# ECONOMIC IMPLICATIONS OF EMPLOYMENT PROTECTION LEGISLATION IN TURKEY: HAS TURKEY FOUND ITS *JUSTE MILIEU*?

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There are various initiatives to modernize labor laws to meet challenges of the globalization of the economy. Our approaches to and expectations from labor laws are changing drastically. Starting with 1980s, economic problems have become the root of the revision of labor laws. How labor laws can evolve to support national economic and employment objectives is the main common problem. In too many studies on labor law, the language of economics and statistics is "obscuring" the language of legal institutions. There is more than ever the need of involvement of economists in the introduction of labor reforms and revision of labor laws. Labor laws have to support and enhance employment creation and development of "just-in-time management." To this end, the classical model of labor legislation designed to protect the weaker party is transforming. There is now the emergence of new debates such as employment creation through flexibility, corporate governance, corporate social responsibility, and alternative dispute resolution.

Labor market legislation has its impacts on the labor market performance. The rules on initiation and termination of labor relationship are known as employment protection legislation (EPL). Studies and surveys

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reveal that a high level of protection has adverse effects on employment creation[1]. The OECD calculates, on the basis of indicators it has developed, strictness of EPL in three areas: dismissal rules; rules on fixed-term contract and temporary agency work; and collective dismissal rules[2].

Turkey's Labor Act 2003 tried to incorporate economic considerations especially through introduction of flexible modalities of employment and flexitime. There were then great expectations of labor laws' potential to deliver change: Employment creation; better social inclusion of the unemployed particularly women, young first entrants and inter-regional migrants; encouraging adaptability of businesses; and transforming undeclared work into regular employment. EPL and its implications on labor market dynamics have always been a much discussed sensational issue in Turkey. Discussions focus mostly on job security. Employers prefer flexibility in hiring and firing procedures whereas the workers claim the need for security. The challenge has been how to reconcile the employers' need for flexibility in hiring and firing with that of workers for security. Whether the Labor Act 2003 has achieved in incorporation of economic considerations in its handling of employment protection is the main concern of this article.

## I. BACKGROUND INFORMATION

The legal rules on employment protection are not unique to us. Turkey is a civil law country by choice. The codification processes aimed at producing a localized system of Turkish labor law were heavily affected by the

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1 WORLD BANK, TURKEY LABOR MARKET STUDY, Report no. 33254-TR. at viii, (2006); DOING BUSINESS 2008 - COMPARING REGULATION IN 178 ECONOMIES, at 20, available at http://www.doingbusiness.org (2008); EUROPEAN COMMISSION, EMPLOYMENT IN EUROPE 2006, at 13, 83, available at http://ec.europa.eu/employment_social/news/2006/nov/employment_europa_en.pdf (2006a); EUROPEAN COMMISSION, *Towards Common Principles of Flexicurity: More and better jobs through flexibility and security,* Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, at 6, available at http://ec.europa.eu/employment_social/news/2007/jun/flexicurity_en.pdf (2007); J. Botero *et al., The Regulation of Labor* (NBER Working Paper No. 9756), JOURNAL OF ECONOMIC LITERATURE (JEL), No. J1, J6 (2003); OECD, EMPLOYMENT OUTLOOK 2007, at 69 et seq, available at http://www.sourceoecd.org (2007a).

2 OECD, EMPLOYMENT OUTLOOK 2004, Annex 2A1, available at http://www.sourceoecd.org

Continental European legal system and currently by the standards laid down by the European Union (EU). Why these rules are the way they are require examination of some influencing factors.

### *A. INTERNATIONALIZATION OF LAWS*

#### 1. Internationalization of Laws in Contexts of Imperialism and Colonialism

Law has always been a mechanism of power. In contexts of imperialism and colonialism, and for the purposes of expansion of capitalism and political power, law was typified as a tool of "construing and civilizing the other" through an orientalist discourse. Colonialism was dressed up as humanitarian salvation for the purposes of justification of the presence of a dominant foreign political power. Especially in the 19th century the attitude about the superiority of Western law and rhetoric of "lazy, chaotic, immoral, unreasoning and degenerate savages" needing to be tamed and shown the right path by the "white men" or "mother country" of a "superior race" developed. The "objective, impersonal and universal" Western law was to be imposed or at least introduced through colonial encounters. Legal codes and institutions were transferred from Europe and North America to Asia, Africa and Latin America. The colonial encounter nevertheless defined labor, land and family relations in the colonies. Center and periphery theories are no longer granted credibility by legal ethnography[3].

Universalist assumptions lacked in the private sphere of Ottoman law that allowed the conquered states to preserve their own legal systems. As regards our topics of interest, the Empire was in a decline at the time of expansion of capitalism. The industry was lean and so was the working class. Moreover, there was no intention of creating a docile, disciplined labor force in the conquered countries.

#### 2. Internationalization of Laws in Context of Globalization

The challenges of globalization mushroomed new technologies of governance and rule enhancing internationalization of rules. We are currently

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[3] Eve Darian-Smith, *Ethnographies of Law, in* THE BLACKWELL COMPANION TO LAW AND SOCIETY (Austin Sarat ed., 2004), available at http://www.blackwellreference.com/subscriber/

living in a period of great legal transition and transformation and experiencing new power axes such as international organizations, nongovernmental organizations (NGOs) and transnational media. Arenas of choice are limited for countries wanting to keep up with encounters of globalization[4]. Any country that desires to keep up with global economy and withdraw foreign investments and multinationals has to create a favorable atmosphere befitting its national system to texts and impacts of organizations of global capitalism such as the World Trade Organization (WTO), International Monetary Fund (IMF), or World Bank (WB). Imposed or introduced global or regional systems are sometimes transplanted as a whole but sometimes are appropriated and adjusted to fit the national systems. Turkey is no exception; the WTO, IMF and the WB have an impact on the development of Turkey's national economic and social policies. Turkey is a member of the United Nations (UN), International Labor Organization (ILO), and Council of Europe (COE) and tries to incorporate the relevant international treaties to which it is a party into its national legal system.

### 3. Internationalization of Labor Laws: Forces and Flows of a Global Economy and Its New Sites and Types of Labor and Commodities

Global economy and expansion of human rights system into the world of work are the main causes of internationalization of labor laws. Human rights system has expanded reaching into new domains of social life such as rights to work, decent pay, unionize, industrial action, gender equality at work, violence against women, protection against discriminatory behavior, etc.

It is an indisputable fact that universalist assumptions still exist in Western law. This is the rationale not only for the transportation of a single human right regime but also significant transplants and transnational adoptions of law. This time in the background is globalization of labor and capital, privatizations, multinational corporations, and foreign investments. As long as a country does not want to wall itself off with a weak national economy, it has to adjust its legal system and practices to encounter both opportunities and threats of global trends. For example, a country that wants to attract foreign investment has to have alternative dispute settlement mechanisms conforming to international standards.

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[4] Francis Snyder, *Economic Globalization and the Law in the Twenty-first Century*, *in* THE BLACKWELL COMPANION TO LAW AND SOCIETY (Austin Sarat, *supra* note 3).

Societies including those in remote areas of the world are vulnerable to new shaping factors like capital flows, multinationals, international production networks, new technologies, modernization of labor laws introducing, inter alia, atypical forms of work, flexitime, adaptability of businesses, and subcontracting. The dynamic and fluid transnational forces of a global economy is shaking not only the concept of the 'local' but also 'regional'[5].

### *B. ATTEMPTS OF HARMONIZATION WITH THE COMMUNITY ACQUIS*

There is indisputable impact of EU law on the evolution of Turkish labor law. Turkey as a country eager to join EU is enacting pieces of legislation with the idea of incorporating Community law into its legal system. The incorporation and implementation of Community a*cquis* represents a key challenge for Turkey.

### *C. INFLUENCE OF VARIOUS NATIONAL LAWS AND JURISPRUDENCE*

In the 1930s German professors of Jewish origin found shelter in Turkey adding a lot to the establishment of modern universities[6]. Professors of law served at faculties of law in Istanbul and Ankara educating students and

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5 In his article on 'Americanisation of the EU Social Model?' J. Vos Kees tries to show that there is an American-style evolution of the European social model that is developed mainly in comparison with USA social and economic performance (K. J. Vos, *Americanisation of the EU Social Model?,* THE INTERNATIONAL JOURNAL OF COMPARATIVE LABOR LAW AND INDUSTRIAL RELATIONS, 21(3), at 355-367 (2005). Recently, the European Union, with the idea of combating the aging population and declining birth rate problems through attracting top talent is putting forth a "Blue Card" scheme inspired by the US Green Card program. The aim is to become more economically competitive by attracting highly skilled immigrants, a part of rigorous recruitment policies by the USA.

