

BRIEF HISTORY AND FLEXIBILISATION EFFORTS OF TURKISH LABOUR LAW

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Before handling the concept of flexibilisation of labour relations it is worthwhile to make a brief explanation of historical background of Turkish Labour Law¹.

I. BRIEF HISTORY OF TURKISH LABOUR LAW

1. Restrictive Industrial Relations Period (1923-1960)

Shortly after the Turkish Republic was established in 1923 the Constitution was passed in 1924 and in 1926 the Civil Code was adopted from Switzerland together with the Code of Obligations. Both the 1924 Constitution and the Civil Code recognized the right of association but not the trade union freedom. However, the Restoration of Peace Act, passed in 1925 with a view to facilitating the launching of Atatürk's reforms and to accelerate the country's economic development, discouraged the establishment of class based organizations, in other words trade unions and the operation of liberal industrial relations. In that period a mixed economic system (liberal and totalitarian) was followed, the realization of which the government played an active role. Due to this policy and the worldwide effect of the 1929 Great Depression, a protective labour relations system was adopted which forbade strikes and lock-outs. Further, in line with this policy the Penal Code of 1923 prohibited the right to unionization and punished work stoppages.

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¹ See T. **Dereli**, *Labour Law and Industrial Relations in Turkey*, Kluwer Law Int. 2011, pp. 33-46; N. **Çelik**, *İş Hukuku Dersleri*, 25th. Ed., İstanbul 2012, pp. 5-14.

During the latter part of this era the most important development was the enactment in 1936 of the first Turkish Labour Act (Nr. 3008). This legislation reflected the protective policy of industrial relations and contained rigid regulations mainly intended to protect the stability of establishments (workplaces). The main feature of this act was that it covered only manual employees (blue collar workers) and left professional employees (white collar workers) regulated by the employment contract provisions in the Code of Obligations, which was an adjunct to the Civil Code of 1926. The Labour Act of 1936 tightened the already existing restrictions on strikes and lock-outs by introducing penal sanctions and included a compulsory arbitration mechanism for the settlement of disputes of interest. This protective labour relations system was attributed to the Republican Party's (single party period) populist and paternalist state policy that arose from the socio-economic conditions of that era. In that period several state economic enterprises, active mainly in metal, glass, textile, metallurgy, mining etc., were founded. Therefore the biggest proportion of national capital was owned by the State (state capitalism).

After World War II, Turkey adopted multi-party democracy, which brought in an era of liberalization as far as the right of association was concerned. In 1946 the Ministry of Labour was established. The Social Insurance Organization (that covered only industrial accidents, occupational diseases and maternity benefits at the beginning but was later extended to cover sickness, old age, disability and survivors benefits) was established in the same year. A year later, the 1938 Associations Act was amended and the ban on forming class based associations was lifted. Consequently, in 1947, Turkey's first Trade Unions Act, which recognized the principles of union freedom and voluntary unionism, was passed. However, this Act too like the Labour Act of 1936, was limited in scope to manual employees, excluding white collar employees from the right to unionize and re-emphasized the bans on strikes and lock-outs. Although Turkey formally joined the ILO as a member in 1932, its actual participation dates from the establishment of the Ministry of Labour in 1945. Consequently Turkey ratified the ILO Convention on the Right to Organize and Collective Bargaining (Nr. 98) in 1951. However the Freedom of Association and Protection of the Right to Organize Convention (Nr. 87) was not ratified until 1993 due to its extensive

coverage that seemed to extend to the right of public servants to organize and to strike. Due to the socio economic situation of Turkey at that time, the right of public servants to association was not granted. In 1950, Act Nr. 5521, which is still in force, established labour courts. Türk-İş the Confederation of Turkish Labour Unions was founded as a national center in 1952.

As can be seen there was no sign of flexibilisation in Turkish Labour Law during its earliest period due to the nature of that period. As a matter of fact during the foundation of the new state in the early 1920s the concept of flexibilisation of labour relations was neither known nor needed.

