



## Mandatory mediation in labour law: A Draft Bill in Turkey

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In the last quarter of the 20th century, Alternative Dispute Resolution (ADR) methods have been discussed to a great extent and a tendency towards mediation, conciliation and arbitration has been observed.<sup>1</sup> Turkey has not stayed out of these evolutions, as Act No. 6352 on Mediation in Civil Law Disputes was enacted in 2012 and new institutions have been established. The parties of an employment relationship may mediate voluntarily, however, the new Draft Bill on Labour Courts would introduce mandatory mediation as a condition of litigating in courts. The article will discuss, whether labour law disputes are appropriate for mandatory mediation in Turkey and evaluate the possible impacts of such a new labour law mediation regime deriving from the Turkish Draft Bill.

### 1. General Overview of the Draft Bill

By means of the Draft Bill on Labour Courts, major amendments in the labour judiciary are proposed in Turkey. As per the first paragraph of Article 3:

“It is mandatory to apply for mediation in legal actions brought by the employee for his/her rights arising from the statute, the contract of employment, collective agreement or for his/her reinstatement before filing the lawsuit. Otherwise, proceedings shall be carried out according to the first paragraph and first subparagraph of the second paragraph article 115 of the Code of Civil Procedure dated 1/12/2011 and numbered 6100.”

In the general preamble of the Bill, the heavy workload of the labour judiciary was underlined as follows:

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<sup>1</sup> See K. J. HOPT – F. STEFFEK: *Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues*. In: K. J. HOPT – F. STEFFEK (ed.): *Mediation Principles and Regulation in Comparative Perspective*. Oxford University Press, 2013. 5 et seq.

“...the disputes between employees and employers take an important place in both the agenda labour life and the jurisdiction. By the end of 2015, approximately 18% of the roughly 3 million 400 thousand legal disputes in the first instance courts and approximately around 30% of 750 thousand legal disputes are labour law originated.”<sup>2</sup> “According to the data of the General Directorate of Criminal Registration and Statistics, the average duration of labour cases is 466 days in 2010, 488 in 2011, 483 in 2012, 381 in 2013, 417 in 2014.”<sup>3</sup>

In the general preamble, the rationale behind the mediation in the labour jurisdiction is stated as follows:

“... The nature of the disputes within the jurisdiction of the labour courts is suitable to be settled by the parties through agreements via negotiations. The necessity of the settlement of these disputes through alternative dispute settlement methods besides labour jurisdiction has been acknowledged by all stakeholders of the problem in the last years. Mandatory mediation, as proposed by the Bill, is considered to be helpful for the settlement of labour disputes in a short time and with reduced expenses, thus, the right to be tried within a reasonable time which is a constituent of the right to a fair trial will be respected. Furthermore, it is expected that this method by resolving the dispute would contribute to social peace by preventing another material or formal dispute concerning the same issue. Taking into account that the mediation negotiations are confidential, by the help of this convenient method for the protection of the secrets of parties, it is anticipated that the parties will have the capability to resolve the dispute without being crumpled”<sup>4</sup>.

The distinguishing part of the proposal is based on mandatory mediation. The voluntary mediation practice seems to motivate the legislator:

“As per the Act No. 6325 on the Mediation in Civil Law Disputes adopted in 2012, the labour disputes can be brought to the mediator voluntarily. As a result of the two and a half year practice, it is observed that 72% of the civil disputes brought to the mediator are employee-employer disputes and approximately 100% of these disputes are concluded with a deal. 85% of the labour disputes brought to the mediator were concluded by negotiations that lasted for one day or less”.

The reasons for such an amendment are stated as

“...the characteristic of the labour jurisdiction, the nature of the relationship between the employee and the employer, the workload of the labour courts, the average duration of the

<sup>2</sup> The General Preamble of the Labour Law Draft Proposal, p. 8. <http://www.adalet.gov.tr/tasarilar/20160323-isMahkemeleriKanunuTasarisi-DuzmetinGerekce.pdf>.

<sup>3</sup> The General Preamble of the Labour Law Draft Proposal, p. 8. <http://www.adalet.gov.tr/tasarilar/20160323-isMahkemeleriKanunuTasarisi-DuzmetinGerekce.pdf>.

