-out deemed likely to endanger public health or national security might be postponed for 60 days by government order and taken to compulsory arbitration at the end of this period, if the parties fail to reach an agreement. In fact, this meant a prohibition, not a suspension or postponement. This provision, as explained below, has been denounced repeatedly both by Turkish Unions[7] and the ILO.

The two Acts of 1983 No. 2821 and 2822 were amended in 1986, 1988, 1995, 1997, 2002 and 2003 with a view to expand the collective labor rights in a democratic way and improve the flexibility of industrial relations in Turkey.

In the 2000s Turkish Industrial Relations System faced two major legislations. The first was the Public Servants Unions Act No. 4688 of 2001 and the second was the (individual) Labor Act No. 4857 of 2003. The Act No. 4688 permits public servants to make collective negotiations with the government without the right to make a collective agreement and the right to strike.

Harmonizing the Turkish Labor Law with the European Union (EU) and arranging new protective and more flexible forms of work and employment, essential for the new global industrial system were the justifications for the Labor Act No. 4857 of 2003.

By the end of the first decade of the 21st Century, there were four major acts under the Constitution in Industrial Relations in Turkey. Labor Act No. 4857 of 2003 dealt with the Individual Labor Law[8] covering almost every worker and workplace, even the ones with a single employee.[9] Trade Unions Act No. 2821 and CASL Act No. 2822 of 1983 dealt with Collective Labor Law of workers.[10] Almost every worker had the right to join trade unions, and every employer to join employers' associations; but, about 1/5 of unionized workforce were engaged in the areas where strike activity was forbidden[11] and was subject to

[7] Türk-İş also denounces and criticizes the composition of Supreme Arbitration Board (which becomes a compulsory arbitration board in the event of postponement) arguing that the workers are underrepresented.

[8] Journalists and seaman have their own Labor Acts; Pres Labor act (No. 5953) of 1952; Sea Labor Act (No. 854) of 1967.

[9] The main exception is the agricultural workplaces which employ 50 or less.

[10] According to the Act No: 4857, a worker is a real person working under a contract of employment. (Art. 2)

[11] Strike activity is permanently prohibited in activities of life and property savings; funeral and mortuary; water, electricity, city gas, processing and distribution of natural gas and petrol, petrol-chemical activities; banking and public notaries; fire fighting and inner-city transportation services provided by public sector. The activity also permanently prohibited in places such as health institutions (hospitals etc.); educational and

compulsory arbitration. This can be criticized as a high ratio for a country committed to free collective bargaining and the right to strike.[12]

And finally, the Public Servants Unions Act No. 4688 of 2001[13] dealt with the unionization of public servants. The Act allowed only collective negotiations but not the right to reach a collective agreement and the right to strike in any branch of activity.

Current Situation

In 2010, the government announced preparing a new act dealing with Turkish Industrial Relations and collective labour law. After two years of work and lots of drafts, the new act; The Act on Trade Unions and Collective Labour Relations (TUCLR) No.6356 was put into force in 2012. TUCLR was an interesting step in Turkish Labour Law because it;

- *legislated away the two acts of 1983 (2821 and 2822),*
- *was the first act which didn't mention strike action in its title,*
- *combined the two major acts in a single one,*
- *was the first civil (regime's) act of Turkey dealing with the collective labour law.*
- *was still regulating the postponement of legal strikes as the previous acts.*

The justifications for this new act were to meet the needs of the new century and to harmonize the laws with international agreements of ILO, UN and EU as well[14].

Postponement of Legal Strikes in Turkish Labour Law

In Turkey, almost every academic study mentions that the postponement of a legal strike by the government is an application derivated from the Taft-Hartley Act of USA,

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training institutions; cemeteries; any establishments run directly by the Ministry of National Defense. (CASL Act No.2822, art.29-30)

[12] See DERELİ, pp. 41-42; AYDIN, pp.367-368.

[13] See, Official Journal, date: 12.7.2001, no: 24440.

[14] Fort he New Act see Melda SUR, "6356 Sayılı Sendikalar ve Toplu İş Sözleşmesi Kanununun Uluslararası Normlar Açısından Değerlendirilmesi", Çalışma ve Toplum, S.4, 2013, pp.317-321.

1947.[15] At the preparation sessions of the CASL Act No. 275 of 1963, there was a debate on the state judgement during a legal strike. The topic of the main debate was if the state should have the power to postpone a legal strike or not. During the session on the article dealing with the state authority on a legal strike, an Istanbul member of Turkish Parliament Coşkun KIRCA, addressing the Taft-Hartley Act stated that: "*….the authority given to the council of ministers during a legal strike here is already at the hands of the cabinet in the USA, too.*" Meaning that the president (council of ministers) has the power to postpone a legal strike.[16] After long sessions and debates, the Parliament passed the Act No. 275; pointing out the state authority to postpone a legal strike (art. No: 21-22).

