

THE PROTECTION OF THE RIGHTS OF CHILD AND YOUNG WORKERS UNDER EUROPEAN SOCIAL CHARTER WITH RESPECT TO TURKISH LAW

INTRODUCTION

European Social Charter¹, recently approved by Turkey is one of the international law documents that covers the right of children and young persons to protection with its articles on work environment. Article 7 of the European Social Charter titled, «the right of children and young persons to protection» is directly related to job security for child and young workers. This article not only cites the minimum age of admission to employment but also includes other assurances on the health and security of child and young workers.

Turkey did not fully approve the Art.7 of the European Social Charter. It has so far approved the 3rd, 4th, 5th, 6th, 8th and 9th paragraphs. The judicial causes of this partial approval in Turkish labor legislations must be understood. In order to do this, first of all regulations on the protection of child and young workers under European Social Charter will be analyzed and later the state of the Turkish labor legislation with respect to it will be discussed.

IMPLEMENTATION PLAN ON INDIVIDUAL BASIS FOR THE PROTECTION OF CHILDREN AND YOUNG PERSONS

The Concepts of Child and Young Worker

The age of the individual is an important criterion in the enacting of protectionist articles on child and young workers. In this sense, Consti-

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1. Turkish Republic has ratified the European Social Charter by Code no. 3581 (June 16, 1989) (Official Gazette, No. 20215, 4 July, 1989) and put into force with the decision of Council of Ministers no. 89/14434 (August 7, 1989) (Official Gazette, no. 20312, October 14, 1989).

tutional Law states that no one shall be required to perform work unsuited to his age and also brings a special protection for the employment conditions of children (Art. 50). Thus, it underlines the need to take into consideration the age factor when citing protectionist measures. The regulations that admits age factor as binding differentiate between children and adults; persons under 18 years of age are defined as children and persons over 18 years as adults. For instance, articles on the protection of the children and young workers in Turkish Labor Law admits 18 years of age as the limit marking between young and adult workers (Art. 49/III, 68, 69, 78/II, 80/I).

It is, indeed, important to differentiate between child and adult workers regarding protectionist regulations since children are not allowed to work and young persons are only permitted for limited work. Thus, the definition of child with regard to judicial regulations that govern labor environment is bound by the minimum age of admission to employment.

The Approaches of the European Social Charter and Turkish Labor Regulations on the Concepts of Child and Young Worker

Concepts of child and young worker are neither clarified in European Social Charter nor in Turkish labor regulations. However, both Turkish Labor Law (Art. 49/III, 68, 69, 78/II, 80/I) and European Social Charter (Art.7/parag.7, 8) differentiate between child and young persons, and the age limit in both is 18. Furthermore, in the Art.7/I, the word «children» is used while citing the minimum age of admission to employment. Thus it can be said that European Social Charter accepts persons under 15 years of age as «child» and persons between 15–18 years of age as «young workers».

As to the Turkish labor regulations; there is no unanimity among the various sectors on the minimum age of employment and it is not possible to set an age limit to differentiate between «child» and «young worker».

Turkish labor law does not treat the concepts of «child» and «young worker», technically. For instance, 78/I, 78/II and 80/I use the following

statements respectively; «children under 16 years of age», «children between 16–18 (18th year is not included)», and «children 13–18 (18th year is included)». However, labor law is the main regulation on labor and Art. 67 of it sets the minimum age of employment as 15 years. Also, the national regulations on maritime labor set the same age limit.

THE PROHIBITIONS ON THE EMPLOYMENT OF CHILD AND YOUNG WORKERS

The Rule of Minimum Age of Admission to Employment Being 15 Years

European Social Charter adopts the minimum age of employment as 15 years in Art.7/I. However, it also holds the possibility of employment of children under the age of 15 years in light work with the condition that work as such shall not be harmful to the health, morals and education of the children (Art.7/I).

In Turkish Labor Law, there is no unity among the sectors on the issue of minimum age of employment. Art.67/I of this law bans the employment of children under 15 years of age. That is to say, the minimum age of employment is 15 years under Turkish labor law. However, exceptionally it is possible to employ children over 13 years of age in light work. Art. 67/II requires that such work «shall not be of a nature to hinder the health, development, schooling of the vocational training of the child.»

