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THE EVER-EXPANDING NATURE OF MANDATORY MEDIATION IN TÜRKİYE

TÜRKİYE'DE ZORUNLU ARABULUCULUĞUN SÜREKLİ GENİŞLEYEN KAPSAMI

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ABSTRACT

As it is the case with almost every modern legal system, mediation performs an important role in civil dispute resolution in Türkiye. Even though mediation in the modern sense was introduced in Turkish law a little more than a decade ago, its development and adoption was swift. Probably the main factor behind this quick adoption in legal circles is the push by the Government and the Legislator; particularly through implementing a form of mandatory mediation in 2017. While there are two main approaches to the implementation of proper mandatory mediation, Turkish Legislator preferred the procedural requirement option. After the first implementation regarding labor disputes, there were three more major expansions to the extent of mediation as procedural requirement; including commercial disputes, consumer disputes and various disputes within the jurisdiction of civil courts of peace. Since the expansion trend is still ongoing, in this study, the effectiveness of mandatory mediation, as well as probable future developments regarding the subject are examined and discussed.

Keywords: *Mediation, Mandatory mediation, Alternative dispute resolution, Labor disputes, Procedural requirement.*

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ÖZET

Tüm dünyada olduğu gibi, arabuluculuk ülkemizde de hukuk uyuşmazlıklarının çözümünde önemli bir fonksiyon yerine getirmektedir. Modern anlamda arabuluculuk Türk hukukuna gireli on yıldan biraz fazla süre geçmiş olmasına rağmen, kurumun gelişimi ve benimsenmesi hızlı şekilde olmuştur. Arabuluculuğun, hukuk çevrelerinde bu denli hızlı şekilde benimsenmesinin altında yatan en önemli faktörlerden biri, Hükümetin ve Kanun koyucunun, bilhassa 2017 yılında zorunlu arabuluculuk kurumunu getirerek arabuluculuğu teşvik etmesidir. Gerçek anlamda zorunlu arabuluculuğun uygulanması bakımından iki temel sistem olmakla birlikte, Türk Kanun koyucusu bunlardan dava şartı olarak arabuluculuk sistemini kabul etmiştir. İş uyuşmazlıklarının büyük bir kısmının dava şartı olarak arabuluculuğa tabi kılınmasından sonra, dava şartı olarak arabuluculuğun kapsamı üç büyük genişleme daha yaşamıştır. Bu genişlemeler, ticari uyuşmazlıklar, tüketici uyuşmazlıkları ve nihayet sulh hukuk mahkemelerinin görevine giren bazı uyuşmazlıkların dava şartı olarak arabuluculuğa tabi kılınması ile gerçekleşmiştir. Bu çalışmada, bahsedilen genişlemenin devam etme eğiliminde olduğu düşüncesiyle, zorunlu arabuluculuğun etkinliği ile ilgili hususlar ve kurumun geleceği incelenmiş ve tartışılmıştır.

Anahtar Kelimeler: *Arabuluculuk, Zorunlu arabuluculuk, Alternatif uyuşmazlık çözüm yolları, İş uyuşmazlıkları, Dava şartı.*

EXTENDED ABSTRACT

Mediation, even though introduced in Turkish law in the modern sense merely a decade ago, has quickly risen to a very important role in civil dispute resolution. After the adoption of The Law on Mediation in Civil Disputes in 2013, mediation has become the major alternative dispute resolution method in Türkiye, even though it was not the first alternative dispute resolution experience. Settlement negotiation, despite having a very established history and being recognized by the current and previous Code of Civil Procedure, enjoyed a negligible practice. One may argue the reasons of its unfortunate fate comprehensively; but it is sufficed to say that settlement, historically and consistently, never exceeded the point one percent mark in Turkish civil dispute resolution. The second most important alternate dispute resolution method in Türkiye, namely the conciliation power of attorneys which was introduced in 2001, more than a decade ago from mediation, met a similar fate with settlement negotiation. Therefore, building on the experience of alternate civil dispute resolution in Türkiye, application of mediation was not majorly different than its counterparts in the first years. The most important development on the subject was, without a doubt, the introduction of mandatory mediation.

First instance of mandatory mediation was implemented with the Law on Labor Courts, which was enacted in late 2017 and went into effect in the beginning of 2018. When proper mandatory mediation is implemented, there are broadly two paths to choose from: Mediation before filing an action or court-controlled mediation. The

Turkish Legislator opted for the first approach; therefore, mandatory mediation, in Turkish law was implemented as "Mediation as procedural requirement". This means that, should the plaintiff file an action before exhausting the mediation route, the court must dismiss the action on procedural grounds. This, inevitably leads to the reduction of caseloads of courts; at least on paper. However, as it is discussed in this paper, the statistics in Turkish experience suggest otherwise.

The scope of mandatory mediation, expanded three times since its inception in 2017. Firstly, commercial disputes in 2018; than consumer disputes in 2020, along with some exceptions, were subjected to mandatory mediation. Finally, in 2023, all disputes arising from rental agreements, with the exception of provisions regarding eviction from rented real property by way of compulsory enforcement without a judgment procedure according to the Code of Compulsory Enforcement and Bankruptcy numbered 2004; disputes regarding repartitioning of movable or real property or rights and dissolution of joint ownerships, disputes arising from Condominium Law dated 23/6/1965 and numbered 634, disputes arising from vicinity rights and disputes arising from agricultural production agreements were added to the scope of mediation as a procedural requirement.

Since the scope of this paper is limited to the expansion of mandatory mediation in Türkiye, the discussion regarding any advantage or disadvantage is also limited to mandatory mediation. There are two major advantages of mandatory mediation: (Supposed) reduction in caseloads; and its utilization as "temporary expedient", in legal systems like Türkiye, which are somewhat foreign to modern ADR and settlement culture. Even though a strong case may be made for the latter; the reduction of caseloads is highly debatable as the official statistics demonstrate. The criticism on mandatory mediation, on the other hand, is very extensive as it is discussed in the paper. First of all, one of the most favorable aspects of (voluntary) mediation, privacy, constitutes a major problem for mandatory mediation; especially in disputes involving parties with asymmetrical standings; such as the ones between employer and employee or landlord and tenant. Another problem regarding mandatory mediation is related to its temporary expedient characteristic. If everything does not go according to the plan, mandatoriness of mediation may easily poison the public perception of mediation as a whole; and may cause more harm than good in the long run. Of course, apart from the mandatoriness of mediation itself; the form of its implementation is equally significant. Since Turkish legislator opted for the mediation as a procedural requirement; the right of going to court; which is a fundamental and constitutional right, is directly affected. This, along with the ongoing and seemingly never-ending expansion of the scope of mandatory mediation, pose the grave danger that courts falling into secondary importance and mediation institutions becoming even more important than the judiciary system as a whole. This, inevitably results in the loss of public confidence in judiciary and the concept of justice.