Postponement of a Legal Strike in the CASL Act No. 275

The title of the Article 21 of the CASL Act No. 275 of 1963 was: "Temporary Stoppage of a Strike and Lock-Out, High Conciliation Committee."

According to Article 21;

1. "Council of Ministers may postpone (or suspend) a legal strike or lock-out called, ordered or commenced by an order for 30 days, if it is likely to be prejudicial to public health or national security for 30 days. Council of Ministers has to take the opinions of the Supreme Arbitration Board. After the evaluation of the opinions of the Supreme Arbitration Board, Council of Ministers may extend the postponement for another 60 days by another order.

2. Council of State (High Court Administration) has to give his decision within a week about the requests for an injunction to the Council of Ministers' order.

3. Minister of Labor and Social Security has to send the details of the dispute to High Conciliation Committee in 6 days if the postponement extension (second 60 days) occurs. High Conciliation Committee shall send his recommendations to both parties by the end of

[15] See AYDIN, pp. 370; main labor law sources dealing with Turkey are, Sarper SÜZEK, İş Hukuku, Ed. 8, İstanbul, 2012; Nuri ÇELİK, Nurşen CANİKLİOĞLU, Talat CANBOLAT, **İş Hukuku Dersleri (Labor Law)**, (27th Ed., İstanbul, 2013), pp. 564-565; A. Can TUNCAY, **Toplu İş Hukuku (Collective Labor Law)**, (İstanbul, 1999), pp. 255-256; Murat DEMİRCİOĞLU-Tankut CENTEL, **İş Hukuku (Labor Law)**, (9th Ed., İstanbul, 2003), pp. 343-344; **Turkish Encyclopedia of Trade Unionism**, Vol.1, İstanbul 1996, pp. 497-498; Fatih UŞAN-Cemil KAYA, "**Danıştay Kararları Işığında Bakanlar Kurulunun Grev Ertelemesi**", Sarper SÜZEK'e Armağan, Ankara, 2011, pp.1722-1726.

[16] See Türk-İş, **Sendikalar, Grev ve Lokavt Hakları, (Unions, Strike and Lock-out Rights)**, (Ankara, 1964), p. 223.

60 days. If the parties accept these recommendations, they reach the collective labor agreements; if not, the Committee shall determine the situation by a written document.

4. If the parties neither solve the dispute nor send it to a private arbitrator; they are free to go on a strike or lock-out. Also the High Conciliation Committee is free to keep working for a settlement in this situation."

Postponement of a Legal Strike in the CASL Act No. 2822

In 1982, the New Constitution[17] of Turkey was put into effect after the referendum, and more than 90% of the people participated in the voting. No need to mention that the constitution was prepared by the military and anti-propaganda was not allowed in the referendum process.

The military regime inserted the rules into the constitution for the state to postpone a legal strike, so that it would ease the legislation process in the future and would have strong constitutional roots.

According to the Constitution of Turkey Art. No: 54, par. 5 (titled "the right to strike and lock-out") "*… when there's postponement of a strike or lock-out, the dispute shall be settled by High Arbitration Board*", whose decisions are certain and not to be appealed.

The draft bill of the Act was prepared by an inquiry commission. The commission took the opinions of both the representatives of the employees and the employers. Disappointingly, the representatives of the employees (Türk-İş, The Confederation of Turkish Trade Unions) did not express any opinion/objection and did not have a debate on the article dealing with the postponement of a legal strike which meant the prohibition of the strike.[18]

The CASL Act No. 2822 envisaged the postponement of a strike by the Council of The Ministers (CM) for the same reasons: general (national) health or national security. But unlike the Act No. 275 under which the strike could resume upon the expiration of the

[17] For the details and the English version of the Turkish Constitution visit the website http://www.tbmm.gov.tr (The Official website of the Turkish Parliament)

[18] See Olcay MİS- Erbaşar ÖZSOY, **2822 sayılı Toplu İş Sözleşmesi Grev ve Lokavt Kanunu – Hazırlık Çalışmaları ile Birlikte Karşılaştırmalı, Gerekçeli** (CASL Act No. 2822 – Preparation Sessions, Comparisons and Justifications), İstanbul, 1983, pp. 121-124.

postponement period, the new system forsaw the culmination of the dispute in compulsory arbitration upon the expiry of the 60 day postponement period.[19] The title of the article arranging the postponement is "*The postponement of a strike (or lock-out)*" (art. 33-34); but as it can easily be understood, it is not a postponement but a prohibition. Briefly, it can be said that, state can prohibit a legal strike for the reasons of general health or safety, and after a 60-day period, can send the dispute to the compulsory arbitration.

