EMK artikkel 11
og
streikeretten

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ARTICLE 11

Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

Art 11. Forsamlings- og foreningsfrihet

1. Enhver har rett til fritt å delta i fredelige forsamlinger og til frihet til forening med andre, herunder rett til å danne og slutte seg til fagforeninger for å verne sine interesser.

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Alminnelige utgangspunkter (1)

The Court notes that while Article 11 para. 1 presents trade union freedom as one form or a special aspect of freedom of association,

the Article does not guarantee any particular treatment of trade unions, or their members, by the State, …

Belgian Police (1975), para. 37

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Alminnelige utgangspunkter (2)

The Court does not, however, share the view expressed by the minority in the Commission who describe the phrase "for the protection of his interests" as redundant. These words, clearly denoting purpose, show that the Convention **safeguards freedom to protect the occupational interests of trade union members by trade union action**, the conduct and development of which the Contracting States must both permit and make possible.

Belgian Police (1975), para. 39

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Alminnelige utgangspunkter (3)

In the opinion of the Court, it follows that the members of a trade union have a right, in order to protect their interests, that the trade union **should be heard**.

Article 11 para. 1 certainly leaves each State **a free choice of the means** to be used towards this end.

While consultation is one of these means, **there are others**.

Belgian Police (1975), para. 39

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Begrepet om «streik»

Objektive kjennetegn og rettmessighetsvurderinger

En «germano-nordisk» tilnærming som analytisk verktøy:

Interessetvister og andre formål

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Utviklingslinjer i anerkjennelsen av et vern for en rett til streik

(1) Interessetvistrelasjoner

(2) «Den tyrkiske linjen» – andre formål

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Utviklingslinjer i anerkjennelsen av et vern for en rett til streik

(1) Interessetvistrelasjoner

Fra Schmidt og Dalström (1976) til RMT (2014) og Junta Rectora (2015)

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Such a right [to strike], which is not expressly enshrined in Article 11 …

Article 11 para. 1 … leaves each State a free choice of the means to be used towards this end [that unions may be able to protect members' interests].

The grant of a right to strike represents without any doubt one of the most important of these means, *but there are others*.

Schmidt & Dahlström, § 36 (min kursivering)

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the Court has consistently held that although collective bargaining may be one of the ways by which trade unions may be enabled to protect their members' interests, it is not indispensable for the effective enjoyment of trade union freedom. Compulsory collective bargaining would impose on employers an obligation to conduct negotiations with trade unions.

The Court has not yet been prepared to hold that the freedom of a trade union to make its voice heard extends to imposing on an employer an obligation to recognise a trade union. The union and its members must however be free, in one way or another, to seek to persuade the employer to listen to what it has to say on behalf of its members.

… the Court does **not** consider that the absence, under United Kingdom law, of an obligation on employers to enter into collective bargaining **gave rise, in itself, to a violation** of Article 11 of the Convention.

Wilson & Palmer, § 44, § 45 (min kursivering)

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There is no express inclusion of a right to strike or an obligation on employers to engage in collective bargaining. At most, Article 11 may be regarded as safeguarding the freedom of trade unions to protect the occupational interests of their members. While the ability to strike represents one of the most important of the means by which trade unions can fulfil this function, there are others.
Furthermore, Contracting States are left a free choice of means as to how the freedom of trade unions ought to be safeguarded (…).

It follows that restrictions imposed by a Contracting State on the exercise of the *right to strike* do **not in themselves give rise to an issue** under Article 11 of the Convention.

OFS, s. 15 (mine uthevelser)

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The Court agrees with the Government

that the essence of a voluntary system of collective bargaining is that it must be possible for a trade union which is not recognised by an employer to take steps including, if necessary, organising industrial action, with a view to persuading the employer to enter into collective bargaining with it on those issues which the union believes are important for its members' interests.

