

Collective Action Right as a Basic Human Right

Pir Ali Kaya

*Prof. Dr., Uludag University, Faculty of Economics &
Administrative Sciences, Department of Labour Economics &
Industrial Relations, Labour Law*

Ceyhun Güler

*Res. Ass., Uludag University, Faculty of Economics &
Administrative Sciences, Department of Labour Economics &
Industrial Relations, Industrial Relations*

Abstract

According to The European Social Charter, the European Convention on Human Rights, the ILO Conventions, the decisions of the European Court of Human Rights, the decisions of the European Social Rights Committee and the ILO supervisory bodies, the right to collective action is a democratic right that aims to protect and correct the economic and social interests of workers in the workplace or in another place appropriate for the purpose of action. The above-mentioned institutions accept the right to collective action as a fundamental human right. According to the decisions of the European Court of Human Rights, the right to collective action is regarded as a democratic right, including strike. In particular, the right to collective action is being used as a resistance mechanism against new working relations, which are imposed on working conditions, right to work and the right to organize. However, the tendency of this right to political field, leads to some debate about the legality of the right to collective action. In this context, In the decision of the European Court of Human Rights, the ILO's supervisory bodies and the European Committee on Social Rights, it is emphasized that collective action rights should be a basic human right. In this study, the legal basis of the right to collective action will be discussed in accordance with the decisions and requirements of the European Court of Human Rights and the decisions of the ILO supervisory bodies.

Keywords: *Collective Action Right, Human Right, International Labour Organization, European Court of Human Rights*

1. Introduction

Collective action right is a democratic resistance right that workers collectively resort to against decrees and applications with adverse affects on their economic, social and working conditions. Collective action right is a fundamental human right evaluated within the scope of freedom of thought and expression. Collective action right is based on decrees by European Human Rights Convention, European Council European Social Charter, ILO Conventions and ECHR decrees, European Committee of Social Rights and ILO Supervisory Machinery.

Collective action right covers strikes but has a wider scope. Protests similar to strikes, slowdowns and general strikes, solidarity strikes and sympathy strikes are evaluated within the scope of collective action right. The benefits that workers are bound to protect by way of collective action are not only directed at occupational or working conditions. It can also be directed at economic and social policy issues that interest them as well as the solution of problems that their workplace faces. In this scope, collective action right that is actualized within the scope of the right of association as is reflected in the decrees by ECHR, should be seen as a collective appearance of the freedom of expression. More clearly, the defense of economic and social interests by way of collective action should be evaluated on the basis of freedom of expression.

The contribution of "evolutive interpretation" matured over time by ECHR has made a significant contribution to collective action right gaining legality. ECHR considers trade union freedom as a special part of the freedom of association when interpreting EHRC item 11, in addition

it also evaluated item 11 together with the freedom of expression right included in item 10. In all its decrees, ECHR does not see EHRC as the only reference with regard to the rights and freedoms it contains but also takes into consideration all principles and rules of international human rights law. Therefore, it protects the principle of the “integrity and universality” principle of human rights by taking into consideration all social, legal and political developments that took place starting from the day the convention went into effect and emphasizes the “living” characteristic of the convention. The decrees of ECHR related with collective action take place in this scope. Therefore, in its decrees related with collective action, ECHR sees collective action as a part of the trade union right and also as a right which is an extension of the freedom of expression. This study focuses on the legal foundations of the collective action right, the legibility of the right as well as the criteria sought for in order to ensure that the right is considered legitimate.

2. Concept of Collective Action and its Legal Bases

Collective action right the legal basis of which is European Social Charter, European Convention of Human Rights, ECHR decrees, European Social Rights Committee and decrees by ILO supervisory machinery is a democratic right aiming to protect and improve the economic and social interests of workers which takes place at the workplace or other places suited to the objective of the action (Engin, 2016: 148 et.al.; Tatal, 2013: 453 et. al.). Collective action right is a democratic right to resist of the workers against decrees and applications which have adverse effects on their economic, social and working conditions.