2. Liberal Industrial Relations Period (1963-1980)

In 1960, the armed forces took power against the misconduct and anti-democratic administration of the ruling Democratic Party. Following this intervention a coalition of armed forces and intellectuals prepared a new Constitution in an atmosphere of freedom that was adopted by a Constitutional Assembly in 1961. This Constitution guaranteed the freedom and right to strike and lock-out, and the right of social partners to bargain collectively. Further it recognized the right of public servants to unionize. This constitution was an important milestone in the history of employment relations in Turkey, because it introduced a rather liberal charactered social and legal order. In line with these constitutional freedoms the Trade Unions Act Nr. 274 and Collective Agreements, Strikes and Lock-outs Act Nr. 275, which covered both blue collar and white collar workers, were passed by the Grand National Assembly of Turkey (TBMM). In 1964 a new Social Insurance Act (Nr. 506) was adopted with a view to improving the already existing workers' insurance schemes. Act Nr. 624 concerning the formation of unions by public servants was passed in 1965 but did not grant the right to collective bargaining nor to strike. These unions therefore remained rather ineffective. A new Labour Act Nr. 1475 was adopted in 1971, which remained in force until 2003 and expanded its scope to professional workers and brought new and extensive rights to employees. However, this Act was rather restrictive and remained far from the concept of flexibility. A low profile military intervention (warning) that was made in order to stop political unrest resulted in some changes in the 1961 Constitution, one of

which was the abolition of the public servants right to unionize. Following this change the Public Servants Unions Act Nr. 624 was repealed by the Parliament.

In the late 1970's, Turkish labour relations were negatively affected by increasing economic crisis and growing political instability. Due to a horrifying wave of political violence from extremists of both left and right, the armed forces again decided to intervene and took power in 1980 with the aim of stopping the violence and establishing general and political security. The new regime suspended laws Nr. 274 and Nr. 275 and the activities of labour unions, levied a ban on strikes and lock-outs, and brought mandatory arbitration for disputes of interest for a transitional period. This transitional period lasted few years. It is obvious that in this era the flexibilisation concept was unfamiliar for Turkish Labour Law as well.

3. The Post 1980 Era (Restoration Period)

A new Constitution prepared by a collaboration of a transitional assembly and governing National Security Committee consisting of five top ranked commanders was put into force after approval by national referendum in 1981. In what appeared to be a reaction against the liberal concept of the former 1961 Constitution, the 1982 Constitution was relatively detailed, restrictive and prohibitive in character, particularly regarding fundamental and social rights. In 1983, after the withdrawal of the National Security Committee from power, multi-party democracy regime resumed and the new Act Nr. 2821 on Trade Unions and the Act Nr. 2822 on Collective Agreements, Strikes and Lock-outs (prepared in line with the new constitutional rules) entered into force. The unions quickly adapted themselves to the new legislation and became indispensable elements of Turkey's post 1983 democracy.

In 1993 and 1994 Parliament (TBMM) ratified six ILO conventions. Among them Convention Nr. 87 of 1948 on Freedom of Association and Protection of the Right to Organize, Convention Nr. 135 of 1971 on Workers' Representatives, Convention Nr. 151 of 1978 on Labour Relations in the Public Service, Convention Nr. 158 of 1982 on Termination of

Employment were of significance. In consequence of these ratifications firstly Act Nr. 4688 on Public Servants Unions Act was passed in 2001.

In 2004 Turkey was accepted as a candidate member state to the European Union, after waiting some 40 years since the Association Agreement concluded with the EU in 1963 (EC then). A further eight years has since passed, and when full membership may be realized remains in question due to mutual distrust and objections of some countries to Turkey which has brought the membership negotiations nearly to a halt. As a matter of fact the majority of Turkish people today is reluctant with regards to Turkey's membership to the EU. The enactment of the new Labour Act Nr. 4857 in 2003 stands as a major landmark of the recent past. The major characteristics of the new law are that it combined for the first time some measures of flexibility with regards to job security against the arbitrary termination of employment contracts by employers. This Act took some significant EC directives on employment relations as a model in order to correspond to EC standards. In the same year the Act of Employment Organization of Turkey Nr. 4904 was passed replacing the previous act with the aim of providing employees with suitable jobs and finding employees for employers and the governance of the unemployment insurance.