Wilson & Palmer, § 46

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Utviklingslinjer i anerkjennelsen av et vern for en rett til streik

(2) «Den tyrkiske linjen» – andre formål

Karaçay (2007), [Aldemir (2007)], Dilek (2007) og Urcan (2008)

→ Yapı-Yol Sen (21.04.2009)

→ Kaya et Seyhan (15.09.2009), Çerikci (2010; ref. Karaçay)

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En ce qui concerne le droit de grève, la Cour rappelle que si l'article 11 ne le consacre pas expressément, son octroi représente sans nul doute l'un des plus importants des droits syndicaux, mais il y en a d'autres. De surcroît, les États contractants ont le choix des moyens à employer pour garantir la liberté syndicale (*Schmidt et Dahlström*, précité, pp. 15-16, §§ 34-36 ; *UNISON c. Royaume-Uni* (déc.), no 53574/99, CEDH 2002-I).

Dilek, § 68

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La Cour a examiné les condamnations pénales litigieuses à la lumière de l'ensemble des faits, pour déterminer en particulier si elles étaient nécessaires dans une société démocratique, eu égard à la place éminente de la liberté de réunion pacifique. Elle note que les requérantes ont été condamnées à des peines d'emprisonnement commuées en amendes ainsi qu'à une exclusion temporaire de la fonction publique, en leur qualité d'enseignantes, en raison de leur participation à une journée de grève organisée par le syndicat Eğitim-Sen pour améliorer leurs conditions de travail (paragraphe 6 ci-dessus). Or les sanctions incriminées sont de nature à dissuader les membres de syndicats et toute autre personne souhaitant le faire de participer légitimement à une telle journée de grève ou à des actions pour défendre les intérêts de leurs affiliés (*Karaçay*, précité, § 37).

Urcan, § 34

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Yapı -Yol Sen, s. 4–5 (mine kursiveringer)

La grève, qui permet à un syndicat de faire entendre sa voix, constitue un aspect important pour les membres d'un syndicat dans la protection de leurs intérêts (…). La Cour note également que le droit de grève est reconnu par les organes de contrôle de l'Organisation internationale du travail (OIT) comme le *corollaire indissociable du droit d'association syndicale* protégé par la Convention C87 de l'OIT … (pour la prise en compte par la Cour des éléments de droit international autres que la Convention, voir *Demir et Baykara*, précité). Elle rappelle que la Charte sociale européenne reconnaît aussi le droit de grève comme un moyen d'assurer l'exercice effectif du droit de négociation collective.

Partant, la Cour rejette l'exception du Gouvernement.

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Efter Yapı -Yol Sen

Kaya et Seyhan (15.09.2009)

Çerikci (2010; ref. Karaçay)

«Konvergens»: RMT

1: Interessetvistrelaterte saker

2: «den tyrkiske linjen» – demonstrasjonsaksjoner

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It recalls that it has already decided a number of cases in which restrictions on industrial action were found to have given rise to violations of Article 11 (see for example *Karaçay v. Turkey*, no. 6615/03, 27 March 2007; *Dilek and Others v. Turkey*, nos. 74611/01, 26876/02 and 27628/02, 17 July 2007; *Urcan and Others v. Turkey*, nos. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 July 2008; *Enerji Yapı-Yol Sen v. Turkey*, no. 68959/01, 21 April 2009).
The applicant placed great emphasis on the last of these judgments, in which the term "indispensable corollary" was used in relation to the right to strike, linking it to the right to organise (*Enerji*, at § 24). It should however be noted that the judgment was here adverting to the position adopted by the supervisory bodies of the ILO rather than evolving the interpretation of Article 11 by conferring a privileged status on the right to strike.
More generally, what the above-mentioned cases illustrate is that **strike action is clearly protected by Article 11**. The Court therefore does **not** discern any **need** in the present case to determine whether the taking of industrial action should now be accorded the **status of an essential element** of the Article 11 guarantee.