6 Some 15,000 Turkish Jews from France, and even of some 100,000 Jews from Eastern Europe were rescued by Turkey (J. SHAW STANFORD, TURKEY AND THE HOLOCAUST: TURKEY'S ROLE IN RESCUING TURKISH AND EUROPEAN JEWRY FROM NAZI PERSECUTION, 1933-1945; and THE JEWS OF THE OTTOMAN EMPIRE AND THE TURKISH REPUBLIC (Both books were published both by the New York University Press and by MacMillian publishers in England, now called Palgrave Publishers).

assistants, the next generations of academics. Today many of the academics in the field of labor law as well as in other fields of law, especially private law, are inspired by the German laws and jurisprudence.

The Civil Code was adopted from Switzerland in 1926 as a part of an unprecedented legal reform[7]. Adoption of the Swiss Civil Code was a radical step that is still unique in the present-day Islamic world. Such attempts started during the 1850s and 1860s of the Ottoman Empire period when modernization attempts also acquired a legal and institutional nature through the introduction of new, European-inspired, law books such as the criminal code or commercial code and the institution of new courts. Of all areas, family law remained under Islamic law the longest, but even that was abolished 1917[8]. The Criminal Code was adopted from Italy and administrative laws from France. The elitist cadre in the early years of the Turkish Republic knew French and they were to a large extent influenced by the French philosophers and the administrative system.

### *D. ECONOMIC CONSEQUENCES OF COMMON LAW VERSUS CIVIL LAW*

The differing legal systems emerged in England and France in the 12th century and spread to their colonies. Why some countries prosper under capitalism while other countries are not so successful has given rise to "legal origins hypothesis."[9] to what extent the laws in civil law countries incorporate

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7 The Civil Code became effective on 4 October 1926 as envisaged by Article 48 of the Code on Implementation of the Civil Code (Official Gazette, 19.6.1926, No. 402) following its publication in the Official Gazette of 4 April 1926. The Civil Code remained in effect until 1 January 2002, the effective date of the new Turkish Civil Code (Official Gazette, 8.12.2001, No. 24607). The Obligations Code (Official Gazette, 29.4.1926, No. 359) is in fact the fifth book of the Civil Code but it starts with article number one merely because it was codified as a federal code before the civil code in the country of origin, Switzerland.

8 E. Zürcher & H. Linden, *Searching for the Fault-Line, A survey of the role of Turkish Islam, in the accession of Turkey to the European Union in the light of the 'clash of civilizations,' in* WRR, THE EUROPEAN UNION, TURKEY AND ISLAM, available at http://www.esiweb.org/index.php?lang=tr&id=134

9 This claim firstly made by R. La Porta *et al.* (*Law and Finance*, JOURNAL OF POLITICAL ECONOMY*,* 106: 1113-55, 1998) in the context of financial and company law was applied to labor law by J. Botero *et al.* (*The Regulation of Labor,* NBER Working Paper No. 9756, JOURNAL OF ECONOMIC LITERATURE (JEL), No. J1, J6,

economic considerations and whether heavier regulation of labor market and job protection is a result of being a civil law country are the main questions.

The laws are, in general, more detailed in civil law countries leaving no or a small room for judges to be creative and develop the law. Consequently, adaptations to social and economic developments may be slower. Issues handled at micro-level in common law countries may require macro-level policies in civil law countries. In all areas embraced by labor law (individual labor contracts, collective labor law, social security), there are collective actors. Therefore, labor law endeavors to gain autonomy and to this end a common law environment may serve better. Despite such general differences, the extent of which may vary from one country to the other, legal origins hypothesis cannot be the sole explanation to the degree of social and economic progress. As regards Turkey, historical and national context (perception of "protection," governments' and social partners' approaches to labor issues, lack of long tradition of a social dialogue - negotiation economy adversely affecting introduction of labor reforms) and its attempts to keep up with the regulations and practices of aspired countries and the EU and attempts to attract foreign investments seem to be a lot more important in the analysis of incorporation of economic considerations and instant adaptability to economic challenges.

### *E. UNIQUE CONTEXTS OF NATIONAL CULTURE*

Cultural approach to law and legal meaning is of utmost importance. The ethos surrounding legal rules will have an important impact on implementation issues. Legal rules that work well in a country or region may prove to be unsuccessful in a transplanting country due to the local values, understandings and industrial relations culture. Also, laws drafted with the assistance of foreign experts without an in-depth information of local features and without interaction with local businesses may fail to meet the coming needs.

Some particular contexts of Turkish industrial relations culture, national traditions and national conceptions of partnership slows down and sometimes

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2003). For a recent study contesting the hypothesis and its application to labor law see: S. Deakin *et al, The Evolution of Labor Law: Calibrating and Comparing Regulatory Regimes*, Working Paper no. 352, Center for Business Research, University of Cambridge, 2007.

even hinders adaptability of the Turkish labor market to innovations and challenges of globalization.

- 'Protectionism' has always been prevalent in labor relations. This was mainly due to having the State as the main employer guaranteeing life-long employment and generous social security benefits for a very long time. Liberalization, ongoing privatizations, opening up to international trade and capital flows, globalization necessitate and pressurize for modernization and flexibilisation of the labor market. Rapid adaptation is not easy because of hardships in consensus building.
- Many a time problems are not handled rationally in Turkey. Issues are discussed not on a technical but emotional basis and blown out of proportion thus requiring longer time periods to achieve or realize something. This general tendency of having polemicized, politicized and even ideologized debates slows down the introduction of reforms necessitating consensus building. Constructive opposition or any compromising attitude is regarded as a sign of weakness. Being an aggressive hard-liner is equated with being strong and influential. This is true not only for political arena and the industrial relations scene but nearly for all walks of life.
- The social partners have the tendency of pressurizing the governments to introduce legal changes in their favor instead of discussing and trying to reach amenable solutions through negotiations. This impedes the development of genuine collective bargaining and stifles social dialogue. Collective bargaining is merely wage bargaining. A greater role has to be given to collective agreements in determining employment relations to instill more flexibility into the labor market.
- The Ministry of Labor and Social Security attempts to shift the industrial relations culture away from adversarial relationships. In the implementation phase, there is a higher representational power and a higher degree of coordination efforts of employers' associations and confederation. Their strong associational setting makes them more active and mobilized in the development of labor market policies. The trade unions and confederations, on the other hand, remain focused on splits at the confederate and sectoral levels and disagreements on representativeness. They spend their energy on inter-union rivals.

### *F. FACTS AND FIGURES ON TURKISH LABOR MARKET*

The most recent figures on economic and social framework were released by the TURKSAT (Turkish Statistical Institute) in February 2007[10]. The Household Labor Force Survey results pertain to the 3 months period including October, November and December 2007.

While non-institutional civilian population increased by 759 thousand persons and has reached to 69 million 185 thousand persons, non-institutional working age civilian population has increased by 740 thousand and has reached to 49 million 511 thousand persons in the period of November 2007.

Number of employed persons decreased by 368 thousand persons compared to the same period of the previous year and has reached to 20 million 867 thousand persons in the period of November 2007. Agricultural employment decreased by 349 thousand persons and non-agricultural employment decreased by 19 thousand persons in this period.