There is not a rule regulating the minimum age of employment in the Code on Maritime Labor. However, Turkey has ratified the Convention titled «Minimum Age (Sea) (Revised in 1936)» with the Code no.7293 (25 May, 1959).² Art. 2/I of this convention states that «Children under the age of 15 years shall not be employed on vessels».

Occupations that are not considered as maritime labor and occupations that are not within the Turkish Labor Law are covered by the Code on General Hygiene (1930). Art. 173/I of this code applies to occupations that are neither considered as maritime labor nor covered by

2. Official Gazette, no. 10220, June 2, 1959.

Turkish Labor Law. This article states the minimum age of employment as 12 years. Although it cites that, «children under age of 12 years shall not be employed in factories, workshops, and in mines as workers or apprentices»; this article can not apply to industrial workers and miners because the mining and industrial sectors are regulated by Art. 67 of Turkish Labor Law. And Article 67 of this code is a more recent rule than Art. 173/I of the Code on General Hygiene. Thus, Art 173/I loses its effectiveness on the issue of minimum age of admission to employment. Art. 67 of the Turkish Labor Law was amended by Art. 15 of the Code no. 2869 (29 July, 1983)³ and was put into a position to regulate the minimum age of employment. Before this revision, depending on the principle of «argumentum a contrario» it was argued that the minimum age of employment being 12 years could not be valid for the workers in the sectors other than mining and industry. In opposition to this argument, it was claimed that the code of General Hygiene which aims at protecting children under age of 12 years is bringing an absolute prohibition.⁴ Therefore, it is possible to adopt the latter argument and accept that the minimum age of employment as 12 years in occupations that are not covered by Turkish Labor Law and that are not considered as maritime labor.⁵

Besides the regulations on minimum age of employment, there are also prohibitions on the employment of child and young workers in specific occupations. For instance, Art. 12/I of the Code on Duties and Authorities of Police states that, «the employment of girls and women in places where alcoholic beverages are sold like night clubs, bars, and cafes or in Turkish baths and on beaches, are subject to the permission of the highest administrative authority of the work place» and second paragraph continues to say that «men under 21 years of age and all women shall not be employed in such⁶ places». In other words, child and young workers are prohibited from working in the entertainment sector. Furthermore, Art. 68 of Turkish Labor Law cites that, «boys under 18 years

3. Official Gazette, no. 13120, July 30, 1983.

4. See Tankut Centel, *Çocuklar ile Gençlerin İş Güvenliği*, İstanbul, 1982, p. 136-137.

5. See Münir Ekonomi, *İş Hukuku I*, İstanbul, p. 95, fn. 94; Mehmet Kocaoğlu, «Çocuk ve Kadın İşçilerin 1475 Sayılı İş Kanunu ile Korunması» *Türk Kamu-Sen I*, Sayı: 4, June 1988; Kenan Tunçomağ, *İş Hukukunun Esasları*, İstanbul, 1989, p. 189.

6. Art. 176 of the Code on General Hygiene.

of age and women at any age shall not be employed in mines, cable installations, sewerages, and in tunnel constructions, namely in works that are to be performed underground or underwater». Also, Art. 2 of Code no. 151 bans the employment of child and young workers in mines by stating that, «persons under 18 years of age shall not be employed in mines». Finally, Convention no. 15 titled «Minimum age (Trimmers and Stokers)» requires that persons under 18 years of age shall not be employed as stokers and trimmers on vessels. This Convention was ratified by Turkey (Code no. 7292, 25 May, 1959).⁷

European Social Charter does not set a minimum age for the employment of children in light work. However, it is harmful for a child under a certain age to work even in light work because the negative effects of a certain occupation on child health, education, and morals are determined by the age of the child not by the quality of the work. Art. 2/I of European Social Charter does not set a minimum age but defines light work as work without harm to children's health, morals and education.

