EUROPEAN COURT OF HUMAN RIGHTS
CASE OF DEMIR AND BAYKARA v. TURKEY
(Application no. 34503/97)

PAR 1: The European Court of Human Rights

The **European Court of Human Rights** is a supranational or international court established by the European Convention on Human Rights. It hears applications alleging that a contracting state has breached one or more of the human rights provisions concerning civil and political rights set out in the Convention and its protocols. An application can be lodged by an individual, a group of individuals or one or more of the other contracting states, and, besides judgments, the Court can also issue advisory opinions. The Convention was adopted within the context of the Council of Europe, and all of its 47 member states are contracting parties to the Convention. The Court is based in Strasbourg, France.

The Court was established on the 21 January 1959 on the basis of Article 19 of the European Convention on Human Rights when its first members were elected by the Consultative Assembly of the Council of Europe.[1] The Convention charges the Court with ensuring the observance of the engagement undertaken by the contracting states in relation to the Convention and its protocols, that is ensuring the enforcement and implementation of the European Convention in the member states of the Council of Europe. The jurisdiction of the Court has been recognised to date by all 47 member states of the Council of Europe.

Judges are elected for a non-renewable nine year term.[3] The number of full-time judges sitting in the Court is equal to that of the contracting states to the European Convention on Human Rights. The Convention requires that judges are of high moral character and to have qualifications suitable for high judicial office, or be a jurisconsult of recognised competence. Judges are elected by majority vote in the Parliamentary Assembly of the Council of Europe from the three candidates nominated by each contracting state.

The jurisdiction of the court is generally divided into inter-state cases, applications by individuals against contracting states, and advisory opinions in accordance with Protocol No.2. Applications by individuals constitute the majority of cases heard by the Court.[2] A Committee is constituted by three judges, Chambers by seven judges and a Grand Chamber by 17 judges.

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PAR 2: The facts

Mr Vemal Demir was a member, and Mrs Vicdan Baykara was the president, of the Turkish trade union for civil servants, Tüm Bel Sen. The union signed a two year collective agreement in 1993, but the employer, the Gaziantep Municipal Council did not comply with its provisions. Demir and Baykara brought proceedings in the District Court, and won their claim. However, on appeal the Court of Cassation quashed the decision. This Court held there was a right to join a union, but the union itself had "no authority to enter into collective agreements as the law stood".

The matter was then remitted to the District Court, which in defiance restated its view that Demir and Baykara did have a right to collective agreements, because this accorded with International Labour Organisation Conventions ratified by Turkey. But again, the Court of Cassation overturned the District Court's decision. Furthermore, a separate claim in the Audit Court had been brought, which found that civil servants had no authority to engage in the collective agreement, and so the civil servants had to get the union to repay extra benefits it had got under the "defunct" collective agreement.
After these domestic avenues were exhausted, in 1996 the union made an application to the European Court of Human Rights, alleging breach of freedom of association under article 11 ECHR and protection against discrimination under article 14 ECHR. After some time, in 2006, the case was heard by seven judges of the second section. It was held that article 11 had been violated, and there was no need to examine article 14. The Turkish Government then requested that the matter be referred to the Grand Chamber.

PAR 3: Articles discussed in the case
Here you have the text of the articles:

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.
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.

Article 14 - Prohibition of discrimination:
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

PAR 4: The judgement
The Grand Chamber of the European Court of Human Rights held unanimously that there had been a disproportionate and unjustified interference with the right to freedom of association.
Here you have the most interesting parts of the judgement:
119. As to the necessity of such interference in a democratic society, the Court reiterates that 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. In determining in such cases whether a "necessity, States have only a limited margin of appreciation.

120. As to whether, in the present case, the non-recognition of the applicants' union was justified by a "pressing social need", the Grand Chamber endorses the following assessment of the Chamber:

"it has not been shown before it that the absolute prohibition on forming trade unions imposed on civil servants ... by Turkish law, as it applied at the material time, met a 'pressing social need'. The mere fact that the 'legislation did not provide for such a possibility' is not sufficient to warrant as radical a measure as the dissolution of a trade union."

126. The Court thus considers that the combined effect of the restrictive interpretation by the Court of Cassation and the legislature's inactivity between 1993 and 2001 prevented the State from fulfilling its obligation to secure to the applicants the enjoyment of their trade-union rights and cannot be justified as "necessary in a democratic society" within the meaning of Article 11 § 2 of the Convention.

127. Accordingly, there has been a violation of Article 11 of the Convention on account of the failure to recognise the right of the applicants, as municipal civil servants, to form a trade union.

The Grand Chamber then turned to whether the Court of Cassation's annulment of the collective agreement between the trade union Tüm Bel Sen and the authority which had been applied for the previous two years was lawful, based on its interference with article 11 ECHR.