<sup>4</sup> The General Preamble of the Labour Law Draft Proposal, p. 8. <http://www.adalet.gov.tr/tasarilar/20160323-isMahkemeleriKanunuTasarisi-DuzmetinGerekce.pdf>.

labour cases and reconsideration of the Law No.5521 taking into account the provisions of Law No.6100”<sup>5</sup>.

In the Draft Bill, not only application for mediation, but also attendance to the negotiation meetings is required as compulsory. As per Article 3(7) of the Bill:

“The non-participating party to the mediation meeting without a valid excuse shall be indicated in the final report and even if a verdict is given in favour of him/her in the lawsuit, he/she shall be sentenced to pay all of the litigation expenses.”

Like in many other countries, the discontent about the gradual increase in the number of litigations and the quality of jurisdiction seems to have been playing an important role in the implementation of alternative dispute resolution methods. In the Dunlop report, prepared in the United States of America in 1994, it was discussed that

“...employment litigation has spiraled in the last two decades. The expansion of federal and state discrimination laws and the growth in common law and statutory protection against wrongful dismissal have provided employees with a broader array of tools with which to challenge employer behavior in court. In the federal courts alone, the number of suits filed concerning employment grievances grew over 400 percent in the last two decades. Complaints lodged with administrative agencies have risen at a similar rate: for example, in 1993, the EEOC received nearly 90,000 discrimination complaints from employees across the country. Employment litigation is a costly option for both employers and employees. For every dollar paid to employees through litigation, at least another dollar is paid to attorneys involved in handling both meritorious and non-meritorious claims. Moreover, aside from the direct costs of litigation, employers often dedicate significant sums to designing defensive personnel practices (with the help of lawyers) to minimize their litigation exposure. These costs tend to affect compensation: as the firm’s employment law expenses grow, less resources are available to provide wage and benefits to workers”<sup>6</sup>. In addition, it is stated that “even for those employees properly situated to file suit, the pursuit of a legal claim through litigation often proves stressful and unsatisfying”.

The similarity of considerations with the ones in the Turkish Draft Bill is striking.

The arguments in favour of mediation are based on the following reasons.<sup>7</sup> In all the alternative dispute resolution methods, the main objective is making parties more active in the settlement of

<sup>5</sup> The General Preamble of the Labour Law Draft Proposal, p. 8. <http://www.adalet.gov.tr/tasarilar/20160323-isMahkemeleriKanunuTasarisi-DuzmetinGerekce.pdf>.

<sup>6</sup> The Dunlop Commission on the Future of Worker-Management Relations – Final Report, 1993-1994, pp. 49 et seq., [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace).

<sup>7</sup> G. ILDIR: *Alternatif Uyuşmazlık Çözümü, (Alternatif Dispute Resolution)*. Ankara, 2003. 24 et seq.; M. S. ÖZBEK: *Alternatif Uyuşmazlık Çözümü, (Alternative Dispute Resolution)*, 3. Ankara, Baskı, (3rd Press), 2013. 256 et seq.; İ. E. POSTACIOĞLU – S. ALTAY: *Medeni Usul Hukuku Dersleri, (Law of Civil Procedure Courses)*, 7. İstanbul, Baskı, (7th Press), 2015. N. 1832 et seq.; H. PEKCANITEZ – O. ATALAY – M. ÖZEKES: *Medeni Usul Hukuku Ders Kitabı, (Law of Civil Procedure Course Book)*, 3. Ankara, Baskı, (3rd Press), 2015. 671–673.; S. TANRIVER: *Hukuk Uyuşmazlıkları Bağlamında Alternatif Uyuşmazlık Çözüm Yolları ve Özellikle Arbuluculuk (Alternative Dispute Resolution Methods and Mediation)*. *TBB Dergisi*, S. 64, 2006. 158.; Ö. OĞUZ: *Türk*

their disputes. By this means, they will experience a trial process under their own control without being subject to long and strict rules and they will not come through the fear of obscurity. Besides, mediation satisfies the needs of the parties for confidentiality. It avoids certain problems caused by the publicity of the judicial decisions and hearings. The confidentiality of the mediation meetings ensures the discussion of certain problems more candidly. Mediation enables the progress of trade relations between parties and the settlements help to improve trade relations among parties. Finally, when taken into account the proportional litigation costs in monetary disputes, mediation is a more economical way. Litigation costs come to the fore as an important reason in countries where jurisdiction is expensive like the United Kingdom and the United States of America. The heavy workloads and budgetary savings of the tribunals lead legislators to reduce costs by alternative resolution methods.