According to the art. 33 of the CASL Act No. 2822, any lawful strike called, ordered or commenced may be postponed by the order of the CM for 60 days if it is likely to be prejudicial to general health or national security. Obviously, assessment of the degree to which a strike imperils public health or national security is likely to be subjective in many disputes; the interpretation of the concepts public health or national security is very probable to misuse. For this reason, the Act provided the parties to lodge an appeal with the High Court Administration for the cancellation of the order, so the postponement.

The possibility of resorting to the High Court Administration has not proven to be an effective device to get rid of the misusage of such power. First, no time limits have been foreseen for the Court to render his decision. Secondly, though the Court may refuse the request to render an interlocutory injunction for the postponement of proceedings, its trial on the merits of the case may result in the cancellation of that order, sometimes much later, for its proceedings are very slow. In fact, the reverse may also be true. Therefore, it would be a better arrangement, as in the US, for the government to obtain the ruling from the court to postpone a legal strike as quickly as possible in case if it imperils the public health or national security when it continues.[20]

According to the art. 34 of the CASL Act No. 2822, titled "*Solution of the dispute in the postponement period*", the Minister of Labor and Social Security himself/herself or a mediator appointed by him/her shall make every effort for the settlement. During this period, the parties may agree to refer the dispute to private arbitration.

But worst of all; if, on the expiry of the time limit fixed for the postponement (60 days) the parties have not been able to reach an agreement, the minister shall refer the dispute to the Supreme Arbitration Board. This means that, the dispute will be settled by the

[19] See DERELİ, p. 307; AYDIN, pp. 382-385.
[20] See DERELİ, p. 307.

compulsory arbitration and the strike will never begin again; and the right to strike has no meaning in such cases.

Thus, in an area or operation where the right to strike prevails, the strike called may be deemed to have been effectively ended, once it is postponed for reasons of general health or national security. This had been one of the controversial clauses severely criticized by the supervisory organs on the ILO on the grounds of its alleged infringement upon the principles of ILO Convention No. 98. As a response to the complaints (Case No: 2303) by Kristal-İş (Glassworkers Union) in October 2003, November 2003 and December 2003, ILO Freedom of Association Committee decided that the power to postponement of strikes in such a way meant violation of the ILO Conventions; there was no reason why a strike in glass industry imperiled national security and these type of state injunctions eroded the right to strike. The committee also stated that, postponement of the strikes can only be used in public servants' strikes at the time when a serious national disaster happens. Moreover, in such situations, the power of postponement should not be left to the state initiative. The postponement must be done by an independent authority.[21]

As a response to national and international criticism against the state authority on the postponement of a legal strike, the government, as a defense, stated that the practice was constitutionally mandated (art. No: 54, par. 5), and it also is available to appeal to the High Court Administration in case of postponements.[22] Another defense point was the limited number of postponement orders, meaning that postponement of legal strikes was not an ordinary application. Although these defenses were so weak, the government tried to introduce a better solution; a draft bill to amend the CASL Act No. 2822 was put in front of the subcommittee of the parliament. According to the draft of amendment, the CM will have to take a prior and consultative opinion from the High Court Administration before the publication of the 60 days postponement order. But the draft bill changes nothing else. If needed, the compulsory arbitration process will continue to end the right to strike.

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[21] See (http://www.kristalis.org.tr/ILO/kristalis.doc) for the details. Also the ICFTU in her 2001 Report about the violations of union right around the world stated that; the postponements of strikes in 2001 was a violation of the rights to strike in Turkey. (p. 181) See also (http://www.kristalis.org.tr/emek_dunyasi.html). The same criticization continues in the ICFTU Annual Survey of violations of Trade Union Rights in Turkey – 2004. (See www.icftu.org/display/ document. asp ? index = 991219534 for the details of the Report.)

[22] See DERELİ, p. 308.

Postponement of a Legal Strike in the TUCLR Act No.6356

As stated above the TUCLR Act No.6356 was put into force in 2012. One of the main justifications of the Act was to harmonize the Turkish Law with international agreements but it seems that the TUCLR failed to do so. Among other aspects of the Act, instead of legislating away, it kept the postponement of legal strikes application inside[23].

The basic outline of the new Act dealing with the postponement is the same as the Act Nr.2822; except the details. As in the previous Act, the new Act;

- gives the authority to postpone a legal strike to the CM,

- perceives general health and national security as the reasons for postponement of a legal strike,

- gives the right to CM to postpone a strike called, ordered or commenced like the previous Act

- states that a strike can be postponed for not more than 60 days and a postponed strike cannot continue after the postponement period. Thus, the dispute shall be solved by the Supreme Arbitration Board.

- explains that the trade union whose strike was postponed can sue against the decision given by the CM.

Unfortunately, in the Act No. 6356 there is no provision about a trade union to make a claim to the court against the decision. As this shows the intention of the government about the right to strike, a constitutional provision (art. nr. 125) gives the right to sue against the decision of the CM, which states that "every action or decision of the government are open to judgement".