International Conventions on labor, as in Art. 67/II of Turkish Labor Law, determine an age limit for admission to employment for the light work. For instance, Convention no.33 (1932) permitted the employment of children over 12 years of age in light work that is harmless to their health and development and does not prevent them from continuing with their education. This Convention has set the minimum age of employment as 12 years. Later on, Convention no.60 (1937) repeated the same conditions but rose that minimum age from 12 to 13 years. Finally, Convention no.138 (1973) which aims to unify the various regulations on the issue of minimum age, gives the possibility for national regulations to determine the minimum age between 13–15 years with the condition that the work shall not be harmful to the health and development of children and shall not prevent them from education and occupational training. In other words, the minimum age of employment in this Convention is 13 years. If the states adopt 14 years of age as the minimum for employment due to their economic underdevelopment and poor educational opportunities, then they may set the minimum age of employment in light work as 12 years.

7. Official Gazette, no. 10220, June 2, 1959.

Although Art. 7 of European Social Charter does not set a minimum age limit for employment in light work, it is in line with other international conventions on the issue of minimum age of employment. Thus, both Art. 2 of Convention no. 138 and Art. 7/I of European Social Charter sets the minimum age of employment as 15 years. However, Art. 7/I of European Social Charter contrary to Convention no. 138 does not introduce the possibility of reaching gradually to 15 years of age to member countries.

The Raising of the Minimum Age of Employment in Dangereous and Heavy Work

Art. 7/II of the European Social Charter envisages the member countries to raise the minimum age of employment even over 15 years in «occupations regarded as dangereous or unhealthy». This definition actually means heavy hazardous work that requires the investment of more force than in ordinary ones and work which carry the risk of being harmful to one's health. Although Art. 7/II of European Social Charter suggests the raising of the minimum age of employment in such work (which is currently 15 years), does not set a certain amount for this raise. According to this, the parties to the charter which ratify this article shall be free to determine any age between 15–18 years as the minimum age of employment of children in heavy and dangereous occupations.

Art. 7/II of European Social Charter is different from the convention no. 138 on the issue of employment of young works in heavy and dangereous occupations. In Art. 3 of this convention, the minimum age of employment of young workers in occupations that are dangereous to their health, lives and morals is 18 years. However, the same article exceptionally allows the national legislation or the relevant authority, the employment of young workers over 16 years of age with the condition that health, life, and morals of the worker shall be protected and the worker shall be specifically trained or educated for this profession.

It is seen that Art. 67/I of Turkish Labor Law raise the minimum age of employment in heavy and dangereous work. It states that, children under 16 years shall not be employed in heavy and dangereous work. However, this article which is in line with the requirement of the Art. 7/II of Euro-

pean Social Charter only applies to work covered by the Turkish Labor Law. Most probably for this reason Turkey has not approved this paragraph, yet.

Children Who Have Not Completed Their Compulsory Education Shall Not Be Employed in Occupations that Deprive Them of the Full Benefit of Their Education

Art. 7/I of the European Social Charter adopts the minimum age of admission to employment as 15 years but does not tie this to the completion of compulsory education. Whereas, Convention no. 138 firmly establishes that the minimum age of employment shall not be under 15 years and also states that it will not be less than the age of completion of compulsory education. On the other hand, Art. 7/III of the European Social Charter states that the contracting parties undertake the requirement «to provide that persons who are still subject to compulsory education shall not be employed in such work as to deprive them of the full benefit of their education» and bans the employment of persons who are at the age of 15 but still subject to compulsory education. Thus, European Social Charter ties the minimum age of employment to the obligation of education and this means both international documents prevent that the differences that can result from the standart norms. Although, Convention no. 138 cites that the minimum age of admission to employment shall not be less than the age of completion of compulsory education, it does not prevent the employment of persons over 15 years of age but who are still at the age of compulsory education. As a matter of fact, national legislation may permit the employment of persons at the age of 15 but still subject to compulsory education. However the work of such persons shall not be harmful to their health and development and shall not deprive them of their right to education and vocational training (Art. 7/II).

As the Turkish legislation; since compulsory education has not been raised to 8 years and it finishes before the age of 12 years (Code on General Hygiene, Art. 173/I), Art. 7/III does not pose a problem. Furthermore, Art. 67/III of the Turkish Labor Law requires that working hours shall be arranged in a way not to hamper the school hours and school hours shall be considered as working hours. However, child workers who have not completed their compulsory education until 12 years of age for

any reason shall not benefit from the protection existing in Art. 67/III of the Turkish Labor Law. For such persons only Art. 59 of the Code on Primary Schooling and Education may apply. This article states that, persons who are at the age of compulsory education but who are not attending any school shall not be employed in any official or private place with or without payment.