## 2. About the role and meaning of adjudication

We believe that one of the most important articles on this subject is “Against Settlement” by Owen Fiss<sup>8</sup>, although labour law is not the main concern of this article. However, many topics examined gives helpful insights to understand the problem in labour law. According to Fiss, the main problem is related to the aim of adjudication: if adjudication is a process to resolve disputes or if it means more than that. Actually, the advocates of alternative dispute resolution methods consider the adjudication as a process of dispute settlement in complete. The conflict between two quarrelled neighbours can be settled by an extrajudicial method instead of a long and expensive judicial process. At this point, courts are characterised as institutionalised third parties intervening in this conflict. The advocates of these methods believe, that the parties can settle their conflicts by bilateral agreements, which provide a more satisfactory and inexpensive solution compared to a court order.<sup>9</sup> The main object for both parties is to reach a satisfactory settlement rather than an equitable and justifiable judgment<sup>10</sup>.

In the settlement of the conflict between two neighbours, both the aim of the trial and the purpose of the settlement are the same: to resolve the dispute between the parties in peace. Mediation may provide such a result at a socially lower cost. However, the purpose of adjudication is not merely the maximisation of personal interests or the settlement of personal disputes in peace. The judicial process is also the interpretation and implementation of the rules and values embodied in the constitution and related codes. Through the settlement of the dispute, the parties does not end this duty of the judiciary.<sup>11</sup>

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*İş Hukukunda Alternatif Uyuşmazlık Çözüm Yolları (Alternative Dispute Resolution Methods in Turkish Labour Law)*. İstanbul, 2016. 28 et seq.

<sup>8</sup> O. M. FISS: Against Settlement. *Yale Law Journal*, Vol. 93, N. 6, 1984. Faculty Scholarship Series, Paper 1215., 1073 et seq.

<sup>9</sup> FISS op.cit. 1073. et seq.1075.

<sup>10</sup> TANRIVER op. cit. 152.

<sup>11</sup> FISS op.cit. 1085.

During the process of mediation, the parties settle, in most cases, property rights<sup>12</sup>. The parties' fundamental strategy is to enlarge and maximise their utilities, but they ignore external costs. If mediation and conciliation methods become widespread, the role of judiciary in law establishment and social behaviour guidance would be undermined. In a very successful alternative dispute resolution model, the courts will be deprived of their roles concerning norm- making by case law.<sup>13</sup> The precedent of the Court of Cassation has played a great role in the development of labour law. Both in Turkey and in other countries, many principles of labour law were firstly adopted by the judiciary and were only later enacted by the legislator.<sup>14</sup>

### 3. The Efficacy of Labour Law and Labour Adjudication

In the general preamble of the draft, the starting point was stated as: “*The nature of the disputes falling under the jurisdiction of labour courts is appropriate to be settled by the parties by reaching an agreement after negotiations.*” This observation needs to be examined carefully.

#### 3.1 Protection of monetary rights and the protection of fundamental rights

The fact that the constitutional rights turn into negotiable rights through the mediation may create risks with respect to the protection and enforcement of these rights. The protection of employees' fundamental rights and freedoms, such as prohibition of discrimination, protection of freedom of association, the freedom of thought and so on, is one of the main goals of statutory regulation. All claims for incomppliance with these rights comprise important difficulties of proof. Taking into account the difficulty of proof, all these rights risk of becoming negotiable in the mandatory mediation model.