It is our conclusion that, should the Legislator choose to uphold mandatory mediation,

instead of the endless expansion of mediation as a procedural requirement; court-controlled mediation should be implemented and promoted. This ensures the fundamental right of parties' day in court while simultaneously establishing the control of the courts on amicable resolution between the parties.

INTRODUCTION

Even though mediation in the modern sense was only introduced in Turkish law a little more than a decade ago, in 2013; its growth realized in a breakneck speed. No other "new" legal institution in Turkish legal experience enjoyed an extensive adoption rate, similar to mediation. This level of adoption rate was achieved, no doubt, at least partly due to the push of the State; all three powers of it. The Ministry of State and judiciary in general, supported the concept in every way that they were able to, and the Legislation passed many laws to extend both the capabilities and the extent of mediation in order for it to, for lack of a better word, dominate civil justice, in a single decade. According to the latest data, mediation has already done away with more than 6 million civil disputes in Türkiye[1]. The Law on Mediation in Civil Disputes, which was put into effect in 2013, has been amended majorly no less than five times. A major part of said amendments, aimed to establish and enforce a new concept: mandatory mediation. Whilst the name mandatory mediation seems and indeed feels oxymoronic[2], it is actually not; at least in the eyes of its supporters[3]. The major building block of mediation, as it is the case with almost all alternative dispute resolution methods, is voluntariness[4]. However, the voluntariness here alludes to two separate things: Resorting to mediation on one's will, and achieving a result in mediation on one's will. While the second portion of this premise is universally accepted as fact; this is not the

[1] Adalet İstatistikleri (Judicial Statistics) 2023, T.C. Adalet Bakanlığı Adli Sicil ve İstatistik Genel Müdürlüğü, March 2024, p. 33.

[2] Muhammet Özekes/ Pınar Çiftçi, "Menfî Tespit Davalarını Zorunlu Arabuluculuğa Dahil Saymanın Gereksizliği Üzerine (İstanbul Bam Kararları Örneğinden Bir Bakış)", *TBB Dergisi*, 148, 2020, p. 102.

[3] Jennifer Winestone, "Mandatory Mediation: A Comparative Review of How Legislatures in California and Ontario are Mandating the Peacemaking Process In Their Adversarial Systems", <http://www.mediate.com/articles/WinestoneJ4.cfm>, Access Date 15 November 2024.

[4] Stella Vettori, "Mandatory Mediation: An Obstacle to Access to Justice," *African Human Rights Law Journal,* 15(2), 2015, p. 57; Melissa Hanks, "Perspectives on Mandatory Mediation", *UNSW Law Journal*, 35(3) 2012, s. 930.

case for the first portion[5]. Despite it is not widely utilized; there are many examples from around the world that, in some way or another, the parties are required to exhaust mediation before filing an action or obtaining a judgment in the court[6]. This distinction also determines the main two approaches to the subject: If the restriction is aimed at also curbing the caseload of the courts; usually the first approach is taken. This is, unfortunately, has been the case for Türkiye as well. The second approach however, utilizes a more academic and court-controlled attitude in order to achieve healthier and more robust results. The approach to be selected is also determined by the legal history and experience of respective legal systems. While the more settlement-oriented systems like the UK or Australia tend to move towards the second approach; more judgment-oriented systems like Italy and Turkey usually opt for the first approach[7].

In this study, we will try to paint a picture of the very recent yet speedy development of mediation in general; and in particular its implementation as procedural requirement in Turkish law. We will examine the amendments to the Law and the seemingly never-ending expansion of mandatory mediation; as well as problems it had brought along the way and what should be done in the years to come.

I. MEDIATION IN TÜRKİYE BEFORE THE INTRODUCTION OF MANDATORY MEDIATION

A. Before Mediation

The Law on Mediation in Civil Disputes no. 6325, which is the principal legislation on mediation, was passed in 2012 by the Parliament and come into effect in early 2013. Before mediation however, Turkish law was no stranger

[5] Dorcas Quek, "Mandatory Mediation: An Oxymoron - Examining the Feasibility of Implementing a Court-Mandated Mediation Program," *Cardozo Journal of Conflict Resolution,* 11(2), Spring 2010, p. 484 vd. Some scholars explain this distinction, through mandatory mediation perspective, by using the terms "coercion to enter" and "coercion to settle" (Vettori, p. 358, Quek, p. 486)

[6] Regarding these examples see. Betül Azaklı Arslan, *Medeni Usul Hukuku Açısından Zorunlu Arabuluculuk*, Yetkin, 2018, p. 85 ff.; Seda Özmumcu, "Karşılaştırmalı Hukuk ve Türk Hukuku Açısından Zorunlu Arabuluculuk Sistemine Genel Bir Bakış", *İÜHFM,* 74(2), 2016, p. 809 ff.; Hanks, p. 932 ff.

[7] Quek, p. 490; Vicki Waye, "Mandatory Mediation in Australia's Civil Justice System," *Common Law World Review,* 45(2-3), June/September 2016, p. 215; Harvey J. Kirsh, "When Is 'Mandatory Mediation' Not Mandatory?," *Advocates' Quarterly,* 50(2), October 2019, p. 185; Hanks, p. 930.

to alternative dispute resolution. Arguably two of the most utilized methods of alternative dispute resolution other than mediation, namely negotiation and conciliation, were already implemented and in use; albeit in their limited respective scopes. Negotiation, the oldest and oft mentioned of the two, was (and still is) drawn up in the Code of Civil Procedure. Both current Code of Civil Procedure (2011) and its predecessor statute (the Code of Civil Procedure -1927), actively mention negotiation for settlement. Article 137 of the Code of Civil Procedure stipulates that: "*The court, in pre-trial examination, shall …, precisely determine the boundaries of the dispute, carry out preparatory proceedings and proceedings necessary for the parties to present evidence and for the discovery of evidence, encourage the parties for settlement or mediation in actions on which they may freely act after informing the parties regarding the guiding principles, course and consequences of settlement and mediation*…" The last part of the sentence regarding the clarification duty of the judge, was inserted into the text in 2020. Settlement (*sulh*), in Turkish law, must also be explained due to its unique characteristics in Turkish Law. Unlike the wide scope of the term settlement in comparative law, it refers to a very limited usage under Turkish law; though settlement may be made before or outside the court.