Collective action right is accepted as a human right in human right documents (Güzel, 2015: 422; Gülmez, 2014: 235 et. al.). Collective action right is adopted as a higher concept in ILO conventions, European Convention of Human Rights, European Social Charter, Social Committee and ECHR decrees that encompasses strikes as well (Gülmez, 2002: 5 et. al.). In this framework, actions such as “protests such as strikes, slowdown...” (TR Supreme Court (TC, Yargıtay) 7 H.D. E 2014/7643; K:2014/12368: 04.06.2014) have been evaluated within the scope of collective action right. ILO supervisory machinery have put forth in their decrees that strikes for a political purpose, general strikes and sympathy strikes should not be banned in issues which affect the interests of the trade union members.

According to the ILO supervisory machinery: right to strike is not limited only with industrial conflicts which can be solved with the signing of a collective agreement. The vocational and economic interests that workers protect by way of the right to strike are not related only with better working conditions or collective demands related with their occupation. It also includes the economic and social policy problems as well as the problems that the business faces which are directly related with the workers. The declaration that the national strike for protesting the social and employment related results of the economic policies of the government is illegal and the banning of the strike are severe breaches of the freedom of association. According to the Committee on Freedom of Association, “It is a fundamental element of the freedom of association that trade unions have the right to organize meetings in their own buildings without prior permits and without any intervention by the officials for discussing their occupational problems. And therefore, administrative authorities should refrain from any interventions that will limit or prohibit the use of this right unless public order is disturbed or the protection of the order is under severe and close danger...” The committee sees the trade union meetings and the right to strike as the basis of trade union rights and asserts that meetings and actions which are open to public are important aspects of trade union rights (ILO, 1996: 29-30; Güzel, 2015: 422; Yorgun, 2016: 1176).

This approach is also observed in the decrees by the European Court of Human Rights and European Committee of Social Rights. When interpreting the “collective action right including the right to strike) included in item 6/f.4 of the European Social Charter, European Committee of Social Rights accepts that “... the right to strike cannot be used only during the collective agreement procedure and in conjunction with this procedure”. According to the committee: the actions by a group of workers during a period when their labour contracts are cancelled or their actions for revocation of the layoffs are included as part of their collective action right excluding the collective agreement procedure preventing cancellation of their labour contracts” (TR Supreme Court (TC,

Yargıtay) 7 H.D. 2014/7643, K.2014/12368, 9: 04.06.2014, 1-2) ECHR considers the international agreements for fundamental rights and freedom such as European Human Rights Convention, European Social Charter, UN Agreements and ILO agreement as comprehensive elements of a whole. In addition, it emphasizes that collective action right covers the right to strike while establishing an absolute relationship between the freedom of association and collective agreement right. Therefore, it evaluates the collective action right within the scope of protecting the freedom of thought and their right to protect the interests. The court emphasizes the basic principles of the EU law in its decrees and tries to establish a balance between the economic and social goal of the Trade union (European Commission, 2012: 2).

The fundamental principle matured over the years by ECHR regarding the interpretation of the basic rights and freedoms is the “integrity and the universality principle of human rights” (Engin, 2015b: 16 et. al.). Indeed, starting from 1975, ECHR has interpreted the European Human Rights Convention taking into consideration the social, legal and political developments that took place from the date when the convention went into effect to until now (Engin, 2015b: 16). The Court expressed in its Belgium Police National Trade union / Belgium (App no 4464/70) Decree dated 1975 that European Human Rights Convention item 11/f.1 gives the discretionary power to the state for selecting the tools it will use and that collective agreement is one tool but not the only one and as a general principle that trade unions reserve their rights to protect the rights and interests of their members by way of collective action in accordance with item 11. In addition, it has also been put forth that the state is obliged to allow and make possible this collective action (Dorssemont, 2016: 68). While interpreting the European Human Rights Convention item 11 in its 1976 dated Schmidt and Dahlström/Sweden (App no 5589/72) Decree, the Court put forth that the trade union members did not gain the right for obtaining a certain treatment from the state and especially that no right for collective agreement has been provided. However, it has been emphasized by the same decree that there is a right to rest for protecting the rights of its members (Dorssemont, 2016: 68; Köksal, 2015: 68). Hence, it was concluded that the trade unions defending the rights of their members as specified in item 11 is not a vain expression but that protecting the rights is part of the freedom of association (Dorssemont, 2016: 68). Following this decree, ECHR considered in its 1996 dated Gustafsson/ Sweden (App no 23196/94) decree that the trade unions making collective agreements in the names of its members is an effective tool for the right to organize a collective action for protecting the rights of its members and the collective agreement right. Thus, the court expanded the scope of the trade union rights with this decree (ECHR 2016: 2 et al.). Six years after this decree, new expansions were made by way of the 2002 dated Wilson et.al./United Kingdom (App no. 5493/72) decree regarding the scope of the trade union rights. After declaring by way of this decree that the lack of imposing an obligation for collective bargaining to the employers in the British law does not bear consequences resulting in the breach of item 11, the court reached a conclusion that the trade unions have the right to organize a collective action encompassing strikes for convincing the employer to start a collective bargain. As a result of the Wilson decree, the court established an organic bond between the trade union right arranged in item 11 and not only the collective bargaining right but also with the collective action right thereby accepting that collective action right is a part of trade union right and collective bargaining right (Çoban Wiles, 2012: 5-6).