Furthermore, vulnerable groups have less chance to achieve advantageous results at the bargaining table. Thus, in the United States it is argued that minorities and other vulnerable groups are under the risk of obtaining lower quality rights in alternative dispute resolution methods compared to formal adjudication.<sup>15</sup> A fast, cheap and informal trial is not always synonymous with a fair and ideal proceeding.<sup>16</sup>

<sup>12</sup> R. KULMS: Privatising Civil Justice and the Day in Court. In: HOPT–STEFFEK (ed.) op. cit. 206–207.

<sup>13</sup> FISS op.cit. 1085 et seq.; H. T. EDWARDS: Alternative Dispute Resolution: Panacea or Anathema. *Harvard Law Review*, 99., 1985-1986. 675 et seq.; A. M. ZACK: Conciliation of Labour Court Disputes. *Comp. Labor Law & Policy Journal*, Vol. 26., 2004–2005. 406.; Z. ŞİŞLİ: Bireysel İş Uyuşmazlıkları ve Yargısal Çözüm (Personal Labour Disputes and Judicial Settlement). *Ankara Barosu*, (Ankara Bar Association), 2012/2. 62–63.

<sup>14</sup> A. GÜZEL: İş Mahkemeleri Kanunu Tasarısı Taslağı Hakkında Bazı Aykırı Düşünceler!... (Some Contrarian Thoughts on the Labour Courts Law Draft Proposal) *Çalışma ve Toplum Dergisi* (Labour and Society Journal), (50), 2016/3. 1138–1140.

<sup>15</sup> EDWARDS op. cit. 672., 679.; ŞİŞLİ op. cit. 49–50.

<sup>16</sup> EDWARDS op. cit. 679.

### 3.2 *Labour law mechanisms to protect employee and mediation*

Labour law tries to deal with the problems arising from the weak status of employee. Not only contractual obligations, but also statutory public law duties are imposed on the employer by the conclusion of the employment contract. Statutory labour law regulates mostly employers' and more limitedly the employees' duties towards the state. The most extensive part of these regulations is related to health and safety regulations. Act No. 6331 on Occupational Health and Safety contains provisions both relating to public and private aspects of employment relationships. Since labour inspection is inefficient to monitor all processes in Turkey, civil liability becomes the only remedy in case of a breach of such duties. Negotiating on the amounts of these indemnities will have a negative impact on the efficiency of such rules.

Furthermore, the main part of the protective mechanisms in labour law aims to restrict the parties' freedom of will by cogent rules. Weakness arising from subordination of employees is compensated by rules of relative mandatory nature that one of the features is prohibition of waiver by its beneficiary, the employee.<sup>17</sup> Judiciary must take into account the imperative nature of these norms while resolving a dispute. In the Draft Bill, it is stated that parties may even negotiate on the items regulated by absolute mandatory rules. Thus, all non-negotiable rights turn into negotiable rights during the mediation process. We believe, that such a wide negotiation possibility would have a negative impact on the efficiency of labour law.

An objection may be brought forward, that the mandatory protection ends with the termination of the employment relationship. This argument is justifiable to a certain extent. If the employee cannot deviate from his/her mandatory statutory rights during the employment relationship, that is not the case after termination of employment. By the end of subordination, the parties' power of discretion gains strength.<sup>18</sup> According to the Turkish Code of Obligations 420/2, for the period of an employment relationship and for one month after its end, the employee may not waive arising from the employment contract. It is obvious that all these provisions will be applicable if the employee files a lawsuit. If not, it is evident that labour rights are not applied ex-officio. However, we believe this fact does not eliminate the drawbacks caused by the mandatory mediation model.

Primarily, the failure of an employee to bring a lawsuit for his/her non-paid rights is different in nature than to force each employee, who claims his/her rights, to sit at the bargaining table. If the Bill is enacted, the employee who aims to acquire his/her rights will be forced to negotiate on these rights mandatorily. As stated above, the economic rationale behind this agreement should be kept in mind.<sup>19</sup> After termination of the contractual relationship, the main aim of the employee would to acquire his/

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<sup>17</sup> K. DOĞAN YENİSEY: *İş Hukukunun Emredici Yapısı, (The Imperative Nature of the Labour Law)*. İstanbul, 2014. 227 et seq.

<sup>18</sup> DOĞAN YENİSEY op. cit. 240–241.