The term settlement within the context of the Code of Civil Procedure, refers only to settlement made before the court[8]. Settlement terminates the action it is relevant to, and produces legal consequence of res judicata (CoCP art. 315). Matters outside the subject matter of the action may also be included in the scope of the settlement. Unlike waiver and acknowledgement, settlement may be contingent. The other type of settlement, i.e. settlement outside the court is not regulated under the Code and unfortunately legal consequences thereof are somewhat vague[9]. However, once again it should be noted that, since all recognized ADR methods (mediation, conciliation) in Turkish law are set out in an end-result oriented manner, "settlement agreements" made as a result are not called as such and have different legal terminologies that are regulated by their respective statutes[10]. In a nutshell, when a Turkish jurist

[8] Ramazan Arslan, Ejder Yılmaz, Sema Taşpınar Ayvaz, Emel Hanağası, *Medeni Usul Hukuku*, 10. Edition, Yetkin, 2024, p. 633; Murat Atalı, İbrahim Ermenek, Ersin Erdoğan, *Medeni Usul Hukuku Ders Kitabı*, 6. Edition, Yetkin, 2024, p. 584; Mustafa Göksu, *Civil Litigation and Dispute Resolution in Turkey*, Banka ve Ticaret Hukuku Enstitüsü Yayınları, 2016, p. 155

[9] Arslan et al, p. 637-638; Göksu, *Civil Litigation*, p. 155.

[10] Göksu, *Civil Litigation*, p. 276.

speaks of "settlement", it is either the one in the Code of Civil Procedure or a completely unregulated and unenforceable agreement.

Since the provisions of the Code of Civil Procedure regarding negotiation are very limited, one can say that the most important of these provisions is the one regarding the evidential restrictions in article 188. As per third paragraph of said article, "*the parties are not bound by admissions made during settlement negotiations.*" Even this provision alone, makes negotiation a proper ADR method in Turkish Law.

Second, yet more modern ADR method regarding civil disputes in Turkish law, is the conciliation power of attorneys. This method was introduced in 2001 in the Law of Lawyers (1969) as article 35/A. According to the article, attorneys (lawyers), in company with their clients, may invite the opposing party to conciliation before the commencement of the action or during the proceedings in which the attorney is appointed and on which the parties may act freely. If the opposing party accepts the invitation and an agreement is reached at the end of the negotiation, a record containing the subject matter, place and date of the agreement as well as the obligations of the parties is prepared. This document carries the power of an execution copy of the judgment within the scope of the article 38 of the Code of Compulsory Enforcement and Bankruptcy, provided that it is signed concurrently by the parties and their attorneys. As the text of the law is obvious, there are two main features of the method: Firstly, despite the name of the procedure being conciliation, it is actually a special type of negotiation[11]. Since the attorneys of the parties can never be completely impartial, their role can not be considered as the involvement of an impartial and independent third party. Secondly, the end-result oriented approach of the Legislator, which we have mentioned right above, is once again readily visible here; legal enforceability of the agreement document is virtually the only important aspect of the method that is expressed in the provision.

There is a third method of ADR, namely conciliation in criminal procedure law, that should be mentioned here. However, since the principal consequences of said method lies mostly within criminal law domain, we will only mention it by name and also enunciate the fact that this method is also end-result oriented as per paragraph 19 of article 253 of the Code of Criminal Procedure (2004) regarding its enforceability, as it is the case with all ADR

[11] Mustafa Özbek, *Alternatif Uyuşmazlık Çözümü,* 3. Edition, Yetkin. 2013, p. 876

methods in Turkish Law.

Apart from the ADR methods explained above, there are some other and interesting procedures that pre-dates the Law on Mediation in Civil Disputes[12]. An interesting example of mediation outside the scope of the Law on Mediation in Civil Disputes is set out by the Law of Villages which goes all the way back to 1924. According to the Statute, village council of elders may resolve issues that can be terminated with the disposition of the parties in villages. There is another ADR method set out by the Law of Villages, which may be designated as negotiation. The Statute stipulates that, should a border or collective work dispute rise between two villages, their respective councils have the power to meet and resolve the dispute as per articles 5 and 48. Other examples of non-LMCD mediation are utilized regarding collective labor disputes. These instances of mediation are brought by the Law on Unions and Collective Labor Agreements (2012). Article 50 of the Statute deals with the more institutionalized mediation and states that in case of a collective bargaining dispute, a mediator registered in the relevant registry (distinct from the registry of mediators according to the Law on Mediation in Civil Disputes) must be chosen and appointed. This mediator has a duty to make effort to bring the parties together and encourage the parties to resolve the issue on their own. However, probably due to its mandatory nature, this ADR method employs a somewhat strange means in mediation: According to the sixth paragraph of the article, the parties and third persons are obliged to produce information and documents relevant to the dispute that are requested by the mediator. The second instance of mediation in said Statute is regarding strikes during collective bargaining. Article 60 of the Statute stipulates that, the Minister of Labor and Social Security may act as a mediator or appoint a person as one, regarding the dispute.

B. Introduction of Mediation in Civil Disputes

Following the enactment of the Law on Mediation in Civil Disputes, it may be expressed that no other legal institution in Turkish law demonstrated a more meteoric rise than mediation. The drafting and enactment of the Statute was not easy either. The draft was encountered with a lot of backlash and pushback from the legal community. The main reason behind this backlash may be linked to the relative obscurity of ADR in Turkish legal tradition. All

[12] See Mustafa Göksu, *Alternatif Uyuşmazlık Yolları ve Tahkim*, 6th Edition, Seçkin, 2024, pp. 23 ff.

the ADR methods we have explained in the previous heading virtually had never been utilized regarding civil disputes. Historical data shows that court settlement rates in civil disputes are generally less than point one percent; conciliation power of attorneys were relatively new at the time and once again virtually never used and no other method akin to modern mediation had yet existed. Another reason of the backlash was most likely due to the profession requirements of mediators. The initial form of the draft was not restricting mediation services exclusively to jurists; other professionals would also be able to have acted as mediator, provided that other requisites were met. However, as a result of the backlash mostly from bar associations, the Statute was passed containing the requisites of graduation from a faculty of law and a minimum of five-year experience.

The first years of mediation before the introduction of mandatory mediation were relatively serene. According to the official data, during the period between the enactment and early 2017, less than two thousand mediation instances had been initiated and almost all of them resulted with agreements. Two thousand instances in more than four years is a number one can hardly be excited for. By April 2017, there were 2555 meditators in the registry, even more than the number of instances up to that date. Another interesting data from that period was the distribution of dispute types among the instances. It was reported that, by that time, more than 71% of the instances was of labor disputes. This high rate of labor disputes among all instances of mediation have certainly played a role on what is to come later.

C. General Principles of Mediation in Türkiye

Before getting to the scope of mandatory mediation, general principles of mediation under the Law on Mediation in Civil Disputes must be addressed. The term "mediation", under Turkish law, is used in different provisions of various statutes; however, institutional mediation is regulated by the Law on Mediation in Civil Disputes. Therefore, with the exceptions set by other statutes, such as the ones that we have mentioned above, mediation services must be conducted in accordance with the Law on Mediation in Civil Disputes. The Law on Mediation in Civil Disputes was passed in 2012 by the Parliament and it has come into effect in early 2013. Similar to the conciliation procedure set out by the Law of Lawyers, mediation is aimed to be terminated with a binding document.