The attitude of the court regarding the fact that the trade union right encompasses the collective action right based on the “protection of interests” clause in item 11 of AIHS by way of evolutive interpretation matured during the 2000’s and reached its peak with the 2008 dated Demir and Baykara/Turkey (App. No. 34503/97) decree. The Demir and Baykara decree of the court is qualified as a “historical and founding” decree (Mouly, 2012: 230 et al.). The Demir and Baykara decree represents the methodological as well as normative maturation of the judicial opinion developed by the Court over the years¹. It should be noted that, different than the decree by ILO

¹ ECHR expanded the scope of the trade union right arranged by Demir and Baykara decree EHRC item 11. The court refuses the limitations that will affect the core of trade union right. With this decree, the court has not made a decision based literally on the convention but also by taking into consideration the social, legal and political developments. Therefore, it has taken an important step in institutionalizing the evolutive interpretation

and the European Social Charter, ECHR decrees may give a ruling with execution power in the domestic law of the country that is a party to the agreement. To put it more clearly, ECHR is a real judicial organ with the authority to express what the “Juris dictio” law is for each case (Engin, 2015b: 16).

3. Characteristic of Collective Action Right

Collective action right has different characteristics in comparison with strikes due to its nature. In a technical sense, strike is a collective action that is called on as an effective tool of the collective bargaining process within the scope of trade union rights which is intended for protecting the interests in professional relations. Thus, even though the collective action right encompasses the right to strike, it is based on freedom of expression and the right of peaceful assembly and association.

The nature of the collective action right has solidified as a result of the decrees by ECHR based on items 10 and 11. As has been expressed in items 10 and 11 of the European Human Rights Convention, “everyone has the right of freedom of expression” and “everybody has the right of peaceful assembly and association”. It should be noted that the enrichment by ECHR of the content of item 11 of the European Human Rights Convention based on expression and demonstration march is no coincidence. Item 11 of the European Human Rights Convention which regulates the right of organization comes after item 10 which regulates the freedom of expression. As is seen clearly in the decrees by the court, the right of organization is handled as the collective appearance of the freedom of expression. In the Energy Structure and Yolsen/Turkey decree (App no 68959/01) dated 2009, the public authority gave a ruling that those who participated in the strike shall receive a disciplinary punishment following the carrying out of the strike by the public workers despite its prohibition with a memorandum. In this lawsuit, the court emphasized that the right to strike is an important factor for defending the interests of the trade union members and considered the disciplinary punishment imposed on the public workers for participating in the strike as an intervention within the scope of item 11. In addition, the related interpretation was based on the ILO Convention No. 87 between the European Social Charter (Köksal, 2013: 69). Therefore, when interpreting item 11 of the Agreement, the Court takes into consideration the protection of the economic and social interests of the workers as well as handling the the issue of defending the economic and social interests from a wider perspective based on the freedom of expression (Engin, 2015a: 22).

On the other hand, in the decrees they made, ILO supervisory machinery did not limit the right to strike only with industrial conflicts that may be solved by the signing of a collective agreement. According to CFA, the occupational and economic interests protected by the workers by way of the right to strike are not related only with better working conditions or collective demands of an occupational nature. In addition, it also includes economic and social policy problems that are directly related with the workers as well as solutions for the problems that the business faces directly. According to the committee, trade unions may use the right to strike for providing support at the point of resolution against economic and political policies with direct effects on its members and in general on the benefits of the workers. However, these actions that can be called upon for affecting the economic and social policies of states should in principle be in the form of putting forth a protest and should not pursue the disruption of peace. According to the committee, demands put

method. In this decree, the court made an evaluation regardless of whether a state made a reservation on the related items of the European Council Social Charter and in addition specified that the convention is not the only basis when interpreting the rights and freedoms in EHRS thus handling international human rights norms as a whole regardless of state approval. When examining the discrepancy, the court included its previous decrees as well as the decrees by ILO and UN regarding trade union rights convention and supervisory bodies. In addition, it used the related human rights documents as a justification for its decrees. Therefore, it has paved the way to the triability of social rights while expanding the scope of trade unions (ECHR, Case Of Demir Baykara v. Turkey: 20-24 and 29 et. al.)

