# Mandatory mediation procedure in Turkish Labour Courts Law: A new era of concerns about protection of labour rights

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## Introduction

In Turkey, the new Labour Courts Law fully entered into force on 1.1.2018. This new law adopted a mandatory mediation procedure that must be exhausted before filing a lawsuit for disputes arising from employment contracts. Therefore, a lawsuit can be only filed if the mediation does not result in an agreement. By introducing a mandatory mediation procedure before accessing the court, the legislator aimed at diminishing the heavy workload of the employment disputes weighed on the judiciary and avoiding the lengthy trial procedure. The legislative preamble states that as of 2016, employment disputes consisted 15% of the private law disputes in courts of first instance and 30% of the workload of private law chambers of Court of Cassation. As of 2016, an employment litigation was taking 434 days (Republic of Turkey Ministry of Justice, p. 10). The aim of diminishing the workload seems to have been reached within the first year of the application of mandatory mediation procedure. According to the official statistics, 65% of the disputes were resolved through mediation within first five months (Republic of Turkey Ministry of Justice Directorate General for Legal Affairs Department of Mediation, 2019). The Minister of Justice stated that 70% of employment disputes were resolved in mandatory mediation stage in 2018 (Republic of Turkey Ministry of Justice Press and Public Relations Counsellor, 2019). Therefore, the new system is successful in reaching its official goal: diminishing the workload. The official statistics still leave a question unanswered: at what cost?

In order to better explain the "costs" of the new system I will briefly explain the reasons of recourse to litigation on employment relations. Then in a second chapter, I will try to analyse the implications of the power imbalance between the employer and the employee on possible outcomes of mediation and the system itself. In the third chapter the implications of the system on the future of the labour law will be discussed.

## 1. The reasons of recourse to litigation in employment relations

The employment relationship comes along with a subordination of the employee to the employer; this makes the employee the weaker party of the employment relation. To limit the discretionary power of the employer, labour laws intervene in the contractual relationship, therefore, to protect human rights and dignity of employees (Collins, Ewing, & McColgan, 2012, p. 8). A range of

fundamental rights are at stake in the employment relationship if those are not protected properly by law; varying from right to life to right to a fair renumeration.

In case of non-respect to labour legislation in the course of employment contract, seeking the application of the law before the judge would mean risking the job (Dockès, Auzero, & Baugard, 2018, p. 102). Therefore, a strong labour inspection system that is reinforced with the power to apply dissuasive penalties, is essential for ensuring the enforcement of the labour legislation (Süzek, 2018, p. 854). However, in Turkey labour inspection is rather insufficient due to low numbers of labour inspection staff. For instance, in 2016, only 8,61% of the employees fell into the scope of labour inspection regarding occupational health and safety and 9,86% of the employees fell into the scope of inspection regarding application of other labour legislation (Yıldız, 2018, p. 743).

Employer's discretionary power can also be limited though employee participation in decision making procedures and collective agreements. In Turkey, a general employee participation mechanism does not exist. This causes a deficiency in democracy in the labour law system (Süzek, 2018, p. 50-51). Trade union rights, the right to collective agreement and the right to strike are guaranteed under constitution and regulated by law. However, in Turkey a minority of the employees are unionised (11,95% as of July 2017) and the number of employees that are covered by collective agreements is even lower (%5,89 according to 2017 statistics).[1]

In this atmosphere, where participation in decision making mechanisms do not exist, collective labour rights are practically non-existent for most of the employees, and labour inspection cover less than 10% of the employees, the judiciary is the only mechanism though which employees can seek justice and respect to their rights; hence the high number of employment disputes and the heavy workload. Diverting employment disputes away from judiciary without resolving the causes of such high rates risks triggering a backwards trend in labour rights.

## 2. The implications of the power imbalance between the parties on mediation system

The alternative dispute resolution methods rely on the assumption that the parties to the dispute are equals (Fiss, 1984, p. 1076). However, in an employment relationship, there is a power imbalance between the parties even if the relation has ended. The former employee continues to be the weaker party of the dispute. This power imbalance has implications on both the possible outcome of the mediation and the system itself.