**Table 1 : Labor force status**

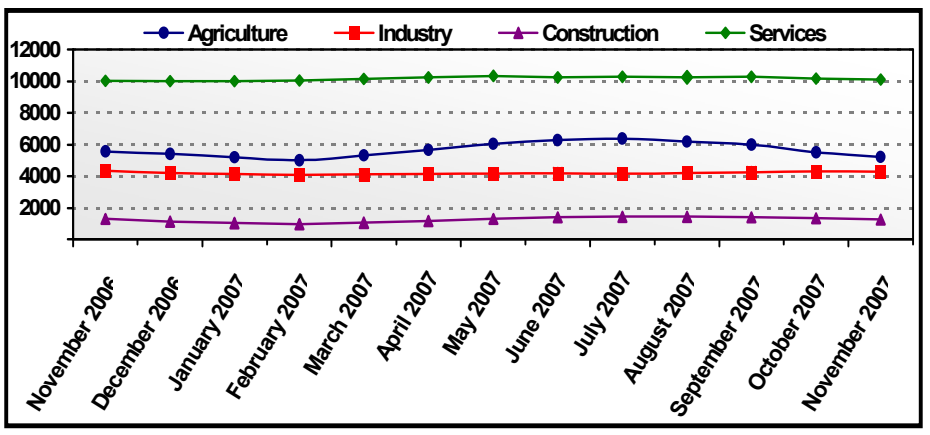
| | TURKEY | | URBAN | | RURAL | |
|---|---|---|---|---|---|---|
| | **2006** | **2007** | **2006** | **2007** | **2006** | **2007** |
| Non-institutional civilian population (000) | 68 426 | 69 185 | 42 926 | 43 819 | 25 502 | 25 365 |
| Population 15 years old and over (000) | 48 771 | 49 511 | 31 073 | 31 800 | 17 699 | 17 711 |
| Labor force (000) | 23 500 | 23 217 | 14 186 | 14 252 | 9 315 | 8 965 |
| Employed (000) | 21 235 | 20 867 | 12 526 | 12 538 | 8 709 | 8 329 |
| Unemployed (000) | 2 265 | 2 350 | 1 660 | 1 714 | 605 | 636 |
| Labor force participation rate (%) | 48.2 | 46.9 | 45.7 | 44.8 | 52.6 | 50.6 |
| Employment rate (%) | 43.5 | 42.1 | 40.3 | 39.4 | 49.2 | 47.0 |
| Unemployment rate (%) | 9.6 | 10.1 | 11.7 | 12.0 | 6.5 | 7.1 |
| *Non-agricultural unemployment rate (%)* | 12.2 | 12.6 | 12.0 | 12.3 | 12.9 | 13.6 |

[10] Available at www.tuik.gov.tr

| | | | | | | |
|---|---|---|---|---|---|---|
| *Youth unemployment rate[(1)](%)* | 19.0 | 20.0 | 21.6 | 21.6 | 14.8 | 17.0 |
| Underemployment rate (%) | 3.0 | 2.8 | 2.7 | 2.3 | 3.6 | 3.6 |
| *Underemployment rate of youth[(1)](%)* | 3.4 | 2.6 | 2.4 | 2.3 | 5.0 | 3.1 |
| Not in the labor force (000) | 25 271 | 26 294 | 16 887 | 17 548 | 8 384 | 8 746 |

*(1) Population within 15-24 age group*

**Figure 1 : Sectoral distribution of employment, (in thousand)**




Of those who were employed in November 2007; 25 % was employed in agriculture, 20.6 % was employed in industry, 6 % was employed in construction and 48.4 % was employed in services. Employment in agriculture decreased by 1.2 and construction decreased by 0.1 percentage points while that industry increased by 0.1 and services increased by 1.2.

Number of unemployed persons increased by 85 thousand persons compared to the same period of the previous year and has reached to 2 million 350 thousand persons in Turkey. Unemployment rate realized as 10.1 % with 0.5 points increase. Unemployment rate increased to 12 % with a 0.3

percentage points increase in urban areas and increased to 7.1 % with 0.6 percentage points increase in rural areas.

Non-agricultural unemployment rate realized as 12.6 % with 0.4 percentage points increase compared to the same period of the previous year in Turkey. The rate is realized as 11.4 % with a 0.8 percentage points increase for male and 17.5 % for female with a 1.1 percentage points decrease.

As regards the structure of employment, in this period, of those who were employed;

- 75 % were male,
- 61 % had education below high school.
- 59.7 % were regular and casual employee, 27.3 % were self-employed and employer, 13 % were unpaid family worker.
- 60 % worked in establishments consisting of "1-9 employees".
- 2.4 % had an additional job.
- 3 % was seeking job either to replace the current job or to augment the existing job.
- 88.1 % of regular employees worked in permanent jobs.

Workers who are not covered by the compulsory social security scheme are regarded as in the informal sector. The ratio of persons who worked without any social security related to the main job declined to 45.4 % with 2.6 percentage point decrease. The share of persons who did not have any social security in agriculture decreased from 87.8 % to 87 % and that in non-agriculture decreased from 33.9 % to 31.6 % compared to the same period of the previous year.

Labor force participation rate (LFPR) decreased to 46.9 % with 1.3 percentage points decrease compared to the same period of the previous year for Turkey in November 2007 period. LFPR was realized as 70.9 % with 0.9 percentage point decrease for male and decreased to 23.4 % with 1.6 percentage point decrease for female. LFPR was 44.8 % with a 0.9 percentage point decrease in urban areas and 50.6 % with a 2 percentage points decrease in rural areas in this period.

As for the distribution of labor force by education and age group;

- 17.8 % of the total labor force were comprised of persons within the 15-24 age group.
- Labor force participation rate for persons having education below high school was 45.7 % while that having higher education was 77.9 %.
- Labor force participation rate of persons having education below high school was

70.7 % for male while it was 19.9 % for female.

- Labor force participation rate of persons with high school and equivalent education was 71.7 % for male while it was 30.3 % for female.
- Labor force participation rate of persons with higher education was 83.7 % for male while it was 68.7 % for female.

According to the Ministry of Finance's data, total public sector employment was 2 million 925 thousand persons in the fourth quarter in 2007.

## II. CONTRACT TERMINATIONS

The rules on contract terminations and protection of the workers are modeled on the ILO C158[11], C135[12] and C151[13] ratified by Turkey, EC directives on workplace transfers, collective redundancies, part-time work, fixed-term work and prohibition of discrimination, and German labor laws and practices. A national understanding of "protection" is also greatly reflected in these rules.

Ways of terminating an employment relationship are:

- Mutual agreement;
- Expiry of time in the case of fixed-term contracts;

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11 Convention on the termination of employment relationship at the employer's initiative, 1982.

12 Convention concerning protection and facilities to be afforded to workers' representatives in the undertaking, 1971.

13 Convention concerning protection of the right to organize and procedures for determining conditions of employment in the public service, 1978.

- Dissolution of the contract by court action;
- Dismissal or resignation without notice during a probationary period;
- Unilateral termination
    - Unilateral termination by the worker
        - Resignation on notice
        - Resignation for just cause
    - Unilateral termination by the employer
        - Dismissal on notice
        - Dismissal for just cause
        - Collective dismissal
        - Significant change to a fundamental term or condition of a worker's employment without the worker's written consent.

Employment termination is covered by statutory and case law and the terms and conditions of collective labor agreements. As Turkey is a civil law country, the main source of rules on dismissal is the law. Employment termination is a part of labor law. Labor law is divided into two main parts: individual and collective labor law. Individual labor law governs individual labor relations, i.e. labor relations between an employer – a private person or a legal entity (legal person; corporate body) and a private worker. Workers are wage earning employees as opposed to public officials (staff employees), salary earning employees. The main statute is the Labor Act (LA)[14]. The Labor Act covers the public and private sector workers as well as manual and non-manual workers. A worker is the one employed in any job under a labor contract. Labor contract comprises work, wage and subordination. Collective labor law regulates collective labor relations, i.e. relations between an employer and a trade union, the organized labor. The main statutes are the Unions Act (UA)[15] and the Collective Labor Agreements, Strikes and Lockouts Act (CLASLA)[16], both enacted in the light of the 1982 Constitution which as the fundamental law lays down a general framework for labor issues. In Turkish, the term "unions" denotes both trade unions and employers'

[14] Law no. 4857 of 22.5.2003, Official Gazette 10.6.2003, No. 25134.

[15] Law no. 2821 of 5 May 1983, Official Gazette 7.5.1983, No. 18040.

[16] Law no. 2822 of 5 May 1983, Official Gazette 7.5.1983, No. 18040.

associations. Collective labor agreements are mostly used to adjust the statutory notice periods, to increase the amount of compensation, or to establish disciplinary committees and procedures. Such provisions of the collective labor agreements shall be binding as long as they do not violate the peremptory legal provisions.

There are two means of unilateral termination provided by the law for the parties to a labor relationship: Termination on notice (termination through respecting a term of notice) and instant termination (termination for just cause).

## III. CONTRACT TERMINATION AT THE INITIATIVE OF THE EMPLOYER

Dismissal is employment termination at the initiative of the employer. The Labor Act distinguishes between causes for instant dismissal (summary dismissal, dismissal for just cause) and lesser forms of dismissal (dismissal on notice)[17].