The Law on Mediation in Civil Disputes, provides definitions for the

term "mediation". Mediation, as per the Statute, refers to the dispute resolution method that is carried out voluntarily with the involvement of a neutral and independent third person who has received a specialty training, brings the parties together in order to discuss and negotiate, and enables the communication process between the parties to ensure that the parties understand each other and thus create their own solutions with resorting to systematic techniques and may also propose a solution should the parties are unable to produce one. Main features of mediation are the principles of voluntariness and equality. According to article 3, the parties are free to consult to the mediator and continue, finalize or abandon the mediation process. In addition, the parties have equal rights in the matter of consulting to the mediator, as well as during the entire process.

As we have mentioned above, since the mediation is initiated with the aim of the end-result (agreement document), regulation of mediation was drafted with this approach in mind. The Statute makes no distinction between eligibility for mediation and eligibility for being the subject matter of the agreement document at all[13]. Accordingly, since article 17 of the Statute clearly imposes on the mediator the obligation to terminate the process should she determine that the dispute is not eligible for mediation, carrying out mediation proceedings without the end-result of an agreement document is not permitted. Therefore, the Statute reduces the main purpose of mediation to the preparation of an agreement document, by ignoring the amicable resolution aspect almost entirely.

The scope of the Statute is limited to the resolution of all civil disputes arising from matters and transactions on which the parties may freely act, except for disputes that involve a domestic violence claim. Eligibility of various certain matters for mediation in Turkish law is somewhat debated. The most important subject of these debates, namely whether rights attached to real properties can be the subject of any dispute resolution method other than litigation and settlement before the court is finally resolved with an amendment to the Law on Mediation in Civil Disputes in 2023. With the newly enacted article 17/B of the Statute, disputes regarding the transfer of real property or creation of limited rights thereon are clearly mentioned within the scope of mediation and some special provisions regarding such disputes are added to the Statute.

[13] Göksu, *Civil Litigation*, p. 276.

The mediator is a natural person who provides the service of mediation and enlisted in the registry of mediators managed by the Ministry. According to the Statute, the mediator must be a Republic of Türkiye citizen and must have graduated from a faculty of law and possess minimum of five-year experience in the profession. There is also an exam that is held after the mandatory mediation training. However, in 2024, jurists with a minimum of twenty-year experience in the profession have been exempted from the exam with an amendment to the provision.

According to the Statute, the mediator is obliged to keep confidential about the information and documents that she is presented or gathered in another manner within the scope of mediation service (LMCD art. 4/1), perform her duty with due care, in a neutral way and personally (LMCD art. 9/1), protect the equality between the parties (LMCD art. 9/3), inform the parties regarding the final record and its consequences (LMCD art. 17/3); as well as conforming to her other duties set out by the Statute.

Another important feature of a legally recognized ADR method is its effect on time limitations. According to the Statute, the duration between the commencement and the termination of mediation process is not taken into account in the computation of statute of limitations and preclusive time requirements. Article 16 of the Statute stipulates that, if mediation is sought before the commencement of litigation, mediation process commences at the date in which a record is prepared documenting the agreement between the parties and the mediator to resume the process upon the invitation to the initial meeting is delivered to the parties. If mediation is sought after an action is filed, the process commences at the date in which the parties accept the invitation of the court for mediation or inform the court in writing that they have agreed to seek mediation outside the court or the statements of the parties regarding the agreement on seeking mediation is put into the court record.

As it is the case with settlement negotiations per the Code of Civil Procedure, statements made and documents presented during the mediation process are inadmissible as evidence in litigation, barring the exceptions specified in article 5 of the Statute. The main exception is the possible vagueness regarding the enforcement of the agreement.

If the desired result of mediation is achieved at the end of the process, an agreement document is prepared by the mediator. The scope of the agreement is determined by the parties and the document is signed by the

parties and the mediator (LMCD art. 18). The procedure for the enforceability eligibility of this document has become somewhat complicated in time with various amendments. According to the article 18 of the Statute, the main rule is that, should the parties and their attorneys sign the agreement along with the mediator, it is immediately enforceable. If the agreement terminates a commercial dispute, even the signatures of the parties are omitted; the signatures of the attorneys and the mediator is sufficient for enforcement. However, if any of these required signatures is missing (apart from the mediator's), a party must obtain an enforceability annotation from the court. This annotation is also required for some disputes regardless of the signatures of all persons involved. For instance, agreements regarding disputes involving transfer of real property must be annotated by the court (LMCD art. 17/b).

II. MANDATORY MEDIATION IN TÜRKİYE

A. Background and Implementation: Mediation as Procedural Requirement in Labor Disputes

In the preamble on the Bill of what would become the Law on Labor Courts, the Legislator asserts that, after the implementation of mediation in 2013, labor disputes had constituted 89% of the total number of mediation instances; and almost 93% of these instances had resulted in agreement (as of 25 May 2017). The Legislator proceeds to naming some quasi-mandatory mediation examples from around the world; including France, Austria, Holland, Malesia and Argentina and concludes that subjecting labor disputes will not infringe any fundamental rights and will serve in achieving swift resolution of labor disputes while protecting the privacy of the parties involved[14]. It should be noted that, first instance of mandatory mediation was neither implemented nor governed by the Law on Mediation in Civil Disputes; but with the Law on Labor Courts, which was enacted in late 2017 and went into effect in the beginning of 2018. Therefore, the scope of the mandatoriness of mediation was limited to labor disputes. Relevant provisions in the Law on Mediation in Civil Disputes would have to wait for another year for an update.

Of course, the most important feature of the implementation, even more important than its scope, was the meaning of mandatoriness. When proper mandatory mediation[15] is implemented, there are broadly two paths to choose

[14] <https://cdn.tbmm.gov.tr/KKBSPublicFile/D26/Y2/T1/WebOnergeMetni/eae5f699-d297-49cc-8405-64435805a0f3.pdf>, p. 11, Access Date 10 November 2024.

[15] By proper mandatory mediation, we are excluding the quasi-mandatory mediation procedures

from: Mediation before filing an action or court-controlled mediation[16]. Unfortunately, the Turkish Legislator opted for the first approach. We are putting the evaluation of these methods off to the next heading but suffice it to mention here, the Government, nonetheless avoiding abstaining from directly mentioning it, chose the way to slash caseload numbers by completely ignoring the second approach. Therefore, mandatory mediation gained a new name for Turkish Law: "Mediation as procedural requirement".