All these show that the new Act, whose aim is to harmonize the Turkish labour law with the international agreements has nothing new on the grounds of the postponement of legal strikes: The procedure, the reasons, the authorities, the period and even the dispute resolution are the same.

[23] See ÇELİK and others, pp.688-690; Ünal NARMANLIOĞLU, İş Hukuku II, Ed.2, İstanbul, 2014, pp.633-634.

Major Postponements of Strikes in Last 15 Years

In the last 15 years[24], the first major postponement was at the oil industry. After a dispute in reaching a collective bargaining agreement, the Petrol-İş Union decided to go on a strike on July 2nd, 2003. The CM postponed the strike perceiving it as a threat to the national security starting July 3rd, 2003. More than 350 workers went back to work.

In the same year, by the same reason (ie. ,national security) the strike in glass industry was postponed by the CM. Despite the annulment of the decision by The High Court of State; the CM postponed the strike again adding the general health reason beside the national security.

In 2004, the CM postponed another major strike (including more than 5000 workers) in rubber industry perceiving it as a threat to the national security. Again The High Court Administration annulled the decision of the CM. But meanwhile the dispute was solved by an agreement.

In 2005, the CM postponed another strike in mining industry finding it a threat to the national security.

Between the years 2006-2012 no major postponements occurred in Turkey. Some called this period as "lack of strike period"[25]. During these years, instead of postponement, some other illegal methods to prevent workers to go on the strike were applied; such as deunionization, dismissals etc. An interesting event occurred in the late 2010s. After the union's strike decision in aviation industry (which State's airlines THY is a major actor), the Parliament amended the Act No.2822 and added the aviation industry to the sectors that have a ban on strike; in other words the aviation industry became a strike-ban sector in 2011. The contradictional part of this process is that, the government, by the Act No.6356, released the ban and set the aviation sector free of strikes in 2012. No need the say that the workers in the sector couldn't went on the strike in 2011.

In the era of the Act No. 6356, in 2014 and 2015 the postponement nightmare came to reality again. In 2014, again in the glass sector a major postponement took place. At the 8th day, the CM postponed the strike (including around 6000 workers) perceiving it as a

[24] See http://www.aydinlikgazete.com/emek/12-yilda-7-greve-8-erteleme-h62102.html (06 July 2015)

[25] See Aziz ÇELİK, "**Milli Güvenlik Gerekçeli Grev Ertelemeleri**", http://www.academia.edu/2761717/Milli_G%C3%BCvenlik_Gerek%C3%A7eli_Grev_Ertelemeleri (03 July, 2015)

threat to the national security and public health. In the same year another major strike (including more than 2100 workers) was postponed by the CM again as a threat to the national security and public health.

Finally in February 2015, the CM postponed another major strike in metal industry which included more than 10.000 workers in more than 40 workplaces. The CM perceived the strike as a threat to national security. But this time, interestingly, The High Court Administration required the CM to prove the relation between the metal industry and the national security in the time of peace[26]. The CM responded that, national security has strong relations with the economy and the decline in exports caused by such a strike can damage the economy; adding that the workplaces which the strike postponed were manufacturing such a carrier to intervene to public protests (so called TOMA).

Conclusion

Postponement of legal strikes by the CM in Turkey is a process borrowed from the American Law. In the beginning in the 1960s and 70s, the application looked like its original and after the postponement period, if the parties couldn't reach an agreement, the workers could go back to strike again. So, postponement meant postponement in the era of the Act No 275 between 1963-1980.

After the 1982 Constitution and the Act No.2822 on collective labor relations, things changed and went worse. This time, after the postponement period, if the parties fail to reach an agreement, the dispute should be solved by the Supreme Court of Arbitration Board, which meant the strike was banned rather than postponed.

This situation did not change in the recent Act No. 6356. While the justification of the new Act was to harmonize the labor law with the ILO and EC law, it really fell behind the international labor law. The postponement procedure remained the same as the Act No. 2822, which was often criticized as the Coup D'état law. So, it is so dramatic to make a law like the military regime at the time of civil regime.

[26] http://www.birgun.net/haber-detay/basbakanlik-grev-ertelemenin-gerekcesini-acikladi-milli-guvenlik-dedikleri-patronlarin-cikariymis-75683.html

Worst of all, the government is using the application to ban the strikes instead of postponement. As the reasons for postponement are very flexible, it is easy for every sector to create links with national security and public health.

As a conclusion, as there is the authority to postpone a legal strike at the hands of CM, the CM will use it for many reasons, which in fact annuls the right the strike. In my opinion, if Turkey wants to reach a universal level of labor law, it should legislate away the provisions related to the postponement of legal strikes; starting from the Constitution, then the TUCLR Act No. 6356.