The legislation on mandatory mediation, only requires the parties to enter the system but it does not coerce parties to settle. However, in practice the weaker party of the dispute may feel pressured to

[1] Statistics retrieved from: https://www.ailevecalisma.gov.tr/media/1263/2017-temmuz-ayı-istatistigi-2.pdf https://www.ailevecalisma.gov.tr/media/3394/tis-2017_.pdf (29.1.2019) Calculations are made by the author.

settle. First, the law requires the parties to attend the first meeting for mediation by imposing a penalty; the party who does not attend the first meeting would be responsible for all litigation costs and cannot be awarded a counsel's fee regardless the outcome of the litigation. Therefore, the parties are forced to enter bargaining (Mutlay, 2018, p. 76; Namlı, 2016, p. 158). Second, even though the system is based on a theoretic equality of the parties, in practice there is a power imbalance which can result in an implicit coercion to settle (Vettori, 2015, p. 358). The former employee who is financially weaker might be coerced into settling by the employer (Mutlay, 2018, p. 76).

The weaker party to the bargaining is likely to settle for a sum inferior to his/her actual rights. This might be because, the lack of information on the actual rights, lack of sources to finance the litigation or an urgent need for payment (Fiss, 1984, p. 1076). So, the inherent power imbalance is likely to result in a coercion to settle in disadvantageous conditions. The power imbalances might be even be deeper for employees who are already more vulnerable in the labour market, such as younger workers, women, LGBTI individuals, disabled individuals, migrants, workers belonging to ethnic or religious minorities and so on (Bakırcı, 2019, p. 376-377).

As the mandatory mediation assumes an equality between parties between whom a severe power imbalance exists, it can be concluded that the new system is based on formal equality rather than substantive equality (Mutlay, 2018, p. 59). The question on substantive equality can be illuminating on discussions whether mandatory mediation violates right to a fair trial. It must be pointed out that the Constitutional Court has dismissed the claims on unconstitutionality of mandatory mediation.[2] The court concluded that mandatory mediation seeks a legitimate aim and the limitations on right to access the court is proportional. One point that is not discussed thoroughly in the decision is that the inequality of the parties. The court dismissed the arguments about inequality merely referencing to the provision that states the parties will be treated equal during the mediation process.

The inherent power imbalance between the parties makes the system questionable with regards to discrimination in relation to the right to a fair trial. The Constitutional Court considered equality in its formal sense but not discussed the issue with regards to substantial equality. The new system lacks safeguards, such as mandatory legal representation, that might help minimizing the power imbalance between the parties such as mandatory legal representation (Namlı, 2016, p. 160). It is highly probable that the employees experience a second-class justice with mandatory mediation (Bakırcı, 2019, p. 375). Then it can be claimed that the employees are discriminated indirectly with regards to access to justice. According to MacGregor, before ECtHR "*This could be argued by demonstrating that, in the introduction of ... ADR/PDR in a particular area of law, the state should have been aware that a particular sector of society would be the major users of the process. If it could be demonstrated that these processes only offered a second-class form of justice, the affected sector of society may be able to*

[2] AYM, 11.7.2018, 2017/178, 2018/82. Official Gazette: 11.12.2018, No. 30622.

*argue that it disproportionately affected them even if the policy or law was neutral on its face. By placing the burden on the state to demonstrate that nothing is lost through formal diversion, parties would have the possibility of arguing that a lower standard of justice resulted from the diversion."* (MacGregor, 2015, p. 631) So, if we apply this logic to the Turkish system, it needs to be proven that this procedure offers a second-class justice to the employees; even if the law states that the parties are equal in the procedure.

At this point I must underline that there is a lack of empirical data on the content of the settlements reached with the new system. As the mediation process is confidential and it is not possible to determine the actual rights of the employees without a court decision or an extensive expert report, we cannot reach exact information on the amount given up in settlement process. There is a difficulty in empirical research on the alternative dispute resolution systems that is not specific to Turkey (Yenisey, 2016, p. 180). However, these concerns on the mediation system were expressed by employees and lawyers in a recent empirical research made before the system started to work (Hatıpoğlu Aydın, 2018, p. 202-206).

## 3. The implications of mandatory mediation in the future of labour law

The legislative preamble relies on the assumption that employment disputes are private monetary disputes when stating that these are suitable for mandatory mediation procedure. However, labour laws protect fundamental rights and liberties of the employee (Yenisey, 2016, p. 174-175). Some of these are, right to life, non-discrimination principle, right to organize, freedom of expression, freedom of thought, conscience and religion, right to a fair renumeration, right to rest and leisure and so on.