forth by way of collective action may carry both occupational and trade union qualities as well as a political quality. In this case, it should be evaluated when determining the legitimacy of the strike whether occupational and trade union demands are used as a tool for hiding the purely political goals independent of the objective to protect and improve the interests of workers. The banning of strikes which protest the economic and social policies of states at a national scale is a serious breach of the freedom of association (Alpagut, 2013: 142). Therefore, the collective action right is a last resort when all means for demanding a right have been tried. Collective action of workers is a difficult decision that is taken when no other solution can be found for solving the problem at the end of a difficult process (Engin, 2016: 156).

In short, the human rights attribute of the collective action right is based on item 11 of ECHR. ECHR evaluates the collective action right within the scope of the freedom of expression. The basis of collective action is the protection of the interests of workers. The action may be towards the workplace in order to protect a right. Or, it might gain a political attribute for the protection of the general socio-economic interests. Whatever the reason is for the action, it should protect its validity condition, it should be based on a legitimate cause and it should retain its peaceful attribute.

4. The Requirements that the Right to Collective Action be Legitimate

4.1 There should be a legitimate aim

First of all, the collective action should bear the purpose of protecting and improving the economic and social rights of workers. However, if the workers use their collective action right against the employer, a fair balance should be established between the right to react for common economic, the property right of the employer and the collective bargaining right. Apart from this, if the collective action right is used for the protection of a right outside of the workplace such as political strike or general strike, it is possible damage to the employer due to the fact that the employer who is under pressure through collective action and the action-ending employee are separated and the oppressed person does not have the initiative of the employer. For instance, workers can carry out protests by asserting that the completed or desired legal arrangement threatens their own rights or to attract attention to the already existing or possible unjust treatment they are facing.

The statement, behavior or action put forth for this purpose are directed towards a legitimate cause. However, this action should not withhold the workers from working for long periods of time and therefore should not cause any irreparable damages to the employer (Engin, 2016: 153-154; Doğan, 2014: 313). In its 2009 dated Kaya and Seyhan/Turkey (App No 30946/04) decree, ECHR decided that item 11 of ECHR is violated on account of the fact that the right to effectively use the freedom for demonstration has been disproportionately overridden when Eğitim-Sen member teachers were issued a warning after participating in a one day national action organized for protecting the public administration law draft following the call by KESK to its member teachers on 11/12/2003 and that even though this punishment is a minor one, it might lead to the teachers to give up on participating the action and that the disciplinary punishment does not correspond to an "immediate social need" and hence it is not "required in a democratic society" (TR Constitutional Court (TC, AYM) Justification of Decisions , 2013/8517, Decree:2015, Date: 06.01.2015).

4.2 It Should be in Accordance with the Principle of Proportionality

In essence, the principle of proportionality is a principle that is applied in administrative law and implies that the restriction tool is suited for actualizing the restriction goal, that the tool does not pose an obligation with regard to the restriction goal and that the tool and goal are not disproportionate (Kılıçoğlu-Şenocak, 2010: 181; Gülmez, 2002: 9).

The principle of proportionality may be divided into three sub-principles. These are; convenience, proportionality principles. Therefore, the measure that will be taken in accordance with the principle of proportionality should be adequate to reach the desired goal, should be necessary with regard to the desired goal and the intervention that will be the result of the measure to be taken should not be disproportionate to the desired goal (Kılıçoğlu-Şenocak, 2010: 185). With

regard to the collective action right, the principle of proportionality indicates that the duration and scope of the collective action are proportionate with the demand put forth via collective action.

The collective action should be a fair tool for the struggle for rights. Hence, it should be suited and necessary for reaching the goal put forth when using the collective action right. It is possible to state that actions which exceed the declared demand and which last a long time do not comply with the principle of proportionality. In addition, whether the work can start again following the collective action as well as the measures required for personal and public needs will determine whether the action has taken place in accordance with the principle of proportionality or not (Doğan, 2014: 328).