THE WORKING CONDITIONS OF YOUNG WORKERS

The Limitation of the Working Hours of Young Workers

Art. 7/IV of the European Social Charter states that, the contracting parties undertake the requirement «to provide that the working hours of persons under 16 years of age shall be limited in accordance with the needs of their development, and particularly with their vocational training». This article aims at the limitation of the working hours of young persons. This limitation may either be realized through a curtail in working hours or through treating the time spent in vocational training as forming a part of the working day. Art. 67/III of the Turkish Labor Law also cites that school hours shall be considered as part of the working hours and this way reduces the time spent in the work place and moreover by requiring that working day shall be «7.5 hours» accepts a person can not be employed more than this duration. The same kind of protection also exists in the regulation aiming to guarantee the right of young persons of the full benefit of their vocational training. Thus, Art. 12/I of the Code on Apprenticeship and Vocational Training reduces the working hours of apprentices candidate and apprentices by citing that such persons shall be subject to vocational training for a duration of not less than 8 hours and more than 10 hours during a week and for these hours they shall be paid. Art. 7/IV of the European Social Charter limits the working hours of those under 16 years of age. However Art. 67/III of the Turkish Labor Law provides this protection through the limitation of working hours for those over 16 years of age as well.⁸ On the other hand, Turkish labor regulations do not have a rule reducing working hours for protecting young workers who are not attending a school or subject to vocational training, as compared to adult workers.

8. Ünal Narmanhoğlu, *İş Hukuku-Ferdi İş İlişkileri I*, Ankara, 1988, p. 429; Kenan Tunçomağ, *İş Hukukunun Esasları*, p. 189.

To Provide the Resting of Young Workers

Night Resting

Art. 7/VIII of the European Social Charter cites that workers under 18 years of age shall not be employed in night work with the exception of certain occupations provided by national laws or regulations. As it can be seen, this article does not absolutely ban the employment of young workers in night work. That is to say, Art. 7 of the European Social Charter makes it possible to employ young persons in night work that are provided by national regulations. Moreover, this article does not define what is meant by night work and leaves the decision to the legislation of the member states.

Art. 7/VIII of the European Social Charter puts a ban on the employment of young persons in night work regardless of sectors. However, international conventions on labor put bans on night work with respect to different sectors and different ages. For instance, Convention no. 6 on the industrial work cites that persons under 18 years of age shall not be employed at night work. And Convention no. 76 (later on 93 and 109) on maritime labor requires that persons under 16 years of age shall not be employed in night work. Although the European Social Charter does not directly differentiate among the sectors, it also does not prevent the possible discrimination between the sectors under national regulations. In fact, Art. 7/VIII does not absolutely ban night work for young persons but leaves it to the national legislation to decide on exceptional cases. On this issue, national regulations can bring different rules for various sectors and also for different age groups. The protection of Art. 7/VIII of European Social Charter is valid for all age groups under 18. Even though this article seems to bring a unanimity of regulations, it is also open to implementations that would create differences between sectors and age groups. Indeed, each contracting party fulfills the spirit of undertaking by providing that «the great majority of persons under 18 years of age» shall not be employed in night work (Additional Protocol to European Social Charter Art. 7/VIII).

Turkish labor regulations do not have a uniformity on this issue as well. For instance, while the ban in Art. 69/I of the Turkish Labor Law is

valid for workers in the industry sector, the Code on General Hygiene is not clear at all. Art. 69/I of Turkish Labor Law applies to all young workers regardless of their age; however, Art. 174 of the Code on General Hygiene includes only young workers under 16 years of age. According to this, any young worker at any age who is employed in an occupation in industrial sector that is covered by the Turkish Labor Law can not be employed at night work. The persons in any sector other than the industrial sector, and who are under 16 years of age shall not be employed in night work regardless of the fact that their occupation is covered by the Turkish Labor Law.