<sup>19</sup> KULMS op. cit. 210.

her receivables immediately; and for the employer the main goal would be to postpone these payments at the soonest possible date. The economic motivations of the parties to maximise their interests cannot be criticised. The problem seems to us, that the legal system supports such negotiation on these rights, which are guaranteed by mandatory rules.

In Turkey, to what extent legal provisions are effectively applied in working life is a matter of debate. The number of unionised workplaces acting in conformity with statutory duties is considerably lower than the number of informal, non-unionised workplaces. The labour inspectorate is far from being efficient in monitoring. Thus, the employee reaches his rights only by filing a lawsuit. By mandatory mediation, the employee would be put in a situation that he/she should make a choice to acquire either all his/her rights in a longer period or to agree for a lower amount in a shorter time.

Just an example to demonstrate this issue: it is prohibited to work overtime more than 270 hours in a year. Similarly, the maximum daily working hours is 11 hours. Even if it is prohibited, it is quite common for employees to work beyond these limits. Practically the only sanction for such a work is overtime payment. In many cases, the employee brings a lawsuit to sue these payments after the end of the contractual relationship. If the parties may negotiate on the amount of overtime work, considering the insufficiency of labour inspectorate, it would be much more difficult to implement these norms in practice.

### *3.3 The power imbalance and mediation*

The power imbalance between the parties constitutes another fundamental problem regarding alternative dispute resolution methods in labour law.<sup>20</sup> In labour jurisdiction and evidence evaluation process, the weakness of the employee has always been taken into account. However, mediation, by its nature, is a negotiation process. The power inequalities between the parties is the legitimate and supplementary part of this process<sup>21</sup>.

Mediation is the equivalent of the freedom of contract in the procedural law. However, the essence of labour law is not the freedom of contract, but the restrictions on the freedom of contract. The power imbalance between the parties of an employment relationship may affect the settlement in different ways. Firstly, the inequality of financial resources and information between the parties may change functioning of the process in favour of the employer and prevent the parties, particularly the employee, from finding the most appropriate solution.<sup>22</sup> Since the employee would be in need of financial payments immediately in many cases, he/she may agree on a lower amount even though he/she knows that he/she would be awarded higher compensation at the end of the court procedure.<sup>23</sup>

<sup>20</sup> GÜZEL op. cit. 1132–1133.

<sup>21</sup> FISS op.cit. 1076–1078.

<sup>22</sup> TANRIVER op. cit. 159.

<sup>23</sup> KARACABEY op. cit. 478.

Secondly, the asymmetry of power exists also relating to access to information.<sup>24</sup> The employee would have in many cases less correct information on the scope of his/her rights. It is more difficult for the employee to predict the extent of his/her legal rights at the end of the judicial process. The employer would have information on the outcomes of similar lawsuits. The settlement at the end of mediation is virtually just a result of parties' predictions about the outcome of the judicial process. Therefore, an informal settlement process may involve the risk of taking wrong decisions by the employee. Also the employer as a repeat player, will conduct the negotiation process keeping in mind to set a precedent for all other similar cases. This is actually a sign, that the employer would conduct tough negotiations.<sup>25</sup>

Besides, the weak party may be forced to make a deal, because, financially, he/she may not be able to bear the costs of a trial. Naturally, the employer will also know the trial costs, thus, he/she may in all cases deduct the trial costs from the offer. In this case, the weak party will bear the trial costs even though he/she made a deal<sup>26</sup>.

Finally, the psychological incentives of the parties are different from each other. From the employee's viewpoint, litigation entails financial and substantial matters. On the contrary, for an employer, litigation is related to financial matters and risk analysis. Employers' apology or similar conduct in the mediation process may be effective over the amount of compensation<sup>27</sup>.

### 3.4 Some empirical studies

The concerns about power imbalance and its impact on agreements are not just theoretical. Empirical studies show that these concerns are well-founded. We should admit that it is not easy to conduct such empirical studies due to great many methodological difficulties arising from the confidentiality principle in the mediation files.<sup>28</sup> However, the results obtained from completed studies seriously support our concerns.