The only losses that will render the collective action illegal are irrecoverable losses. For instance, the participation of the main service staff to a collective action by health staff may result in irrecoverable losses (Engin, 2015a: 32). In its decrees, ECHR sought for the principle of proportionality in the interventions of public authorities towards trade union rights. According to ECHR, it should be evaluated with regard to the requirements of a democratic society whether "there is a balance between the restriction goal and tool" towards trade union rights. Democratic society criteria should be interpreted on the grounds of "pluralism, tolerance and open-mindedness" (1976 dated Handyside/ United Kingdom, App No. 5493/72, 1999 dated Başkaya and Okçuoğlu/ Turkey App. No. 23536/94, 24408/94). The assurance that comes into play in limitations against rights and freedoms is the principle of proportionality. Proportionality reflects the relationship between the goals and tools for limiting the basic rights and freedoms. Therefore, it should be evaluated in interventions against trade union right whether the intervention is adequate, necessary and proportional for reaching the determined goal (TR Constitutional Court (TC, AYM), App no 2012/1051,20.02.2014, App no: 2013/409,25.06.2014). ECHR explained the 10th and 11th items of the Convention. According to ECHR, the concept of "necessity" implies a "compulsory social need" (1976 dated Handyside/ United Kingdom, App No. 5493/72). It will be necessary to look at whether the structural or administrative interference with the freedom of association and trade union's right to meet the pressure of a social need. An intervention within this framework should be proportional with the legitimate cause; secondly, the justifications put forth by the public authorities for the legitimacy of the intervention should be sufficient and related with the issue 2001 dated, Stonkov and Ilinden/Association of United Macedonians/ Bulgaria, App No: 29221/95, 29225/95). Therefore, the balance between the disciplinary action taken against the collective action of not coming to work within the scope of trade union activities and the public benefit aimed should be proportional. If not, the public benefit sought will not have credible and therefore will not be legitimate (TR Constitutional Court (TC, AYM), App No: 2013/7199, 25.03.2015: 8).

4.3 It Should be in Accordance with the Ultima-Ratio Principle

Ultima-ratio principle in labour law is a method that is frequently used for protecting the worker in cases when the labour agreement is terminated by the employer and which implies refraining from termination. It is used in modern labour law as a last resort (ultima ratio) if contract termination is required in case a solution cannot be reached when all means are used. The term "ultima ratio" was first used on the inscription of "ultima ratio regum" on French cannons and it should be noted that it means "the king's last resort". What is meant by the aforementioned inscription is that the armaments should be used as a last resort if it is not possible for the political power to solve the issue without the use of armaments. War should be a last resort only when other means of solution are not possible.

It should be noted that ultima-ratio has been included as a principle for the cancellation of contracts in decrees by the German Federal Court of Labour since the 1970's. According to the decrees by the German Federal Court, termination of contract will be used only as a final resort when the worker has no means of working at the workplace even under worse conditions in cases of termination due either to the insufficiency of the worker or to issues related with his/her behavior regardless of whether it is an ordinary or an extraordinary termination (Kılıçoğlu-Şenocak, 2010: 198-199). Whereas with regard to collective action right, the ultima-ratio principle implies all negotiations and peaceful means that should be tried before collective action. As is the case in legal strikes, a balance should be established between the proprietary right of the employer and the

demand put forth by the action when using the collective action right.

Collective action right should not result in irrecoverable damages whether it is used against the workplace or for political purposes. The possible damage to the employer should especially be regarded (Engin, 2016: 153-154; Güzel, 2015: 413 et.al.; Doğan, 2014: 328). The most important limitation related with the trade union freedom in German law is the ultima-ratio principle for strikes. According to the German law, all means of negotiation should have been tried for resolving the conflict. Only then may strike be considered as ultima-ratio for the resolution of the conflict (Doğan, 2014: 326).