Annual Leave

Art. 7/VII of the European Social Charter states that the contracting parties undertake the requirement «to provide that employed persons under 18 years of age shall be entitled to not less than three weeks' annual holiday with pay». This duration of holiday exceeds the one provided with the Convention No. 52. This convention determines the duration of the annual leave with pay as «at least 12 working days» (Art. 2/II).

As to the Turkish labor regulations; in Art. 49/III of the Turkish Labor Law it is stated that the annual leave with pay shall not be less than 18 days. This is valid for works that are covered by Turkish Labor Law. Since the national, weekend, and general holidays are not considered as a part of the annual leave with pay (Turkish Labor Law, Art. 52/V), the duration of the annual leave under Art. 49/III of this law corresponds to the minimum duration provided in Art. 7/VII of the European Social Charter. However, Art. 49/III of Turkish Labor Law applies only to work that is covered by this law. That is to say, the occupations that are not within the scope of the Labor Law does not meet the duration required by Art. 7/VII of the European Social Charter. Due to this reason, Turkey did not approve 7th paragraph of Art.7 (Code no. 3581, Art.1/I).

The Protection of the Vocational Training Opportunities for the Young Workers

Art. 7/VI of the European Social Charter states that the contracting parties undertake the requirement «to provide that the time spent by

young persons in vocational training during the normal working hours shall be treated as forming part of the working day». This undertaking already exists in the Art. 12/I of the Code on the Apprenticeship and Vocational Training which cites that the employee must give permission with pay to those who are subject to vocational training. This article limits the duration between 8–10 hours a week.⁹ However, Art. 7/VI of the European Social Charter does not determine a highest and a lowest limit for the duration of the vocational training.

The Payment of a Fair Wage to Young Workers

Art. 7/V of the European Social Charter guarantees «the right of young workers and apprentices to a fair wage or other appropriate allowances». In this sense, Art. 55/II of the Turkish Constitution requires the state «to provide the workers with a fair wage that is in accordance with the work performed and make the workers benefit from the various social allowances». Constitutional law does not mention the age of the worker as a criterion in the determination of the wage. Art. 2 of the by-law on minimum wage cites that «age factor shall not be taken into consideration in the determining of the minimum wage». However the possibility of determining the minimum wage depending on the workers' age being over or under 16 (Regulation Art. 5/I) is exempt from the prohibition of taking into account the criteria in the determination of the minimum wage. Since, this possibility had been reserved by Art.2 of the regulation. Thus, it would be correct to say that the prohibition of making discrimination on the determination of the minimum wage holds valid for workers over 16 years of age.¹⁰

The wage protection aimed by the Art. 7/5 of the European Social Charter is more in the direction of preventing the exploitation of young workers with respect to wage. It is a historically proved fact that, employees have always preferred to employ child and young workers rather than adults since it is easier and cheaper to make child and young workers content. Therefore, the differences stemming from the age of the

9. See above «Limitation of the Working Time of Young Workers».

10. See Kenan Tunçomağ, «Milletlerarası Antlaşmalar ve Türk Mevzuatı Açısından Asgari Ücret Kavramı», *İş Hukuku Dergisi* I, no. 5, May, 1969, p. 436.

young worker not from his (her) objective conditions should be considered as invalid before the law.

The protection provided in the Art. 7/V of the European Social Charter also includes apprentices. On this issue, Art. 25/I of the Code on Apprenticeship and Vocational Training cites that the employee shall pay the apprentice from the first day of the work (Turkish Labor Law Art. 33/I) a wage that is not lower than 30 per cent of the minimum wage. This was criticized by its unfairness.¹¹ However, if the apprentice is indeed being trained at work, this implementation can be considered as just. Since, there is no word of an obligation on the employee that he (she) has to pay the full minimum wage and train the apprentice. Otherwise, the employees would prefer adult workers rather than apprentices that can not directly involve in productive activity¹².