This grand variety of rights are protected through methods special to labour law. Labour laws set minimum standards (minimum pay, maximum work hours, minimum paid leave etc.), that cannot be lowered even with the consent of the employees (Süzek, 2018, p. 33). It can be said that employees are protected even from themselves. Another tool of labour laws to ensure a minimum protection is fixing lumpsum indemnities to be paid when the law is breached, so that the employee does not need to prove the existence and the amount of the loss incurred. The fact that there is a breach of law is enough to award these indemnities (Süzek, 2018, p. 129). For example, a lumpsum indemnity is fixed for the cases of discrimination. The rules ensuring protection from unfair dismissal also serve to the protection of fundamental rights; as dismissals breaching these rights are also unfair.

With mandatory mediation system, the fundamental rights of the employees and the minimum standards drawn by legislation become negotiable (Yenisey, 2016, p. 175). This negotiation is not directly breaching fundamental rights or the minimum standards evidently. However, when the sanctions for the breach of these rights; such as lumpsum indemnities, sanctions of unfair dismissal and

even the minimum pay is negotiated in mediation, the rights protected by these become implicitly negotiable. The difficulties in the proof of the breach of fundamental rights, such as non-discrimination, outside a court also adds to the power imbalance in the mediation. (Yenisey, 2016, p. 175)

With the mandatory mediation system, it would be realistic to expect a backwards trend in compliance with labour legislation and therefore the protection of fundamental rights of the employees. As stated above, other mechanisms that can ensure respect to the legislation are already non-functional for most of the employees as explained in the first chapter. This was the reason for the high number of employment disputes before the courts in the first place. When all the sanctions and rules of the labour legislation become eventually negotiable, the imperative nature of labour legislation and its effectiveness will become purely hypothetical in practice (Yenisey, 2016, p. 178).

Diversion of disputes from adjudication can hinder development in the area of law in question (Edwards, 1986, p. 679). Thus, another concerning result of the resolution of a majority employment disputes through mediation would be the stagnation in the labour law case-law. The courts do not only solve disputes, but they also create law and make norms through their decisions (Yenisey, 2016, p. 174). This function of the courts is particularly important in labour law, as it is a very dynamic branch of law affected by economic, technological and social changes. The evolution of labour law has been marked by case law that applies and interprets the existing legislation, rather than already existing positive law (Güzel, 2016, p. 1338-1339).

The loss of case-law and example setting functions of adjudication through mandatory mediation process would also have effects on a smaller scale; the workplace. A recent empirical study on the justice experience of the employees, both the lawyers and employees had pointed out that winning individual cases set example for other employees to file lawsuits (Hatıpoğlu Aydın, 2018, p. 140-141). As the mediation procedure is confidential, the outcome depends hugely on the bargaining power of the parties, and the result of it is a settlement not a judgement that defines the rights and the rightful party, the empowering role of the litigation for the others would be also lost or diminished.

**Conclusion**

*"Inexpensive, expeditious, and informal adjudication is not always synonymous with fair and just adjudication. The decisionmakers may not understand the values at stake and parties to disputes do not always possess equal power and resources."* (Edwards, 1986, p. 679) I neither claim nor think that formal justice system is completely effective in protection of employees' rights. However, I believe diverting cases from adjudication would cause more harm than a defective adjudication process.

There is an inherent power imbalance between the parties of an employment dispute. This renders the mandatory mediation system defective as the system is based on the equality of the parties. By forcing two parties who are substantially unequal to bargain as if they are equals, the system has

adopted a formal equality approach. This can render the system discriminative against the employees. While I am not dismissing the arguments claiming the mandatory mediation violates access to court, I believe that the discrimination aspect should be further analysed. This system risks providing the employees a second-class justice. So, one important value at stake is access to justice and non-discrimination.

Mandatory mediation procedure in employment disputes also puts the very essence of the labour law at stake. The raison d'être of labour law is the fact that the parties to the employment contract are in an asymmetrical relationship where the employee does not have enough bargaining power to adjust the content of the contract to provide protection from abuse. The mandatory mediation system forces parties to bargain for the rights that were given protection "from bargaining". With this system, every aspect of employment relationship becomes bargainable once the contract has ended. Therefore, the essence of labour law seems to be at risk.

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