### *A. DISMISSAL ON NOTICE*

Dismissal on notice is provided by the Labor Act only for open-ended labor contracts. A fixed-term labor contract may terminate upon mutual consent, expiry of the specified period or for just cause.

Where an employer ends the employment of a worker, the employer must provide a written notice of termination (LA, Art. 109). Written notice of termination of employment must be addressed to the worker. It can be delivered in person or by mail, fax or e-mail, as long as delivery can be verified.

#### 1. Notice Periods

The labor contract gets terminated not at the time of notification but with the elapse of the notice period. The worker has to continue working during the

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17 S*ee also,* O. GÜVEN ÇANKAYA *ET AL*.,TÜRK İŞ HUKUKUNDA İŞE İADE DAVALARI (2nd ed. 2006); Kadriye Bakırcı, *Unfair Dismissal in Turkish Employment Law*, EMPLOYEE RESPONSIBILITIES AND RIGHTS JOURNAL, 16(2), 49-69 (June 2004); Nurhan Süral, *Employment Termination and Job Security Under New Turkish Labor Act*, MIDDLE EASTERN STUDIES, 41(2), 249-268 (2005).

notice period and be paid his corresponding regular wages. The employer has to continue to pay contributions to the compulsory social security schemes during the notice period. How much notice is required depends on how long someone has been employed by an employer. The following specifies the periods of notice an employer must give a worker based on length of employment at that particular workplace:

**Table 2 : Notice periods**

| Length of Employment | Notice Required |
|---|---|
| Less than 6 months | 2 weeks |
| 6 months but less than 1½ years | 4 weeks |
| 1½ years but less than 3 years | 6 weeks |
| 3 years or more | 8 weeks |

Notice periods may be increased through individual or collective labor contracts (LA, Art. 17/3).

**2. Advance Termination (Termination Pay Instead of Notice)**

The employer may have the fear of retaliation. In some extreme cases, dismissed workers have been known to erupt in violence against their former employers ("going postal"). The employer may opt for advance termination meaning that the worker does not get the required notice but termination pay (advance payment) instead (LA, Art. 17/5). Termination pay is a lump sum advance payment equal to the wages that the worker would have earned during the notice period had notice been given.

**3. Notice Pay**

Where notice periods are not recognized by the employer, the worker shall be paid compensation called notice pay equaling to the worker's last basic wage plus whatever wage supplements, monetary or in kind, corresponding to the notice period.

### 4. Leave to Seek New Employment

The worker shall be allowed to a leave to seek new employment during the notice period (LA, Art. 27). The time allowed should not be less than two hours per working day and, if the worker so desires, he can take these hours together preceding the day on which his employment terminates. If the employer does not comply with these periods, he shall pay the corresponding wage. If the employer utilizes the worker during stated periods, he shall pay twice the regular wage.

### 5. Workers with Regular Job Security and Workers with Increased Job Security

There are two sets of workers who may be subjected to dismissal on notice. Workers with increased job security enjoy greater protection against dismissal on notice. A worker who has been working for more than six months under an open-ended labor contract at a workplace where at least thirty (fifty in agriculture) workers are employed benefits from increased job security if he is not in the position of an employer's representative managing the whole undertaking or workplace with the authority of making hiring and firing (LA, Art. 18). Where the employer owns more than one workplace in the same industry, the total number of the workers shall be considered.

**Table 3 : Conditions to benefit from increased job security**

| |
|---|
| To be employed under an open-ended labor contract; |
| To be employed in a workplace where at least thirty workers are employed; |
| To be working for at least six months at the concerned workplace; and, |
| Not to be in the capacity of an employer's representative tasked with hiring and firing |

The reason for confining the scope of increased job security to workplaces with thirty or more workers is to avoid imposing legal constraints in a way that would hold back the creation and development of small and medium-sized enterprises (SMEs).

### *a. Protection of Workers with Regular Job Security against Dismissal on Notice*

A worker with regular job security may be dismissed at any time for any reason or indeed for no reason. The employer is not under the legal obligation of specifying the ground for dismissal (LA, Art. 17). In these aspects, workers with regular job security are similar to "at-will employees" in the USA. But workers with regular job security have protections against "wrongful terminations" and the courts will intervene to protect the ex-worker from allegedly unfair treatment by the employer. A wrongful termination is a breach of "good faith and fair dealing", an implied covenant that workers have to be treated fairly by their employers. Abusive and discriminatory dismissals are deemed wrongful termination. Bad-faith pay, unionism pay, discrimination pay, and severance pay are the consequent types of compensation.

#### ***aa.*** *Protection against Abusive Dismissal*

Whenever the employer misuses his right of termination, abusive dismissal is deemed to exist. For example, an abusive dismissal exists where a worker who has reported wrongdoing in the workplace ("whistleblower") or who has not yielded to sexual advance by the employer encounters retaliatory termination. Dismissal as a form of sexual harassment, dismissal in violation of labor laws, and individual and collective labor agreements constitute abusive dismissal. It is the worker to prove that he has been abusively dismissed. An abusively dismissed worker shall be entitled to the so-called "bad-faith pay", thrice the amount of notice pay.

#### ***bb.*** *Protection against Discriminatory Dismissal*

Discriminatory dismissal is a special type of abusive dismissal. Discrimination pay is to be paid to the worker upon breach of Article 5 of the Labor Act on equal treatment principle. Unionism pay is to be paid upon anti-union discrimination, the minimum amount of which is the basic annual wage of the worker. Protection against discriminatory dismissal is analyzed in detail in the article on "Employment Discrimination in Turkey."

***b. Protection of Workers with Increased Job Security against Dismissal on Notice***

Workers with increased job security enjoy a greater protection against wrongful termination of employment. Such workers can be dismissed only for a valid reason connected with the capacity or conduct of the worker or operational requirements of work or workplace or undertaking. With this regard, workers with increased job security are like the "just cause employees" in the USA who can be dismissed from employment only for a good reason.

**Table 4 : Valid reasons for termination**

| |
|---|
| Capacity or conduct of the worker; and, |
| Operational requirements of work or workplace or undertaking |

A non-exhaustive listing of incidents that do not constitute valid reason has been adapted from the ILO C158 (LA, Article 18):

**Table 5 : Cases that do not constitute valid reason**

| |
|---|
| • Union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours; |
| • Acting in the capacity of a trade union representative; |
| • Recourse to judicial or administrative authorities by filing a complaint or the participation in proceedings against an employer involving alleged violation of legislation or contract; |
| • Race, color, sex, marital status, family responsibilities, pregnancy, confinement, religion, political opinion, and similar reasons; |
| • Absence from work during maternity leave; and, |
| • Temporary absence from work during legally prescribed periods due to illness or injury. |

Also, according to the Collective Labor Agreements, Strikes and Lockouts Act, involvement in a decision to initiate a legal strike or

participation in a legal strike shall not constitute valid reason for contract termination (Art. 42).

Where a worker with increased job security is dismissed, the employer is under the legal obligation of specifying the reason of dismissal clearly and precisely. The worker has to be provided an opportunity to defend himself when the allegations are related to his capacity or conduct (LA, Art. 19). Where no reason is specified or the reason specified is not a valid one, the worker shall pursue court action to protect his rights and be reinstated by the court (LA, Art. 20). If the employer does not reinstate him, as is usual due to the fear of retaliation, the worker shall be entitled to job security pay. The minimum amount of this compensation corresponds to the worker's four months' basic wages and the maximum to the worker's eight months' basic wages. But if the ground for dismissal is anti-union discrimination, i.e. union membership or involvement in union activities, this time the minimum amount of job security pay shall be the worker's basic annual wage.

The worker shall be entitled to at most four months' wages for the unworked period until the finalization of the court decision. The worker shall also be entitled to severance pay. The reasoning behind "at most four months' wages" is that the worker has to apply to the court within one month of being notified, following which the court has to rule within two months according to the accelerated trial procedure and if appealed, the Appeals Court is to render a final decision within one month (LA, Art. 20).