The Protection of the Health and Security of Young Workers

To Provide Regular Medical Controls for Workers

Regular medical controls are helpful in the diagnosis of occupation linked diseases and they are also beneficial for keeping workers' puberty under control.¹³ Art. 7/IX of the European Social Charter states the contracting parties to undertake the requirement «to provide that persons under 18 years of age employed in occupations prescribed by national laws or regulations shall be subject to regular medical control». However, since the expression «employed in occupations» is used in the article, it is understood that medical control shall be at stake only after the person is employed. Furthermore, although the article requires regular medical controls, it does not state the intervals between the controls. Also, it does not differentiate on the age of the young persons who are employed in heavy or light occupations but only adopts 18 years of age in general.¹⁴

11. See B. Hasan, «Türkiye'de Çırağın Konumu», *Yargı*, no. 26, June 1978, p. 27-28; Turgut Kazan, «Çıraklık Yasası Sömürüyü Yasallaştırıyor», *İstanbul Barosu Dergisi*, Vol. LI, no. 7-9, July-Sept. 1977, p. 26-28.

12. Cahit Talas, «Çocuk, Çocuk Haklarının Evrimi ve Ülkemizde Gelişimi», Prof. Dr. Ahmet Şükrü Esmer'e Armağan, Ankara, 1981, p. 322.

13. S. Forssman/G.H.Coppee (trans. by T. Çiloğlu), *Genç İşçilerin Mesleksel Sağlık Problemleri*, Ankara, 1979, p.75.

14. For the stands adopted in international labor conventions on it see: Centel, p. 124-129.

Art. 80/I of Turkish Labor Law requires that young workers under 18 years of age shall be subject to the control of a medical doctor every six months to check whether there is any disadvantage for the worker to continue with his (her) job. However, this article applies only to those occupations that are within the scope of Turkish Labor Law and since Art. 7/IX of the European Social Charter requires obligatory medical controls in «occupations prescribed by national laws», the member states to the Charter do not have to provide medical control in every occupation.

Protections Against Dangers Resulting From the Work

Art. 7/X of the European Social Charter states that children and young persons will be provided with «special protection against physical and moral dangers to which (they) are exposed». This article ensures protection but does not elaborate on its content. As to Turkish labor regulations; children and young workers benefit from the rules enacted for the technical job security for adult workers. There are not any special rules for child and young workers. Therefore, Turkey did not ratify 10th paragraph of Art.7

CONCLUSION

The protection provided for child and young workers by Art.7 of the European Social Charter has not been fully transferred to Turkish national regulations. The primary reason for this partial approval and the barrier still preventing the full approval of the Art. 7 arises from the fact that in Turkey regulations on labor do not cover workers employed in all sectors. For instance, Conventions no. 15 and 58 on maritime labor have been approved by Turkey and the minimum age of admission to employment in heavy and dangerous work is over 15 years (16 years) and Art. 67 of Turkish Labor Law brings a more advanced regulation on the issue of minimum age of employment. However the exceptions in Art. 5 of Turkish Labor Law and especially the lack of a Code on agricultural labor prevents Turkey from approving the first and second paragraphs of Art. 7 of the European Social Charter. Similarly Art. 49/III of Turkish Labor Law meets the requirements of Art. 7 of the European Social Charter however, since the national regulations have a limited scope of implementation, Turkey could not approve the paragraphs of Art. 7 of the European Social Charter on the issue of the rights of children to education.

Turkey did not approve the paragraphs which it considered as unrealizable or those which it did not want to realize with the concern that their approval could leave itself with an undesired pressure. Thus, cautiously analyzed its national labor regulations and then approved the paragraphs which it believed that it could implement (namely the paragraphs which fitted to the Turkish regulations). It can be said that, Turkey legalized what was already existing. In this sense, the partial approval of the European Social Charter did not force the Turkish legislator to make any advancements regarding the labor regulations. However, this does not mean that the approval of the Art. 7 of the European Social Charter did not contribute to the betterment of Turkish social policies. Turkey must examine the fact it could not approve the paragraph on the minimum age of admission to employment since it lacks a common labor law for all workers. Also Turkey must revise another fact that, young worker are more prone to dangers resulting from work and it must aim at bringing special job security measures.

15. Kenan Tunçomağ, «Çalışma Hayatında Çocuk ve Gençler», Sosyal Siyaset Konferansları, book no. 31, 1982, p. 69.