RMT, § 84 (mine uthevelser)

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RMT = Anerkjennelse av en rett til streik

- i prinsipp også sympatistreik (sekundærstreik; secondary action)

- bekreftet gjennom senere dommer

  Tymoshenko o.a., 2. oktober 2014 (§ 78)

  Hrvatski Liječnički Sindikat, 27. november 2014 (§ 49)

  (og implisitt, *Junta Rectora*, 21. april 2015)

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Men – hva *er* «streik» (grève; strike) i EMDs forstand?

Objektivt – nedleggelse av arbeid (noen timer, en dag, lengre varighet)

Subjektivt – ulike formål (*Trofimchuk* 2010 – «picket»)

– *uten* skille mellom dem i Artikkel 11 (1)-relasjon

«Metodisk» og i relasjon til Artikkel 11 (2) – senere

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Ingen ubetinget rett

(1) Artikkel 11 – rekkevidde *ratione personae*

«den tyrkiske linjen» o.m.a.

(AFEDOMIL, Matelly, Junta Rectora (ctr ECSR)

«… lawful restrictions may be imposed on the exercise of trade-union rights by members of the armed forces, of the police or of the administration of the State. However, it must also be borne in mind that the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association».

Demir and Baykara [GC] 2008, § 119

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Artikkel 11 (2)

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Utøvelsen av disse rettigheter skal ikke bli undergitt andre innskrenkninger enn de som er foreskrevet ved lov og er nødvendige i et demokratisk samfunn av hensyn til den nasjonale sikkerhet eller offentlige trygghet, for å forebygge uorden eller kriminalitet, for å beskytte helse eller moral eller for å beskytte andres rettigheter og friheter. Denne artikkel skal ikke hindre at lovlige innskrenkninger blir pålagt utøvelsen av disse rettigheter for medlemmene av de væpnede styrker, av politiet og av statsforvaltningen.

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Artikkel 11 (2)

– to be (core) or not to be (core)

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RMT, § 84 (mine uthevelser)

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Metode og skjønnsmargin («margin of appreciation»)

(1) Komparativ og dynamisk metode

Belgian Police (§ 38) **≈** *Schmidt and Dahlström*

In addition, trade union matters are dealt with in detail in another convention, also drawn up within the framework of the Council of Europe, namely the Social Charter of 18 Octobre 1961. Article 6 para. 1 of the Charter binds the Contracting States "to promote joint consultation between workers and employers". The prudence of the terms used shows that the Charter does not provide for a real right to consultation. Besides, Article 20 permits a ratifying State not to accept the undertaking in Article 6 para. 1. Thus it cannot be supposed that such a right derives by implication from Article 11 para. 1 (art. 11-1) of the 1950 Convention, which incidentally would amount to admitting that the 1961 Charter took a retrograde step in this domain.

vs. *Demir and Baykara*, *Yapı -Yol Sen, [RMT]* – *vs. Junta Rectora*

The Court will consider this later in its analysis. For now it suffices to refer to the following passage from the *Demir and Baykara* judgment (§85):

> "The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values."

It would be inconsistent with this method for the Court to adopt in relation to Article 11 an interpretation of the scope of freedom of association of trade unions that is much narrower than that which prevails in international law.

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Metode og skjønnsmargin («margin of appreciation»)

Komparativ og dynamisk metode (II)

vs. *Demir and Baykara*, *Yapı -Yol Sen, [RMT]*

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>
> *RMT* § 76

– *vs. Junta Rectora*

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Metode og skjønnsmargin («margin of appreciation»)

(2) Skjønnsmargin

Demir and Baykara (§ 119); *Yapı -Yol Sen*

> «… lawful restrictions may be imposed on the exercise of trade-union rights by members of the armed forces, of the police or of the administration of the State. However, it must also be borne in mind that the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association».

vs. *Unison – RMT – Junta Rectora*

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Core (per idag)

- Positiv organisasjonsfrihet (Artikkel 11 (1))
- Negativ organisasjonsfrihet (Artikkel 11 (1); *Sörensen and Rasmussen* (2006))
- Kollektive forhandlinger («collective bargaining»; *Demir and Baykara*
- Fagforenings «right to be heard»

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