4.4 *It Should be Peaceful*

Another criteria used by the European Court of Human Rights and the ILO supervisory machinery for inspecting the legality of the collective action is considering whether the action is peaceful or not. It is actually a fundamental condition of the principle of proportionality that the collective action is peaceful. Committee on Freedom of Association which is one of the audit bodies of ILO, the right to strike cannot be limited only with collective agreement conflicts; the workers and trade unions have the right to express their dissatisfaction with economic and social policies at a wider scale if they consider that it is necessary to do so. According to the committee, actions of slowdown, stoppage and workplace occupation are within the scope of the freedom of association. It is not proper to impose a general ban with regard to strike types; however, actions such as slowdown, stoppage, workplace occupation may be limited in case they are no longer peaceful (Engin, 2016: 157). On the other hand, "No one should be deprived of his/her freedom or be subject to penal sanctions for organizing or taking part in a peaceful strike" (ILO, 1996: 123).

Freedom of association and trade union rights are among the freedoms that embody political democracy and make up one of the fundamental values of a democratic society. Discussion and resolution of issues as open to public make up the basis of democracy. In this scope, individuals who use their trade union rights including collective action right benefit from the preservation of the fundamental principles of democratic society such as pluralism, tolerance and open-mindedness. Even if opinions that do not encourage violence or that are put forth within the framework of trade union rights as long as they do not involve the rejection of democratic principles or their means of expression cannot be accepted by public authorities, easures for eliminating the freedoms of expression, association and trade unions endanger democracy. Different opinions should be allowed to be expressed by way of trade union freedoms or other means in a democratic society based on the supremacy of law (TR Constitutional Court (TC, AYM), Application No.: 2013/8463, 18.09.2014). Hence, the sustainability of the democratic social order should be observed when using the right for collective action be it for the protection of the interests at the workplace or against the economic or social policies of states. According to the ILO Committee on Freedom of Association, actions should put forth a protest and should not seek to disrupt the peace (ILO, CFA, Report, Case Nr.: 1562, Prgrph. 518(a)).

According to the committee, the strike should be among the types of actions that can be used by labour organizations in case of a general strike. For instance, a 24 hour strike for the increase of minimum wages, revision of economic policies (decrease of prices and unemployment), demand from the employer to comply with the collective agreement that is in effect are legal and are within the scope of the normal activity area of trade union freedoms (ILO, CFA, Report Case Nr.: 1381, Prgrph. 412 and 413). Similarly, actions such as stoppage, slowdown and workplace occupation are legal as long as they retain their peaceful attribute (ILO, CFA, Report Case Nr.: 997,999, 1029, Prgrph. 367, 260 and 39).

5. Conclusion

Collective action right is a fundamental human right protected by international human rights law. Even though collective action encompasses the right to strike, there are some technical differences in comparison with strikes. Whereas strike is a right used within the scope of collective bargaining, collective action right is based on freedom of expression.

Collective action right that takes place within the scope of the trade union right which is a special appearance of the freedom of association is included among the fundamental values of democratic societies. It serves to the protection of the rights of workers to found trade unions and carry out trade union activities as well as to the protection of their economic, social and cultural rights. Peaceful and measured actions carried out collectively by workers against applications at their workplace with adverse effects on their economic and social status are evaluated within the scope of the use of a democratic right in democratic societies. It should be noted that it is a ultima ratio decision that is used when there are no other means left but to protect a right due to the nature of collective action right.

In its decrees, ECHR considers collective agreement right and collective action right as parts of the trade union right whole based on the "protection of interests" statement included in item 11 of EHRC. ECHR interprets item 11 of the contract that regulated trade union right together with item 10 which regulates freedom of expression. In addition, it also bases the decrees related with trade union rights and freedoms only on the arrangements in the convention thanks to the "evolutive interpretation" method it uses. It also bases the decrees on the European Council European Social Charter along with the conventions of UN and ILO related with human rights. ECHR evaluates collective action right within the scope of the workers' right to protect their occupational interests. However, ECHR points out that there should be a legitimate goal when using the collective action right, that all means of struggle should have been used, that the action should be peaceful, measured and that it should not result in irreparable damages.

Similarly, Social Rights Committee and ILO Committee on Freedom of Association evaluate the collective action right within the scope of trade union right in their decrees. According to both committees, the limitations that will be imposed should not harm the rights and freedoms but that collective action right should be used in accordance with the principle of proportionality and thus not result in any harm in public order, public safety and general health. Therefore, collective action right is a legitimate right as is openly emphasized in the decrees by ECHR, Social Rights Committee and ILO Committee on Freedom of Association. However, the workers should ensure when using this right that the action takes place in a peaceful manner within the scope of a legitimate goal and should not cause any irreparable damages.

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