Procedural requirements, in Turkish procedural law, are requisites that must be present (or absent with regards to some) throughout the litigation process. It is universally accepted in Turkish law that, procedural requirements are of public policy; therefore, the court must examine the procedural requirements during the entirety of the action ex officio (CoCP art. 115); and the parties may object to the absence of a procedural requirement at any time[17]. Should the court determine the absence of a procedural requirement, it dismisses the action on procedural grounds. However, a crucial rule stipulates that, if it is readily possible to rectify the absence of the procedural requirement, the court must allow time to the plaintiff for this rectification. In other words, procedural requirements in Turkish law may be broadly divided into two categories: Rectifiable procedural requirements and unrectifiable procedural requirements[18]. Here lies one of the biggest problems regarding mediation as procedural requirement in Turkish law: According to the article 3 of the Law on Labor Courts, regarding any employee or employer debt or compensation claims or reinstatement actions based on the Statute or personal or collective labor agreements, resorting to mediation is procedural requirement. However, the same provision proceeds to say, should it be determined that the action was filed before resorting to mediation, the action shall be terminated immediately. Therefore, the court is not permitted to allow time to the plaintiff in the absence of the procedural requirement at

such as Calderbank offers or Part 36 offers to settle, in jurisdictions like England and Wales or Australia. See Quek, p. 489; Özmumcu, p. 809; Ayşe Kılınç, "Mevcut Düzenlemeler Çerçevesinde Zorunlu Arabuluculukta Yetki", *YBHD*, 8(2), 202,3, p. 538, fn. 9; Azaklı Arslan, p. 33.

[16] Michael Bartlet, "Mandatory Mediation and the Rule of Law," *Amicus Curiae,* 1(1), Autumn 2019, p. 53,54; Sushree Dash, "Positive and Negative Aspects of Mandatory Mediation," *International Journal of Law Management & Humanities*, 5, 2022, p. 663; Quek, p. 480, 481; Azaklı Arslan, p. 31-33.

[17] Arslan et al, p. 338; Atalı et al, p. 324.

[18] Arslan et al, p. 339; Göksu, *Civil Litigation*, p. 115.

hand[19]. This is a highly controversial provision and exists in contrast with the general principles governing procedural requirements; and as a result, the constitutional right that is freedom of claiming rights (Const. art. 36)[20].

Along with the requirement and the scope of the mandatory mediation implementation, the provision in the Law on Labor Courts, also brought very complicated and somewhat insufficient procedures for the implementation, including venue rules, mediation offices, time limits etc. This provision acted as the basis for the provision for general rules on mandatory mediation in the Law on Mediation in Civil Disputes a year later (LMCD art. 18/A). The scope of the implementation later expanded in 2023, once again in a controversial manner. After the Law on Labor Courts was put into effect, some types of actions became the subject of debate on whether they were within the scope of mandatory mediation. Turkish Code of Compulsory Enforcement and Bankruptcy provides means of recovery of monetary debts without a judgment. These means of recovery provide that a creditor may initiate a recovery procedure despite lacking a judgment and if the debtor fails to object, the creditor may collect her credit through the compulsory enforcement agency. If the debtor objects, then the creditor must either file for removal of objection in the compulsory enforcement court, which is a special procedure; or file a proper action for invalidation of objection (*itirazın iptali davası*) in the proper court. The debtor may also file for a negative declaratory action (*menfi tespit davası*) before or during the enforcement procedure or an action for restitution (*istirdat davası*) if she already were forced to pay what she had not owed[21]. Since these three types of actions are related and relevant to compulsory enforcement law and filed only in limited circumstances, it was debated for almost six years whether mediation should be exhausted before filing such action[22]. In 2023, along with the latest expansion, which will be examined later; the Legislator ended this debate by expressly including these types of actions within the scope. Therefore, even if the action was originated with regards to recovery of monetary debts without a judgment procedure, the

[19] İlker Koçyiğit, Alper Bulur, *Ticari Uyuşmazlıklarda Dava Şartı Arabuluculuk*, Hukuk İşleri Genel Müdürlüğü Arabuluculuk Daire Başkanlığı, 2019, p. 48

[20] Ali Cem Budak, "Ticari Davalarda Dava Şartı Olarak Arabuluculuk", *MİHDER,* 42(1), 2019, p. 27.

[21] For more information on the subject, see Mustafa Göksu, "Recovery of Monetary Credits by Way of Procedures for Compulsory Enforcement Without a Judgment According to Turkish Code of Compulsory Enforcement and Bankruptcy", *Ankara Bar Review*, 7(1), pp. 81-112.

[22] Özekes, Çiftçi, p. 122 ff.; Süha Tanrıver, "Dava Şartı Arabuluculuk Üzerine Bazı Düşünceler", *TBB Dergisi,* 147*,* 2020, p. 123 ff.

creditor or the debtor must resort to mediation before filing the proper action.

Some labor disputes, on the other hand, are excluded from mandatory mediation. According to the third paragraph of the provision, any type of action regarding damages based on work accidents or occupational illnesses are exempt from mandatory mediation.

One of the more important and interesting aspects of the provision in the Law on Labor Courts, which was later also adopted by the article 18/A of the Law on Mediation in Civil Disputes, was the implementation of sanctions regarding judicial costs to be applied in the absence of any party in mandatory mediation. According to the original text of the provision, should the mediation be terminated due to the unexcused absence of a party from the first meeting, this fact is noted in the record by the mediator and even if said party prevails partially or as a whole in the action to be filed regarding the dispute at hand, shall be held responsible for judicial costs and also be denied attorney's fee recovery. However, the Constitutional Court, in 2024, struck this provision down, on the basis of principle of proportionality, stating the excessive unjust burden on the absent party[23]. Whilst the judgment of the Constitutional Court is to be effective after 18 January 2025, the Legislation amended the provision before said date. According to the new text of the article, the absent party, under aforementioned circumstances, will be held responsible for the half of the judicial costs to be paid by the opposing party and may recover half of the attorney's fee determined by the Tariff.

B. First Expansion: Commercial Disputes

First expansion to mandatory mediation came less than a year after the first implementation was put into effect. The Legislator asserts in the preamble of the Statute no: 7155 that, the reason behind adding commercial disputes to mandatory mediation was the "*success and advantages of mediation as procedural requirement in practice which was adopted and utilized since 1 January 2018*"[24]. The Preamble, on the other hand, fails to provide a reason as to why commercial disputes were selected as the first expansion and how

[23] Constitutional Court of the Republic of Türkiye, 14/3/2024, E: 2023/160, K: 2024/77.

[24] It must be noted that the date of the Preamble is 13 November 2018, which is less than a year later after the first implementation. It is up to the reader to decide whether "almost a year" is sufficient to draw such a conclusion. Also see Ömer Ekmekçi/ Muhammet Özekes/ Murat Atalı/ Vural Seven, *Hukuk Uyuşmazlıklarında Arabuluculuk*, 2. Edition, On İki Levha, 2019, p. 141.

this expansion was expected to improve the rights of the parties; other than stating "*it is aimed that such disputes be resolved according to the will of the parties significantly faster and with less expense*"; as if voluntary mediation is not capable of such feat.