The employer has to prove the valid reason he has claimed. If the worker claims that there was another reason for dismissal, the burden of proof shifts to the worker. There is no written rule that a dismissal must be "*ultima ratio*" but according to the rulings of the Appeals Court largely drawn on German law and practices, dismissal has to be the employer's final solution. The *ultima ratio* rule presumes that alternatives to dismissal such as an offer of reasonable alternative employment, or training for another job in the same workplace or another workplace of the same employer have been envisaged. The *ultima ratio* rule referenced rulings of the Appeals Court have gone to the extent of infringing employers' prerogatives, especially in dismissals for operational requirements of work or workplace or undertaking[18].

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[18] Polat Soyer, *İş Güvencesi Konusunda Uygulamada Karşılaşılan Sorunlara İlişkin Değerlendirme*, İŞVEREN, 45(7), 44-46, 46, (December 2007).

In Turkey, courts complain about the case load and at the same time hinder development of out-of-court procedures. Nearly all contract terminations are before the courts. There is the unending struggle between the worker and the employer: Many a time, the worker attempts to base the ground of dismissal on anti-union discrimination to make the most whereas the employer tries to rely on worker's gross misconduct to free himself of the high costs of dismissal. Although there was no legal hindrance, the Appeals Court did not give way to private arbitration in individual labor disputes. The Labor Act 2003 envisaged grievance arbitration for contract termination disputes between a worker with increased job security and employer. But upon an application, the Constitutional Court ruled for unconstitutionality of arbitration clauses in collective labor agreements[19]. Recourse to private arbitration on the basis of mutual consent between the individual worker with increased job security and the employer with regard to contract termination remains possible.

**Table 6 : Protection of indeterminate workers with regular or increased job security against dismissals**

| Workers with regular job security | Workers with increased job security |
|---|---|
| May be dismissed for any reason or for no reason | May be dismissed for a valid reason: Capacity or conduct of the worker; operational requirements of the undertaking, workplace or work |
| No legal obligation for the employer to state the reason for dismissal | Reason for dismissal has to be specified clearly and precisely |
| Worker cannot defend himself before termination | Worker shall defend himself against the allegations before termination for reasons related to his capacity or conduct |

[19] Constitutional Court decision 19.10.2005, No. 2003/66-2005/72, Official Gazette 24.11.2007, No. 26710.

| | |
|---|---|
| Adjudication as the only means of settlement of such disputes | Adjudication<br>Private arbitration (very limited) |
| Both parties are under the burden of proof. If abusive dismissal or unionism-based dismissal is claimed, the worker is to prove. | Employer to prove the valid reason for termination; worker to prove if he claims another reason for termination |
| Notice periods | Same |
| No reinstatement, only compensation | Reinstatement if no reason for termination is specified or the specified reason is not proved by the employer. Job security pay upon not being reinstated by the employer |
| Severance pay if the worker has completed one year of service | Same |
| Abusive dismissal: Bad-faith pay | Invalid dismissal: Job security pay |
| Unionism-based dismissal: Unionism pay | Unionism-based dismissal: job security pay (amount is the same) |
| Breach of Article 5 on equal treatment: Discrimination pay | Same |

### *c. Protection of Trade Union Representatives against Dismissal*

Trade union representatives are appointed by the authorized union (bargaining agent, the most representative union, majority union). Authorized union is the one that has fulfilled the numerical requirements[20] to conclude a collective labor agreement for a workplace, workplaces or an undertaking. Consequently there will be a local or a group or an undertaking collective

[20] There are two workforce-size thresholds to be qualified as the authorized trade union: To be representing at least 10% of the total employed in the concerned sector and to be representing more than half of the total employed in the concerned place of work. The 10% threshold and the ban on the establishment of local unions (plant unions) are criticized by both the ILO and EU.

labor agreement. Authorized union becomes the signatory union with conclusion of the collective labor agreement.

Trade union representatives represent the trade union at the place of work, the number varying in proportion to the number of the total employed (UA, Art. 34). Apart from trade union representatives there are not workers' representatives (shop stewards). Trade union representatives are to perform the following functions, limited to the workplace, from the time of appointment until the termination of the collective labor agreement (UA, Art. 35):

- To follow up and resolve workers' requests and complaints;
- To promote and maintain cooperation, harmony of work and peaceful labor relations;
- To protect rights and interests of workers; and,
- To assist the enforcement of working conditions provided by labor legislation and

collective labor agreements.

Such union activities of trade union representatives may make them vulnerable to anti-union discrimination, and in this respect, they are protected under the Unions Act and Labor Act against a change in the workplace, a substantial change in working conditions and dismissals (UA, Art. 30). A change in the workplace or a substantial change in working conditions shall be deemed invalid unless approved by the trade union representative. A trade union representative employed under an open-ended labor contract shall enjoy protection against contract termination like the other workers. But, if the ground for termination is representative functions, then no matter whether he has regular or increased job security, job security pay of not less than annual wage shall be ruled.

Turkey is a party to the ILO C135 on Protection and facilities to be afforded to workers' representatives in the undertaking.

### 6. Collective Dismissal

A collective dismissal exists where at least 10 workers out of 20-100 total employed, or at least 10% of the total employed between 101-300, or at least 30 out of 301 or more workers are dismissed on notice at the same time or different times during a period of one month (LA, Art. 29). Procedures

pertaining to projected collective dismissals include information-sharing and consultation but there is no legally provided social selection procedure. This provision draws on the ILO C158 and Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

Collectively dismissed workers are given special priority by the employer when seeking rehire. A "recall right" is the legal right of collectively dismissed workers to be called back to work by the employer. When the employer is to employ new workers for the same jobs within a period of six months following the collective dismissal, of the collectively dismissed those with the qualifications for the vacancies shall have priority.

### 7. Substantial Amendments in Employment Conditions

According to the Labor Act, when a substantial amendment in employment conditions established by the labor contract, or similar sources, or consistent workplace practices is desirable by the employer, he has to notify the worker in written form (Art. 22). A substantial amendment made without a notification or a notification objected in written form by the worker shall not be binding on the worker. If the worker objects to amendment, the employer may make a dismissal on notice claiming that the amendment is based on a valid reason or that there is another valid reason for termination. The worker may challenge dismissal according to protections provided for workers with regular or increased job security.

If the worker is not paid his wage or paid a lesser wage or if the conditions of work are not applied, then the worker shall have the right to resign for a just cause, entitling to severance pay (Art. 24/2e, f).

A substantial amendment in employment conditions such as being assigned to an undesirable shift, or moved to a different location or subjected to unfair hostility or degrading working conditions may amount to “constructive dismissal” (contrived resignation), a form of wrongful termination. For the purposes of not being sued against termination and not to pay severance pay, companies may wish for a worker to exit of his own accord on notice and therefore use forms of manipulation, hoping that he will leave “voluntarily”. Constructive dismissal is not easy to prove. If the worker quits on notice as a result of such a manipulation, he shall not be entitled to compensation including severance pay and there is no legal rule on converting

such a resignation into unfair termination by the employer. But when the reason for termination is unclear, it is the court to find out the facts and define the type of termination.

**8. Transfer of the Workplace**

Transfer of the workplace or part of the workplace shall not in itself constitute grounds for dismissal by the transferor or the transferee (LA, Art. 6). This provision draws on Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

**9. Privatizations**

There is resort to attrition to reduce the workforce of would-be privatized companies. Under the Law on Privatizations[21] there shall be a 30% increase in the retirement bonuses of the public officials requesting retirement within two months of entitlement or within two months following the date the organization has been included in privatization plan if entitlement took place prior to this date (Art. 24). Of the public officials who are to be transferred to other public bodies following finalization of privatization, those who give up the right to transfer and resign within ten days following the publication in the Official Gazette of the decision that the company has been finalized, shall be deemed dismissed with entitlement to notice pay and severance pay (Art. 22).

As regards workers employed in privatized companies, those who have been made redundant and those who quit for a just cause within a period of one year following the transfer of the company, there shall be "loss of employment pay". This compensation is twice the amount of daily minimum wage. It shall be paid for the number of days corresponding to the uninterrupted period of employment at the time of contract termination (Art. 21):

- 90 days to the one who has been employed for at least 550 days;
- 120 days to the one who has been employed for at least 1.100 days;
- 180 days to the one who has been employed for at least 1.650 days; and,

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[21] Law no. 4046 of 24 November 1994, Official Gazette 27.11.1994, No. 22124.

- 240 days to the one who has been employed for at least 2.200 days.

These workers shall also be provided with job-insertion training. Disabled workers shall be entitled to twice the prescribed amount. Of redundant workers those who are entitled to retirement shall not be paid loss of employment pay (Art. 21).