One of the most important legislative developments in that period was the adoption of Social Security and General Health Insurance Act Nr. 5510 in 2008 after a long process of public debate. This act (Nr. 5510) aimed a better service and introduced a new but broader system in social security field which established a single institution which brought the existing three different institutions under the same roof (irrespective of whether individuals are working under an employment contract or independently for their own or public servant status) and foresees the creation of a general health insurance covering all citizens. The Turkish Social Security System covers all branches of social insurance including unemployment insurance but excluding family allowances.

In 2010, a new package of amendments to the 1982 Constitution were proposed and approved by national referendum. With these amendments constraints on some freedoms, including the freedom of association, were lifted. More recently a new Code of Obligations and Code of Commerce, prepared in order to meet new needs and developments, was passed by

Parliament and entered into force on July 1st, 2012. The section of the Code of Obligations involving employment contracts has been rewritten, and is almost a one to one translation of the Swiss Code of Obligations that was amended in 1971. The new code brought more protective provisions for the employees so as it raised the protective level of the new act up to the Labour Act.

Recently a long debated draft bill on trade unions and collective agreements was passed and put into force on November 7th 2012 replacing the Acts No. 2821 and 2822 dated 1983. This new Act (Nr. 6356) aimed to adopt a more liberal system complying with ILO standards by lifting some highly criticized restrictions on the exercise of the collective bargaining process and the implementation of the union freedom. Finally a new Act on Work Health and Safety Nr. 6331 entered into force as of December 30th 2012 repealing some insufficient provisions concerning this subject in the Labour Act.

II. FLEXIBILISATION OF LABOUR LAW

1. In General

The term “flexibilisation” refers to the process of researching employment rules and legislation to determine where they may be so rigid as to restrict employers’ competitiveness, and where they do so to relax and adjust those rules and legislation in order to create a more amenable environment for workforce supply to meet the new demands and sudden needs of the market². In a system where employment rules are too rigid, employers will always look for opportunities to evade the rules in order to protect their economic interests and competitive ability. This will serve to encourage the growth of the informal labour market and contribute to unfair competition. Moreover, workers in the informal market will remain vulnerable or without legal protection. However, flexibilisation has to be subject to some restrictions. In other words the term flexibilisation does not mean the abolition or the deregulation of labour laws in favour of

² J. Plantenga/C. Remery, Flexible Working Time Arrangements and Gender Equality, European Commission 2010, p. 19.

employers³. Flexibility without adequate legal protection for employees would be unacceptable putting workers at risk of job and employment insecurity. For example, it would be unacceptable for employers to compel employees to conclude a series of fixed term (chain) employment contracts or to offer employment without social insurance or to be paid clandestinely in order to avoid the legislation which protects employees. Because employees' job security principle cannot be ignored. Therefore a fair and reasonable balance must be established between flexibility and security in the labour market.

This balance in practice produces a relative new but the useful concept of «flexicurity». This means that flexibilisation should be established where the needs and demands of employers and employees match in a reasonable balance. The term (which is a combination of two terms flexibility and security) was launched in the Netherlands in 1999 in terms of the enactment of the Dutch Flexibility and Security Act⁴. Hence the aim is to create better employment conditions for employers as well as for employees. Flexicurity can be seen as an alternative to the neo-liberal view of the labour market, which dominated the debate during the 1990's and 1980's. The European Commission's Green Paper of 2006 has put flexicurity to the top of the political agenda and in June 2007 the Commission published its flexicurity communication, representing its most comprehensive effort to outline its view which aims to create better jobs by combining flexibility and security for employees and companies⁵. Flexicurity has also become the core concept in the employment guidelines of the European Employment Strategy (EES) proposed by the Commission for 2008-2010⁶. The necessity of a greater security of employees becomes obvious, when taking into consideration that they should be able to keep up their employability security in general. Without support for the security of employees, the negative effects of

³ **Zöllner/Loritz/Hergenröder**, *Arbeitsrecht*, 6. Aufl, München 2008, p. 10.