According to article 5/A that was inserted to the Turkish Commercial Code (2011) with the aforementioned Statute no: 7155, before filing a commercial action with the subject matter of a monetary claim or compensation mentioned in Turkish Commercial Code or any other statutes, exhaustion of mediation is a procedural requirement. Therefore, the provision limits the commercial actions that are subject to mandatory mediation to monetary claims. Should any commercial claim be based upon on real or movable property or right, mediation is not a procedural requirement. However, as we have mentioned above regarding labor disputes, a debate regarding actions for invalidation of objection, negative declaratory actions and actions for restitution was ongoing for commercial disputes as well[25]. As it is the case with labor disputes, the Legislator ended this debate in 2023 by expressly including these types of actions to the scope of article 5/A.

Another important development brought by the Statute no: 7155 was the addition of article 18/A to the Law on Mediation in Civil Disputes. This article, governs the universal procedure to be carried out regarding any mandatory mediation instance. The article is mostly adopted from the article 3 of the Law on Labor Courts and introduced a cumbersome and complicated procedure regarding mandatory mediation. Said article currently consists of 20 paragraphs and co-exists with the provision in the Law on Labor Courts, which constitutes a problem regarding the implementation of rules[26]. Another problem regarding the provision is that mandatory mediation is approached as if it is a completely separate institution from (voluntary) mediation; rather than a mere implementation difference. Because of this approach, courts sometimes completely ignore the voluntary mediation experience of the parties regarding the dispute and require a new mandatory mediation procedure to be exhausted.

C. Expansion Continues: Consumer Disputes

The Law on Consumer Protection (2013), through articles 66 through

[25] Özekes/ Çiftçi, p. 122 ff.; Tanrıver, p. 123 ff.; İbrahim Ermenek/ Betül Azakli Arslan, "İcra ve İflâs Hukuku Açısından Ticarî Davalarda Arabulucuya Başvuru Zorunluluğu (TTK m. 5/A)", *TBB Dergisi,* 148*,* 2020, p. 141 ff.; Aydın İ, *Ticari Davalarda Dava Şartı Olarak Arabuluculuk*, On İki Levha, 2022, p. 171 ff.; Koçyiğit/ Bulur, p. 67 ff.

[26] Ekmekçi et al, p. 129.

72, stipulates that, disputes between consumers and dealers, manufacturers etc. that do not exceed a certain amount[27] (subject to annual adjustment) must be resolved by the relevant consumer arbitral tribunals, which are established in the provinces and select districts. Even though the name and some of the features of this procedure resemble mandatory arbitration, exact legal characteristics of consumer arbitral tribunals are contentious[28]. In 2020, with the Statute no: 7251, the scope of the mandatory mediation was expanded again to include consumer disputes. However; since there is already a different dispute resolution method in consumer protection; the Legislator opted to keep the consumer arbitral tribunals and limited the utilization of mediation as procedural requirement to consumer courts.

According to the newly added article 73/A of the Law on Consumer Protection, regarding all disputes to be filed in consumer courts, exhaustion of mediation beforehand is a procedural requirement. However, the article also provides an extensive exclusion list; including any disputes to be filed in consumer arbitral tribunals; any objection to be made before consumer courts against the decisions of consumer arbitral tribunals; any disputes involving real property rights and various other special circumstances.

Another significant provision in the Law on Consumer Protection is that; consumers are exempted from the sanctions regarding judicial costs to be applied in the absence of any party in mandatory mediation. Therefore, even if the consumer party fails to attend the mediation meeting; said sanctions cannot be utilized against them in a future action in court.

D. Latest Inclusion: Various Disputes Mostly Within the Jurisdiction of Civil Courts of Peace

Before the current Civil Code of Procedure was enacted in 2011, under the regime of the previous Code of Civil Procedure, actions which were not included in the subject matter jurisdiction of specialized courts, were divided between the civil courts of general jurisdiction (*asliye hukuk mahkemeleri*) and the civil courts of peace (*sulh hukuk mahkemeleri*) based on the value of their subject matter. The new Code abandoned this division and designated the courts of general jurisdiction as the sole general court; while determining the specific subject matter jurisdiction scope of the courts of peace. Whereas this

[27] Set amount for 2024 is 104.000 Turkish Liras.

[28] İbrahim Ermenek, "Yargı Kararları Işığında Tüketici Sorunları Hakem Heyetleri ve Bu Alanda Ortaya Çıkan Sorunlara İlişkin Çözüm Önerileri", *GÜHFD*, 17(1-2), 2013 p. 571 ff.

abandonment should have eased the workload of courts of peace; because of the expansion of their duties regarding rental agreements to cover all matters therein, workload of courts of peace began to swell. For instance, of the total 2.869.361 civil actions filed in 2023, 1.208.762 were filed before courts of peace; almost double the number of the following type of court; which was the court of general jurisdiction[29].

The seemingly unbearable workload of civil courts of peace, signaled the next big expansion of mandatory mediation. In 2023, with the Statute no: 7445, the Law on Mediation in Civil Disputes saw its biggest overhaul to date. Among these amendments; for the first time, a mandatory mediation implementation was enacted into the Law on Mediation in Civil Disputes itself. With the newly added article 18/B; all disputes arising from rental agreements, with the exception of provisions regarding eviction from rented real property by way of compulsory enforcement without a judgment procedure according to the Code of Compulsory Enforcement and Bankruptcy numbered 2004; disputes regarding repartitioning of movable or real property or rights and dissolution of joint ownerships, disputes arising from Condominium Law dated 23/6/1965 and numbered 634, and disputes arising from vicinity rights were added to the scope of mediation as a procedural requirement. Annotation for enforceability from court is mandatory for any agreements in mediation regarding all these disputes.

The biggest probable issue regarding this latest expansion, is the addition of disputes regarding repartitioning of movable or real property or rights and dissolution of joint ownerships. These types of disputes are the most complicated and long-lasting types of disputes in Turkish legal tradition. It is not uncommon that these types of disputes involve sometimes hundreds of parties (e.g. inheritors) and may last even for decades or more. Even if the mediator, with all information provided to her, manages to reach to all relevant parties and successfully conclude the mediation process; the agreement may be annulled by the court at later date if a previously unknown party emerges and thus all the labor and effort may be lost. Since this expansion is relatively new, we are yet to experience the problems which may arise.

Along with aforementioned expansion; the Statute no: 7445 introduced other new provisions to the Law on Mediation in Civil Disputes. Firstly, necessary provisions regarding United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the

[29] Adalet İstatistikleri (Judicial Statistics) 2023, T.C. Adalet Bakanlığı Adli Sicil ve İstatistik Genel Müdürlüğü, March 2024, p. 112.