Unemployment insurance scheme was introduced in September 1999 by the Law on Unemployment Insurance (UIA)[22] and it became operational in April 2002. Daily earnings-related unemployment insurance scheme covers insured workers who lose their jobs through legally specified categories of contract termination. There is a qualifying period that is a combination of a period of employment and a period of contribution: To have worked as an insured worker for at least 600 days during the 3-year-period preceding contract termination and to have worked continuously during the previous premium-paid 120 days. The amount of unemployment benefits is 50% of the worker's daily net wage. The unemployment benefit cannot exceed the amount of net minimum wage (Art. 50). Unemployment benefits shall be paid for the number of days specified:

- 180 days to the unemployed who has worked as an insured worker for a period of 600 days and has paid unemployment insurance premiums;
- 240 days to the unemployed who has worked as an insured worker for a period of 900 days and has paid unemployment insurance premiums; and,
- 300 days to the unemployed who has worked as an insured worker for a period of 1.080 days and has paid unemployment insurance premiums.

Becoming unemployed as a result of a privatization is one of the reasons for entitlement to unemployment benefits. Where a worker is entitled to loss of employment pay and unemployment benefits, he shall first be paid loss of employment pay. If he is still unemployed at the end of the period he has been paid loss of employment pay, he shall benefit from the unemployment benefits but the number of days he has been paid loss of employment pay shall be deducted from the number of days he is entitled to unemployment benefits (UIA, provisional Art. 1).

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[22] Law no. 4447 of 25 August 1999, Official Gazette, 8.9.1999, No. 23810.

### *B. INSTANT DISMISSAL (SUMMARY DISMISSAL, DISMISSAL FOR JUST CAUSE, DISMISSAL WITHOUT A PERIOD OF NOTICE)*

Instant dismissal is a means of termination at the initiative of the employer on the basis of "just causes" specified by the law (LA, Art. 25). As there is a just cause to terminate the labor contract immediately, there are no notice periods, notice pay, bad-faith pay, unionism pay or job security pay. Instant dismissal is possible not only for indeterminate but also for fixed-term workers.

There are four categories of just causes: Just causes related to worker's health, gross misconduct, force majeure and excessive absenteeism. As a general rule, a worker dismissed on notice or for a just cause is entitled to severance pay. The only exception is being dismissed for gross misconduct. This is why many a time an employer tries to base the dismissal on worker's gross misconduct whereas the worker to make the most claims that he has been dismissed for union membership or involvement in union activities.

Immediate dismissal may occur for specified serious offenses known as gross misconduct (zero tolerance offenses). Examples are resume fraud, sexual harassment of other workers, verbal or physical abuse directed at the employer or the members of his family, illegal drug usage, willful neglect of duty that is not trivial, and has not been condoned by the employer, abuse of trust such as theft, embezzlement, disclosure of trade secrets, use of employer's equipment (e.g., vehicles and computers) to engage in non-work-related activity. Some workers terminated for gross misconduct may face additional consequences like criminal prosecution (bank teller stealing money from the cash drawer) or a civil lawsuit.

## IV. CONTRACT TERMINATION AT THE INITIATIVE OF THE WORKER

Resignation (voluntary termination) is employment termination at the initiative of the worker. Depending on the worker's reason, a worker may resign on notice or make an instant resignation (resignation for just cause).

Personal dissatisfaction with job or employer, confinement, family obligations, moving to a new location, graduation, hire at a new job with better conditions, establish own business are examples to reasons for resignation on notice. A worker making an instant resignation gets entitled to severance pay but there shall be no severance pay upon resignation on notice.

This reduces incentives not only to change employers but also to establish own businesses. According to the OECD, severance payment can be a barrier to efficiency-enhancing labor reallocation by discouraging workers from quitting their current jobs to move to better jobs[23]. This problem arises where high tenure workers are entitled to significant severance payments, if they are dismissed from the current job, but lose this entitlement if they voluntarily quit jobs. This is why in Turkey workers refrain from resignation on notice trying to "create incidents" to be dismissed on notice[24].

In Turkey, severance pay equals to the last 30 days' gross wage multiplied by the years of employment. Remaining time periods are calculated on a prorated basis. Wage supplements, if any, are also added to the last monthly gross wage. The 30-day-period may be increased through individual and collective labor agreements.

**Table 7 : Conditions for entitlement to severance pay**

| |
|---|
| Severance: To have worked for at least a year at the concerned workplace |
| Specified means of contract termination:<br>• Death of the worker;<br>• Worker's being called up for military service;<br>• Worker's becoming qualified for an old-age pension, disability benefits or a lump-sum payment from a legally established social security organization;<br>• Worker's resignation after fulfilling the qualifying period (combination of a period of employment and a period of contribution) but before reaching the prescribed age to be entitled to an old-age pension;<br>• Worker's instant resignation;<br>• Dismissal by the employer excluding dismissal for worker's gross misconduct; and,<br>• Female worker's resignation due to her marriage within one year following the marriage. |

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23 OECD, ECONOMIC SURVEY OF TURKEY 2006,at 103, available at http://www.sourceoecd.org (2006); OECD 2007a, *supra* note 2, at 70.

24 Soyer, *supra* note 17, at 45.

## V. FIXED-TERM CONTRACT AND TEMPORARY AGENCY WORK

### *A. FIXED-TERM LABOR CONTRACT*

Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE (now Business Europe) and CEEP served as the basis of Articles 11-12 of the Labor Act on fixed-term work.

A 'fixed-term worker' is the one having a labor contract, by which the end of the labor contract is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event (Art. 11). The article tries to prevent abuse arising from the use of successive fixed-term labor contracts, the so-called 'chain contracts,' by stating that unless there are objective reasons justifying the renewal of such contracts, fixed-term labor contract cannot be renewed. If a fixed-term labor contract is renewed without an objective reason, it shall be reclassified as an open-ended labor contract (Art. 11/2-3).

With the idea of 'protecting' the worker, possibilities to conclude fixed-term contracts are restricted: An objective reason is required both for its initiation and renewal. Upon conclusion of a fixed-term labor contract, or at the latest at the time of its termination, the part-timers apply to the courts challenging validity of the contract requesting it to be transformed into an open-ended one. The Court of Appeals make a strict interpretation of the term 'objective reasons' outlawing fixed-term labor contracts concluded for permanent jobs. Also, although not stated in the law, the Court of Appeals has rendered decisions invalidating fixed-term labor contracts concluded with unqualified workers and those concluded with minimum-wage-paid workers[25].

### *B. TEMPORARY AGENCY WORK*

Temporary (interim) employment is legally of a temporary nature and it is characterized by a triangular relationship between the user firm, the temporary work agency (temp agency; temporary help supply service), and

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[25] For an analysis of such recent decisions of the Court see: Ali Güzel, *Bireysel İş İlişkisinin Kurulması, Hükümleri ve İşin Düzenlenmesi*, *in* YARGITAYIN İŞ HUKUKUNA İLİŞKİN KARARLARININ DEĞERLENDİRİLMESİ 2005, 11-71, 22-32 (2007).

the temporary worker (temp). The workers have a contract with the temp agency which sends them to work as a temp for a user firm needing additional staff.

The ILO Convention 181 concerning Private Employment Agencies, 1997, referring to the importance of flexibility in the functioning of labor markets, revises the Fee-Charging Employment Agencies Convention (Revised), 1949, and the Fee-Charging Employment Agencies Convention, 1933. The Convention cites 'services consisting of employing workers with a view to making them available to a third party, who may be a natural or a legal person (user enterprise) which assigns their tasks and supervises the execution of these tasks' as one of the labor market services to be provided by private employment agencies (Art. 1). Turkey has ratified the revised ILO Conventions but it has not yet ratified C181.

The draft Labor Act had rules on temporary agencies and temporary work. These rules were severely criticized by trade unions and the then main opposition party on the basis of lack of job stability and being a threat to open-ended labor contracts. Temporary work was equated with 'slavery.' Issues of flexibility were completely twisted as a result of which the degree of flexibility in the proposed act could not be maintained but was reduced as a concession.

Temporary agency work is illegal in Turkey. Temporary work agencies cannot be established and temps cannot be provided by employment agencies. Turkey is now one of only two countries in the OECD where temporary agency work is illegal[26]. The Labor Act provides for 'temporary labor relations' allowing employers to transfer workers temporarily (at most 18 months) within the 'same holding or a conglomeration of identical companies' (Art. 7).