PAR 5: General principles about the right of association

Interesting principles from case law:

140. The Court has always considered that Article 11 of the Convention safeguards freedom to protect the occupational interests of trade-union members by the union's collective action.

141. As to the substance of the right of association enshrined in Article 11 of the Convention, the Court has taken the view that paragraph 1 of that Article affords members of a trade union a right, in order to protect their interests, that the trade union should be heard, but has left each State a free choice of the means to be used towards this end. What the Convention requires, in the Court's view, is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests.

142. As regards the right to enter into collective agreements, this right in no way constituted an element necessarily inherent in a right guaranteed by the Convention.

143. In the case of Wilson, National Union of Journalists and Others, the Court considered that even if collective bargaining was not indispensable for the effective

enjoyment of trade-union freedom, it might be one of the ways by which trade unions could be enabled to protect their members' interests.
144. The evolution of case-law as to the substance of the right of association enshrined in Article 11 is marked by two guiding principles: firstly, the Court takes into consideration the totality of the measures taken by the State concerned in order to secure trade-union freedom, subject to its margin of appreciation; secondly, the Court does not accept restrictions that affect the essential elements of trade-union freedom. These two principles are not contradictory but are correlated.
145. the following essential elements of the right of association can be established: the right to form and join a trade union; the prohibition of closed-shop agreements; and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members.
146. The Convention is a living instrument which must be interpreted in the light of present-day conditions. Limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human rights.

The right to bargain collectively:
In international law, the right to bargain collectively is protected by ILO Convention No. 98, it was ratified by Turkey in 1952. It states in Article 6 that it does not deal with the position of "public servants engaged in the administration of the State". However, the ILO's Committee of Experts interpreted this provision as excluding only those officials whose activities were specific to the administration of the State. With that exception, all other persons employed by government should be able to engage in collective bargaining in respect of their conditions of employment.
148. The Court further notes that ILO Convention No. 151 leaves States free to choose whether or not members of the armed forces or of the police should be accorded the right to take part in the determination of working conditions, but provides that this right applies everywhere else in the public service, if need be under specific conditions.
149. As to European instruments, the Court finds that the European Social Charter, in its Article 6 § 2 (which Turkey has not ratified), affords to all workers, and to all unions, the right to bargain collectively. The Court observes, however, that this obligation does not oblige authorities to enter into collective agreements. According to the meaning attributed by the European Committee of Social Rights (ECSR) to Article 6 § 2 of the Charter which in fact fully applies to public officials, States which impose restrictions on collective bargaining in the public sector have an obligation, in order to comply with this provision, to arrange for the involvement of staff representatives in the drafting of the applicable employment regulations.

PAR 5: Evolution and consequences
It is also appropriate to take into account the evolution in the Turkish situation since the application was lodged. Following its ratification of Convention No. 87 on freedom

of association and the protection of the right to organise, Turkey amended, in 1995, Article 53 of its Constitution by inserting a paragraph providing for the right of unions formed by public officials to take or defend court proceedings and to engage in collective bargaining with authorities. Later on, Law no. 4688 of 25 June 2001 laid down the terms governing the exercise by civil servants of their right to bargain collectively.

PAR 6: Relation between ECHR and ECJ

The Court of Justice of the European Union (ECJ) is not related to the European Court of Human Rights. However, since all EU states are members of the Council of Europe and have signed the Convention on Human Rights, there are concerns about consistency in case law between the two courts. The ECJ refers to the case-law of the European Court of Human Rights and treats the Convention on Human Rights as though it was part of the EU's legal system, since it forms part of the legal principles of the EU member states. Even though its member states are party to the Convention, the European Union itself is not a party, as it did not have competence to do so under previous treaties. However, EU institutions are bound under article 6 of the EU Treaty of Nice to respect human rights under the Convention. Furthermore, since the Treaty of Lisbon took effect on 1 December 2009, the EU is expected to sign the Convention. This would mean that the Court of Justice is bound by the judicial precedents of the Court of Human Rights's case law and thus be subject to its human rights law, avoiding issues of conflicting case law between these two courts.

PAR 7: Comparison with Laval case

Demir and Baykara v Turkey has widely been seen as a landmark case in the international development of freedom of association. Its significance lies in confirming that there is an inherent right to collective bargaining protected by article 11 ECHR, within the right to freedom of association. Only interference that is strictly necessary in a democratic society can be justified.

A particular point of interest is its apparent tension with decisions of the European Court of Justice of the European Union in *The Rosella* and *Laval*, which held that there is a qualified right to strike, but one which can only be exercised when it does not disproportionately affect the EU business right to freedom of establishment or providing services. It is highly open to question that these two cases, which preceded the judgment in *Demir* could be reconciled, given that Convention jurisprudence places the emphasis on justifying restrictions on the human right to free association, and would seem to favour greater attention to the need to collectively bargain.