"Singapore Convention on Mediation") were added to the Statute as article 17/A and said agreements were enabled to be enforced in Türkiye[30]. Secondly, with the newly enacted article 17/B of the Statute, disputes regarding the transfer of real property or creation of limited rights thereon were clearly mentioned within the scope of mediation and some special provisions regarding such disputes were added to the Statute; thus, ending the debate on the matter. Thirdly, the requirement for the signatures of parties proper were lifted for commercial disputes and the signatures of the attorneys and the mediator made sufficient for enforceability. And finally, the loop-hole regarding the suspension of enforcement procedures with an injunction in negative declaratory actions was patched; and the debtor was given to opportunity to be able to do so should she commenced the mediation proceedings before the enforcement procedure.

Apart from the Statute no: 7445; Statute no: 7442 also added a new instance of mandatory mediation in the Law of Agriculture (2006). According to the provision inserted to the Law, in actions regarding disputes arising from agricultural production agreements, exhaustion of mediation beforehand is now a procedural requirement.

III. EVALUATION OF MANDATORY MEDIATION

A. Advantages and Disadvantages

Before commencing our evaluation, it must be noted that we will not be evaluating the advantages and disadvantages of mediation as a whole; since it grossly exceeds the scope and extent of this study. Instead, we will make do with evaluating the advantages and disadvantages of only mandatory mediation.

The case for mandatory mediation is unfortunately very limited; and historically and empirically almost always comes from the State both in Turkish legal experience and comparative examples. The reason of such attitude is not surprising; since probably the sole tangible case for mandatory mediation relies on easing the workloads of courts. Though this payoff usually does not get uttered openly by government officials; it is for the most part mentioned in passing. As we have referred to the preambles of enacted statutes above, government officials or Legislation usually touches upon the advantages of mediation in general, rather than the implementation of mandatory mediation. The advantages of mediation proper set aside; the conversation, most of the

[30] Aydın, p. 271 ff.

time, stays limited to easing the workloads of judiciary[31]. But one must ask, if it really is the case. According to the (official) Justice Statistics by the Ministry of Justice, published between 2017 and 2023, the number of actions filed yearly in labor courts and commercial courts are as follows[32]:

	Cases Filed in Labor Courts	Cases Filed in Commercial Courts
2017	227.449	87.660
2018 (Mandatory med. for labor disputes)	162.339	96.087
2019 (Mandatory med. for commercial disputes)	208.173	69.011
2020	190.861	67.274
2021	268.389	94.482
2022	224.382	100.338
2023	226.516	96.655

As it can be observed from the statistics, the difference throughout the years, can at best be interpreted as yearly fluctuations, rather than a decrease; let alone a sharp decline in the number of filed cases. Therefore, even the numbers published by the Government are not very evident of the case for

[31] Dash, p. 664; Özekes/ Çiftçi, p. 118; Azaklı Arslan, p. 120.

[32] Adalet İstatistikleri (Judicial Statistics) 2017, T.C. Adalet Bakanlığı Adli Sicil ve İstatistik Genel Müdürlüğü, August 2018, p. 186; Adalet İstatistikleri (Judicial Statistics) 2018, T.C. Adalet Bakanlığı Adli Sicil ve İstatistik Genel Müdürlüğü, August 2019, p. 186; Adalet İstatistikleri (Judicial Statistics) 2019, T.C. Adalet Bakanlığı Adli Sicil ve İstatistik Genel Müdürlüğü, August 2020, p. 186; Adalet İstatistikleri (Judicial Statistics) 2020, T.C. Adalet Bakanlığı Adli Sicil ve İstatistik Genel Müdürlüğü, September 2021, p. 186; Adalet İstatistikleri (Judicial Statistics) 2021, T.C. Adalet Bakanlığı Adli Sicil ve İstatistik Genel Müdürlüğü, September 2022, p. 186; Adalet İstatistikleri (Judicial Statistics) 2022, T.C. Adalet Bakanlığı Adli Sicil ve İstatistik Genel Müdürlüğü, March 2023, p. 96; Adalet İstatistikleri (Judicial Statistics) 2023, T.C. Adalet Bakanlığı Adli Sicil ve İstatistik Genel Müdürlüğü, March 2024, p. 112.

mandatory mediation.

Another (claimed) advantage of mandatory mediation is its utilization as "temporary expedient"; in legal systems like Türkiye, which are somewhat foreign to modern ADR and settlement culture. This argument asserts that, should the Government push mediation by making it mandatory, the adoption rate might be greater in a shorter time period[33].

On the other side of the coin, there are many concerns and criticism against mandatory mediation[34]. First of all, almost all of the studies carried out regarding the subject, are limited to the advantages of mediation in general. Therefore, a strict distinction must be made between (voluntary) mediation and its implementation as a mandatory procedure[35]. If not, the line between the features of the two may be blurred and unscientific results may be reached. The main feature of meditation is its voluntary nature. Of course, the utilization of mediation may be the result of other factors such as judicial costs and time concerns; but this fact does not render the method mandatory in nature. If the process is actually mandatory, and the party already possesses various concerns such as cost, time or public or peer pressure; she may experience an urgency to settle the matter in mediation even though a much more favorable and just conclusion may be achieved through trial[36]. This may be the case, especially in disputes involving parties with asymmetrical standings, such as the ones between an employer and an employee or the landlord and tenant; incidentally, which are both instances of mandatory mediation in Turkish law.

Another concern regarding mandatory mediation is the (lack of) transparency. Privacy is certainly a favorable feature in mediation in most of the cases[37]; however, especially regarding the aforementioned asymmetrical disputes, protection of the weaker party poses an important question[38]. Particularly after the simplification of enforcement requisites (i.e. no annotation requirement), most of the agreements signed in mediation may

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[33] Quek p. 484; Frank E. A. Sander, "Another View of Mandatory Mediation," *Dispute Resolution Magazine,* 13(2), Winter 2007, p. 16; Martin Svatos, "Mandatory Mediation Strikes Back", <http://www.mediate.com/articles/ SvatosM1.cfm>, Access Date 15 November 2024; Azaklı Arslan, p. 46-47.

[34] Quek, p. 498 ff.; Waye, pp. 214-215; Ekmekçi et al, p. 150 ff.

[35] Bartlet, p. 71; Svatos.

[36] Vettori, p. 361.

[37] Özbek, p. 1052; Azaklı Arslan, p. 55 ff.

[38] Azaklı Arslan, p. 49; See İbrahim Ermenek, *Arabuluculuk Sürecinde Zayıf Tarafın Korunması*, Yetkin, 2021.

stay outside the review of courts. This lack of review may pose problems, both in short term and long term. In short term, due to the dissatisfaction of the weaker party; and in long term, due to the fact that the agreement may be brought before the court with a claim of defective intent[39]. This second problem, along with the disputes that still require annotation from the court, pose another disadvantage that may negate the only tangible advantage of mandatory mediation; namely, caseload reduction.