## VI. ECONOMIC IMPLICATIONS OF THE LEGAL SYSTEM

### *A. WHERE IN THE SPECTRUM?*

#### 1. General Evaluation

Turkey is one of the fastest growing economies in the world. It is the world's 17th and Europe's 6th largest economy. Turkey has recently achieved

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[26] WORLD BANK 2006, *supra* note 2, at 84.

impressive results in economic liberalization, privatizing state-owned enterprises (SOEs), and opening up its economy to international trade and capital flows, a significant break from the past decades of short-lived economic booms, followed by sharp downturns or recessions[27]. The Turkish economy has grown by an average 7.5% per annum since the 2001 crisis, the strongest growth performance among OECD countries[28]. Baseline growth projections remain about 6% for 2007 and 2008 in the absence of further domestic and international shocks, and provided that the 2007 Presidential and Parliamentary elections do not create additional uncertainties and macroeconomic policies remain on track[29].

The far-reaching macroeconomic and structural reforms helped to increase confidence, reduce risk premia and stimulate domestic and foreign investment[30]. Turkey ranks 57th out of 178 countries in the ease of doing business[31]. Direct foreign investments reached 22 billion $ in 2007. The figures in million $ were 19.919 in 2006, 10.029 in 2005, 2.885 in 2004, 1.752 in 2003, 1.133 in 2002, 3.352 in 2001 and 982 in 2000[32]. The reforms, together with the real depreciation of the exchange rate in the 2001 crisis led to a rapid increase in exports, which outstripped export market growth by a cumulative 30% between 2000 and 2005. Turkey thus achieved one of the largest gains in export market shares among all OECD countries during this period[33]. The increase of exports and the deceleration of imports in volume terms did not prevent the current account deficit from widening to 7.8% of GDP in 2006, mainly due to higher oil prices. Yet the acceleration of foreign direct investment inflows, which reached 4.8% of GDP, and long-term private loans amounting to 7% of GDP, more than funded the deficit and the Central Bank increased its reserves to above 15% of GDP[34].

The employment-to-working-age-population ratio is still low. Despite strong job creation in industry and services, total employment is growing

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27 *See e.g.*, OECD 2006, *supra* note 22.

28 *Id.* at 36.

29 OECD, ECONOMIC OUTLOOK 2007, at 168, available at http://www.sourceoecd.org (2007b).

30 OECD 2006, *supra* note 22, at 36.

31 WORLD BANK 2008, *supra* note 2, at 6.

32 Statement by the Minister of Finance (Star, 16.2.2008).

33 OECD 2006, *supra* note 22, at 80.

34 OECD 2007b, *supra* note 28, at 165.

slowly (amid continuing exits from agriculture) and wage growth remains very moderate. Unemployment was still high at 9.8% in 2006, reaching 12.6% in urban areas[35]. Promoting the creation of more and better jobs remains a priority in the country.

**2. EPL and Labor Market Efficiency**

Turkey has rigid EPL. Of the OECD countries, Turkey is among those with the most restrictive EPL; the new Labor Act did not change the overall rating (3.5/6)[36]. In terms of job protections for regular (indeterminate) workers, Turkey ranks tied for ninth among the 30 countries[37]. Simplification is needed in the regulatory environment. Otherwise such a strict EPL will continue to be featherbedding for the informal sector by pushing the firms and workers into it. This is why the OECD, in its Economic Survey of Turkey 2006, states that "the Government needs to improve conditions for job creation in the formal sector by adopting more flexible employment protection regulations, replacing severance payments with unemployment insurance…"[38]. The cost of complying with labor regulations such as those on severance pay is high by international standards as a result of which the employers increase working hours instead of creating employment. For example, if workers in manufacturing sector had worked 45 hours (weekly statutory hours of work) on average instead of 52, for example, another 500.000 workers would have been required[39].

Of OECD countries, the amount of severance pay is the highest in Turkey[40]. A worker with 20 years of service is entitled to 20 months pay compared to average of 6 months for OECD countries, 4 months for Europe and Central Asia countries, and 10 months for middle-income countries[41].

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35 *Id.* at 167.

36 OECD 2006, *supra* note 22, at 101; WORLD BANK 2006, *supra* note 2, at 80.

37 WORLD BANK 2006, *supra* note 2, at 80. Countries range as follows: Portugal, Turkey, Mexico, Spain, Greece, France, Sweden, Norway, Estonia, Belgium, Germany, Italy, Slovenia, Netherlands, Austria, Poland, Finland, Slovak Republic, Republic of Korea, Czech Republic, Denmark, Japan, Hungary, Switzerland, Australia, Ireland, New Zealand, Canada, United Kingdom, and United States.

38 OECD 2006, *supra* note 22, at 7-8.

39 WORLD BANK 2006, *supra* note 2, at ix.

40 OECD 2006, *supra* note 22, at 101.

41 WORLD BANK 2006, *supra* note 22, at X; OECD 2006, *supra* note 22, at 103.

Given the late introduction of unemployment benefits in 1999, mandatory severance pay for dismissed workers became an established way to provide income support and facilitate job search. The severance pay together with procedural costs of dismissal (advance notice, required notifications, and trial expenses) impose excessive costs on firms and should be considerably reduced or lifted altogether to facilitate firm restructuring and productivity growth together with a substantial reduction in administrative and judicial procedures associated with dismissals. Very high severance pay liabilities make open-ended labor contracts costly while fixed-term work is very much limited and temporary employment agencies are prohibited.

**Table 8 : Severance payments in OECD countries**[42]

| Severance pay for no-fault individual dismissals by tenure categories, in 2003 | | | |
|---|---|---|---|
| | Severance pay after | | |
| | 9 months | 4 years | 20 years |
| Australia | 0.0 | 1.0 | 1.0 |
| Canada | 0.0 | 0.4 | 2.1 |
| Czech Republic | 1.0 | 1.0 | 1.0 |
| Denmark | 0.0 | 0.0 | 1.5 |
| France | 0.0 | 0.6 | 4.0 |
| Greece | 0.3 | 1.0 | 5.9 |
| Ireland | 0.0 | 0.4 | 1.9 |
| Japan | 0.4 | 1.4 | 2.9 |
| Portugal | 3.0 | 4.0 | 20.0 |
| Slovak Republic | 1.0 | 1.0 | 1.0 |
| Spain | 0.5 | 2.6 | 12.0 |
| Switzerland | 0.0 | 0.0 | 2.5 |
| **Turkey** | **0.0** | **4.0** | **20.0** |
| United Kingdom | 0.0 | 0.5 | 2.4 |

42 OECD 2006, *supra* note 22, at 102.

Stringent dismissal regulations increase the cost of firing workers, making companies reluctant to hire new workers particularly if they expect to make significant employment changes in the future[43]. Turkey experienced decades of short-lived economic booms, followed by sharp downturns or recessions and these uncertainties made employers quite reluctant to hire new workers. EPL also impedes flexibility, making it more difficult for companies to react instantly to changes in technology or product demand that require reallocation of staff or downsizing, and slowing the flow of labour resources into emerging high-productivity companies, industries or activities[44].

EPL is one of the reasons of having a very big informal sector; about half of the employed are in the informal sector. Informal sector constitutes a great threat to national economy and to the formal sector employers. According to the OECD, reducing labour market regulations and labour costs, improving competition in product markets and improving infrastructure would not only enhance the productivity of firms in the formal sector, but would also facilitate the creation of new firms and the move of the large population of informal firms into the formal sector[45].

Global Competitiveness Report is an assessment of industrialized and developing countries' competitiveness[46]. Global Competitiveness Report includes the World Economic Forum's global and business competitiveness indices. Country performance of Turkey according to the Global Competitiveness Index 2007-2008 (out of 131 countries/economies) is stated as follows:

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43 OECD 2007a, *supra* note 2, at 69.