In one of the empirical studies in the literature, it is provided that the employee obtains a sum smaller than the sum he/she may obtain at trial.<sup>29</sup> It is evident that alternative dispute resolution methods do not ensure an imperative protection for the employee. Another empirical study<sup>30</sup>, even though it is about another country and another alternative dispute resolution method, verifies the same result, that the

<sup>24</sup> G. OREN-AYAL – R. PERRY: Imbalances of power in alternative dispute resolution: the Impact of Representation and Dispute Resolution Method on Case Outcomes. *Law and Social Inquiry*, Vol. 39/4, Fall 2014. 791. et seq.

<sup>25</sup> OREN-AYAL–PERRY op. cit. 795.

<sup>26</sup> FISS op.cit. 1076.

<sup>27</sup> OREN-AYAL–PERRY op. cit. 795.

<sup>28</sup> Regarding methodological difficulties in these studies see D. SHERWYN – S. ESTREICHER – M. HEISE: Assessing the Case for Employment Arbitration: A New Path for Empirical Research. *Stanford Law Review*, 57., 2004–2005. 1564. et seq.

<sup>29</sup> OREN-AYAL–PERRY op. cit. 791. et seq., p. 819.

<sup>30</sup> A. J. S. COLVIN: Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury. *Employee Rights and Employment Policy Journal*, Vol. 11, 2007. 405., 445.

success rate of the employees and the amount of obtained payments in alternative dispute resolution are lower than those at the judiciary process.<sup>31</sup> Another research from the United States demonstrates, that the employees, who bring the discrimination disputes to the mediator, receive a lower amount of compensation than the other labour receivables.<sup>32</sup>

To sum up, it can be alleged that by mediation employees obtain his/her rights more quickly, however, less than the amount that the legal norm provides. The fact that the parties agreed at a higher rate does not demonstrate the justness of this settlement.

### *3.5 A behavioural pattern in the form non-payment of employees' claims*

An important part of individual labour law disputes in Turkey is related to the non-payment of statutory rights of the employee on time.<sup>33</sup> In some cases, it is even difficult to tell that there exists a legal dispute relating to the existence of the given right. To give an example, if the employer terminates the contract by respecting notice periods, he/she should pay a severance payment to the employee on the condition that the employment relationship has been maintained for at least one year. Likewise, it is evident that the amount of wage cannot be lower than the minimum wage. These norms cannot be changed to the detriment of the employee by private agreements. However, in many cases the employee receives his/her rights only, if he/she files a lawsuit against the employer.

The point is that an employer, who knows that the employee is entitled to severance payment, but it is impossible to bargain on the sum, may postpone the payment until the employee files a lawsuit, just to be able to bargain on the amount of the severance pay at the mediation phase. This situation may create an advantage in favour of the employers who do not respect legal requirements. Furthermore, it may create the risk of increasing informality and the number of disputes in the country.

## **4. Conclusions**

In civil law disputes, a settlement reached by the parties may be more meaningful than a verdict given by the judge. However, many theoretical incompatibilities exist between the logic of labour law and the one of alternative dispute resolution methods. The imperative nature of labour law requires a careful analysis of mediation.

Furthermore, comparative labour law should be analysed meticulously. It should be born in mind that in a country, where there is strong workers participation, high union density and low informality, mediation may be promoted in spite of some of its inconveniences. However, considering the extent of

<sup>31</sup> COLVIN op. cit. 419., 424., 445.

<sup>32</sup> J. R. LAMARE – D. B. LIPSKY: Employment Arbitration in the Securities Industry: Lessons Drawn from Recent Empirical Research. *Berkeley Journal of Employment & Labor Journal*, Vol. 35, 2014. 113., 126–127.

<sup>33</sup> GÜZEL op. cit. 1132–1133.

informal economy in labour market, low union density and the absence of participation mechanisms in Turkey, a mandatory mediation model risks of being exploited by the employer to avoid fulfilling its obligations to the employee. Making mediation mandatory, because of the work load of the judiciary, may cause the disputes taking longer time and failure in obtaining the expected benefits.<sup>34</sup>

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<sup>34</sup> TANRIVER op. cit. 169–170.