Since the most characteristic feature of mediation is voluntariness, injecting adverse features may very well harm the institution in the years to come[40]. In order to draw healthy conclusions from statistics, ample time is needed. As we have mentioned above, after only a couple of years and a couple of thousand cases; it is extremely early to draw conclusions and make experimentations on a subject. Since mediation is a very recent institution in the eyes and minds of Turkish jurists and more importantly lay people, any bad experience encountered in mandatory mediation, may automatically poison the public opinion regarding the credibility of mediation (and other instances of ADR for that matter) as well.

Another possible danger regarding the unending expansion of mandatory mediation is its effect on the public perception of civil justice and services provided by the judiciary. If almost all of the disputes on which parties have discretion (i.e. disputes eligible for voluntary mediation) falls under the ever-expanding extent of mandatory mediation, courts may fall to secondary importance and mediation institutions may become even more important than the judiciary system as a whole. This, inevitably results in the loss of public confidence in judiciary and the concept of justice.

B. The Future of Mandatory Mediation and How It Should Be Implemented

The final disadvantage of mandatory mediation, in our humble opinion, is not related to the institution in general; but its implementation. As we have mentioned before, proper mandatory mediation has two broad implementations: mediation as procedural requirement and court-controlled mediation. When a legal system opts for the first, all disputes that fall within a set category must be argued before mediation, without any case-by-case

[39] Tanrıver, p. 135.

[40] Bartlet, p. 74; Patricia Hughes, "Mandatory Mediation: Opportunity or Suberversion," W*indsor Yearbook of Access to Justice*, 19, 2001, p. 200.

exceptions. This preferment, completely denies people of going to court; which is a fundamental and undeniable right itself. One may argue that even mandatory mediation is not actually mandatory, the parties may go to court after exhausting the mediation route; but it must be noted that, denying an action, even on procedural grounds has some abstract and symbolic ramifications. On the flipside; if the second route is opted for, said drawback is negated. The system allows for people to file actions; however, during the proceedings, mandatory mediation is employed.

Should one ask what the future of mandatory mediation holds in Türkiye, the answer may be two-fold: The easy answer is, "the sky is the limit". As it is the case with previous expansions, the Legislator may, with proudly citing the previous achievements, include matters to the extent of mediation as a procedural requirement, one after another; until every single matter in parties' discretion falls under mandatory mediation. Thus, making mandatory mediation the norm[41]. The second answer, however, draws a more arduous picture: Court-controlled mandatory mediation[42]. Rather than categorical inclusions, and thereby cutting down the number of actions; after employing adequate number of judges and training said judges in mediation along with usual and conventional legal subjects; the system can easily employ a more trusting, viable and integral mandatory mediation system, which is weaved into the judiciary.

The main tool for this system in Turkish law is already implemented and in use: pre-trial examination in the Code of Civil Procedure. As we have cited right in the beginning, article 139 of the Code stipulates that, "*The court, in pre-trial examination, shall …, precisely determine the boundaries of the dispute, carry out preparatory proceedings and proceedings necessary for the parties to present evidence and for the discovery of evidence, encourage the parties for settlement or mediation in actions on which they may freely act after informing the parties regarding the guiding principles, course and consequences of settlement and mediation*…" This duty of judge has always existed in Turkish civil procedure, yet rarely employed[43]. The timing of such encouragement in the provision is not accidental. All cumulative experience in dispute resolution shows that, most convenient time for settlement, is during or right after the pre-trial procedures. This timeline provides two priceless

41 Tanrıver, p. 119; Kılınç p. 539; Aydın, p. 85.

42 Özbek, p. 322 ff.

43 Mustafa Okur, *Hâkimin Sulhe Teşviki*, Yetkin, 2024, p. 453.

advantages regarding the matter: Parties acknowledging their and other party's real situation regarding the dispute and the judge painting a more concrete picture on the parties' willingness to negotiate the matter and the prospect of a settlement.

This method, apart from said advantages, provides a more appropriate frame to mandatory mediation as well. Instead of categorically determining what is to be subject to mandatory mediation and what is not; all matters in which parties have discretion, may potentially be subjected to mandatory mediation after the attentive and careful consideration of the judge[44]. If the judge opines that parties are highly unlikely to achieve a settlement, she may spare the time to them and the swift service of justice. This approach not only serves for a more interwoven dispute resolution system; but also, ultimately elevates the credibility and trustworthiness of the judiciary and courts. Mandatory mediation should never dare to replace adjudication nor act as a viable alternative to a strong civil justice system[45].

CONCLUSION

It is an undeniable fact that, the adoption rate of mediation in Türkiye, in a little more than decade was unprecedented and very extensive. If one examines and compares the data, especially between the years 2013-2017 and 2018-2024; the effect of mandatory mediation becomes very evident. Adopting mandatory mediation after only a couple of years of experience was courageous, if not impetuous. When a legal system adopts mandatory mediation, two questions become most relevant: "Which disputes will fall into the extent of the restriction (at first)?" and "How do we implement it?" The answer to the first question, by the Turkish legislation was a bold one: Labor disputes. Legal disputes in Türkiye, historically were considered the most lop-sided disputes among other asymmetrical disputes. This lop-sidedness was so apparent that, sometimes the principle of protection of workers in labor law was mistakenly carried along to courts in trials. Therefore, it was probably the least convenient subject matter for the unconfined and mutual nature of mediation in the first place. The answer to the second question, however, was unfortunately a quick and unlaborious one. The Government opted for the easy way and implemented mandatory mediation as a procedural requirement; thereby completely taking the courts out of the equation. The major benefit of

[44] Özbek, p. 415 ff.
[45] Bartlet, p. 77.

this decision was the potential decline in the workloads of the courts; however, as we have mentioned above, the data shows otherwise. One can only wait and see how the data will shape in the next decade of mediation.

The extent of mandatory mediation, after the first implementation regarding labor disputes, enlarged in a major way three more times since. First with commercial disputes; then consumer disputes and finally rental and repartitioning or dissolution disputes. Along with these major expansions, mandatory mediation's extent also saw other smaller expansions for disputes such as disputes arising from vicinity rights and agricultural production agreements; as well as some generic expansions such as the actions for invalidation of objection, negative declaratory actions and actions for restitution in compulsory enforcement law. If this trend continues, the only limit will be the parties' discretionary power in disputes; in other words, in theory, every single dispute that is eligible for voluntary mediation may fall under the purview of mandatory mediation. However, it is our opinion that, this would be a wrong and potentially downright dangerous path. Every move that tries to replace, or at least may seem as replacing judiciary and courts with the mediation system, harms the credibility and dependability of the judiciary and the courts; and this, inevitably leads to atrophy in public's sense of justice. Therefore, if mandatory mediation is to continue and flourish, in our humble opinion, court-controlled mediation should be implemented and promoted. Thus, people in dispute may still achieve an amicable resolution; but also, simultaneously be sure that this resolution was realized under the trustworthy and watchful eye of the courts, and the judiciary in general.

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