44 *Id.*

45 OECD 2006, *supra* note 22, at 108.

46 Available at http://www.gcr.weforum.org

**Table 9 : Global Competitiveness Index 2007-2008**

**(out of 131 countries/economies)**

| | Rank | Score (out of 7) |
|---|---|---|
| **Global Competitiveness Index 2007-2008** | 53 | 4.25 |
| Global Competitiveness Index 2006-2007 (out of 122) | 58 | 4.14 |
| **Subindex A: Basic requirements** | 63 | 4.44 |
| 1st pillar: Institutions | 55 | 4.13 |
| 2nd pillar: Infrastructure | 59 | 3.68 |
| 3rd pillar: Macroeconomic stability | 83 | 4.66 |
| 4th pillar: Health and primary education | 77 | 5.31 |
| **Subindex B: Efficiency enhancers** | 51 | 4.16 |
| 5th pillar: Higher education and training | 60 | 4.05 |
| 6th pillar: Goods market efficiency | 43 | 4.54 |
| 7th pillar: Labor market efficiency | 126 | 3.60 |
| 8th pillar: Financial market sophistication | 61 | 4.40 |
| 9th pillar: Technological readiness | 53 | 3.39 |
| 10th pillar: Market size | 18 | 4.97 |
| **Subindex C: Innovation and sophistication factors** | 48 | 3.90 |
| 11th pillar: Business sophistication | 41 | 4.45 |
| 12th pillar: Innovation | 53 | 3.36 |
| | | Rank |
| **Business Competitiveness Index 2007-2008** | | 46 |
| Sophistication of company operations and strategy | | 41 |
| Quality of the national business environment | | 48 |

As regards labor market efficiency Turkey ranks 126th out of 131 countries. In the national competitiveness balance sheet, under the title of 'Notable competitive disadvantages, 1st pillar: Institutions,' as regards efficiency of legal framework Turkey ranks 63 out of 131 countries. The 7th pillar is 'Labor market efficiency' where Turkey ranks 89th in rigidity of

employment (hard data), 88th in hiring and firing practices, 112th in firing costs, and 125th in female participation in labor force (hard data).

**Table 10 : National competitiveness balance sheet, notable competitive disadvantages**

| 7th pillar: Labor market efficiency | Rank/131 |
|---|---|
| Female participation in labor force (hard data) | 125 |
| Firing costs (hard data) | 112 |
| Cooperation in labor-employer relations | 93 |
| Rigidity of employment (hard data) | 89 |
| Flexibility of wage determination | 88 |
| Hiring and firing practices | 88 |
| Non-wage labor costs (hard data) | 86 |
| Pay and productivity | 83 |
| Reliance on professional management | 68 |
| Brain drain | 58 |

'Employing workers' data from Doing Business 2008, also confirms EPL rigidity in Turkey[47].

**Table 11 : Employing workers**

| Employing workers | rank/136 |
|---|---|
| Difficulty of hiring index (0-100) | 56 |
| Rigidity of hours index (0-100) | 40 |
| Difficulty of firing index (0-100) | 30 |
| Rigidity of employment index (0-100) | 42 |
| Nonwage labor cost (% of salary) | 22 |
| Firing cost (weeks of salary) | 95 |

47 WORLD BANK 2008, *supra* note 2, at 93, 157.

### *B. WHITHERTO EPL: SOME FUTURE PROSPECTS*

How do the stakeholders and State respond to the problem of EPL rigidity? The industrial relations context has an important impact on the issue, making the process more complex and emotional. The trade unions, in general, have a "status-quo" bias against reforms. They severely criticize the present system but where a reform is to be introduced, they become obdurate defenders of the present system. As "insider" groups they define the political agenda blocking reforms thus making it harder for the "outsiders" to enter labor markets through flexibility arrangements. Trade unions are not in search of 'greater good for all' but play to the gallery. In the absence of consensus for the reforms and the status-quo bias against reforms, the governments sometimes bypass this obstacle by introducing reforms at the margin. Reforms are emasculated by introducing extra long transitory periods or by having the existing arrangements for "insiders" remain largely unchanged or making reforms applicable to the new entrants into the labor market. Trade unions approach detailed legislation with rigid provisions as their 'retaining wall'. Job security is the highest priority for the trade unions. Trade unions heavily criticize flexible modalities of employment and flexitime, regarding them as 'revival of laissez faire' in spite of the guarantee to flexicurity beyond the Community directives. Trade unions contend themselves with defending existing levels of protection and institutional arrangements that stand in the way of decentralization destandardisation of employment relations without offering alternatives generating new employment. The renunciation of set normal working times and flexible employment were regarded as heralding the end of trade unionism. Polarization and credibility gap between the fragmented labor confederations adds to this. Competing labor confederations watch each other and are ready to label the one with a compromising attitude a 'puppet union'. There is, on the other hand, a strong incentive for employers to make use of changing patterns conceived to be in their favor. It is the employers who have been taking the initiative in pushing the trend towards deregulation and flexibility.

There are the pressures for modernization and flexibilisation of the labor market coming from the employers. Job creation is a priority for Turkey and the negative impact of strict EPL on job creation is emphasized by international bodies such as the OECD, World Bank and the EU. Figures indicate that the most flexible markets are the ones creating most employment. Turkey's ratings are important in attracting direct foreign

investments. On the part of the Government, there is the awareness of the problem and the intention to resolve it. The Government is well aware of the strictness of the EPL and its negative impact on the efficiency of the labor market. The Program of the 60th Government[48] states, *inter alia,* the intention,

- To enhance competitiveness of economy;
- To enhance competitiveness of enterprises;
- To enhance industrial relations context;
- To further develop the Labor Act in a way to support employment policies;
- To increase and widespread new modalities of employment by considering flexicurity;
- To continue with privatizations;
- To prioritize combating undeclared work;
- Reduction of labor costs, active labor market programs (ALMP) and strengthened education and labor market cooperation shall be the three main components of the new employment program.

These issues are detailed in the Ninth Development Plan (2007-2013)[49]. Mid-term Program (2007-2009)[50], and the 2008 Program[51]. There is also an 'employment package' under preparation.

## VII. CONCLUDING REMARKS

1. Excessive employment protection is a prominent feature of the Labor Act. EPL is among the strictest in OECD economies. A national perception of protection is the ethos surrounding the making and interpretation of legal rules. There is the verification of grounds; dismissal is not completely the employer's prerogative. Fixed-term contract is very much limited and temporary agency work is completely prohibited.

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48 Official Gazette 7.9.2007, No. 26636.

49 Official Gazette 1.7.2006, No. 26215.

50 Official Gazette 13.6.2006, No. 26197.

51 Official Gazette 28.10.2007, No. 26684bis.

2. The stringent EPL slows job creation and deemed a significant obstacle. Overly protective laws not only deter employers from hiring during economic upturns but also prove to be tempting for undeclared work. Overregulation contributes to noncompliance as the firms find EPL too costly to comply and thus evade or circumvent labor regulations. Thus the overly generous labor provisions remain largely on paper.

3. There is a very rigid judicial interpretation of the principle of *ultima ratio*. Nearly all dismissals are followed by a long-lasting lawsuit. Expert witnesses are to consider all dismissal related issues. The court shall consider whether there would be some way of avoiding the dismissal especially through retraining and redeployment of the worker. As regards redeployment, not only a current or near future job vacancy is considered but also the possibility of redeployment through retraining or in elsewhere in the same company or in another company of the same employer. There are even court rulings obliging the management to reorganize his workforce to avoid dismissal.

4. Employers face high costs of dismissing workers. This is likely to discourage employers from hiring even in economic upturns, to avoid future dismissal costs of redundant labor.

5. There is a need for a shift from job security to employment security. This way not the jobs but the workers will be protected through enhancement of employability and adaptability. Key challenge is to lower the large skills and opportunity gaps among the population thus helping the low-skilled to enter into the labor market.

6. A climate of unbridled, laissez-faire expansionism is not supported in this article but excessive protection of workers and inviting the courts to become involved in determining intricacies involved to the extent of infringing employers' prerogatives adds a lot to low employment and informal market. If employers are expected to manage to meet market conditions in the globalizing world, they must be allowed to do so without excessive legal and judicial interference. While it is thought that the workers are protected, employers fearing new hiring and regarding each hiring a lawsuit are created.

7. The industrial relations context and lack of long tradition of a social dialogue – negotiation economy hinders immediate adaptability of the Turkish labor market to innovations and challenges of global economy. The hard-liner

aggressive attitudes by trade unions and their *status-quo* bias against reforms slow down reformatory attempts or result in quite a gradual implementation of the introduced reforms.

8. A change of perceptions is essential to improve. Turkey has to find its right mix of social and economic concerns as there is no "one-size-fits-all" solution. An effective participatory role by social partners as envisaged by the laws does not seem practicable; in the years to come governments are likely to play a dominant role in national development policies.