⁴ **H. Seifert/A. Tangian**, *Flexibility and Precariousness of Work in Europe*, Survey 2005, p. 7.

⁵ Council of the European Union: Council conclusion, towards common principles of flexicurity, adopted on 5/6 December 2007.

⁶ **M. Keune**, *Flexicurity and the EU approach to the law on dismissal*, *Tilburg Law Review*, 2007-2008, 90, p. 96.

atypical employment strategies come out. The aim cannot be to create a labour market in favour of employers only. Without flexibility and security social welfare cannot be realized⁷. Briefly «flexibility as much as needed, security as much as required». Achieving such a balance requires the mutual trust of social partners and hence social dialogue as well⁸.

Turkey has, in fact, a rather large informal labour market which creates, ironically, a very flexible market. In the informal sector job insecurity, black employment, long working hours, insufficient health and job safety and informal payments prevail. As can be appreciated, the informal market leads to unfair competition for enterprises working in the formal sector. In this paper the informal employment market shall not be examined.

However the Directive on Part-time Work Nr. 97/81, the Directive on Fixed Term Work Nr. 99/70, the Directive on Organization of Working Time Nr. 93/104, the Directive on the Length of Working Time Nr. 2003/88 are the most important regulations in this area. A framework agreement signed between some upper level labour organizations of Europe (ETUC, UIECE, UNICE, UEAPME and ECPE) in 2005 on telework aimed at ensuring greater security for teleworkers employed in the EU can be mentioned in this respect too. During the preparation of the new Turkish Labour Act of 2003 Nr. 4857 the same EU directives have been taken into consideration.

2. Reasons of Flexibility

There is a number of reasons for the need of flexibility in the working life. The first and foremost reason is the economic crisis and recession. In these times investments and the production slowdown, the economic growth drops and all these factors lead to unemployment and increase in layoffs. Another reason is the need to keep up with the competitiveness in the international markets as a result of globalization. Further the rapid

⁷ Söllner/Waltermann, Arbeitsrecht, 15. Aufl., München 2009, p. 21.

⁸ M. **Ekonomi**, İş Hukukunda Esnekleşme Gereği, Çalışma Hayatında Yeni Gelişmeler, Esneklik, Çimento M. İşverenleri Sendikası, Ankara 1995, p. 24; C. **Tuncay**, Çalışma Süreleri ve İstihdam Türlerinde Esnekleştirme, same publication, pp. 58-59; D. **Ulucan**, Çalışma Hayatında Esneklik, Prof. Dr. M. Kutsal'a Armağan, Ankara 1998, pp. 527, 540.

development of computer technology creates the need of flexibility in the working life. Moreover the workers need more time and flexible working rules to arrange their social and family lives. All these reasons lead to the need of the protection of the enterprises. This need is mainly met by the flexibilisation of working rules⁹.

The flexibilisation has a number of tools. For example introducing atypical working model arrangements has the aim to reduce unemployment and to increase the adaptability of the work force to the demands of the labour market¹⁰. The development of flexible forms in labour law could be described as a process of modern times. Until the 20th century the common and general form of employment was applied on a long time relationship between employee and employer with predictable prospects for the future. In most large corporations jobs were arranged into «hierarchical ladders» as one could aim to climb up step by step after asserting himself within the entry level¹¹. Those types of a straight lined working life rarely exist today. Labour law regulations underwent great changes and led to more flexible forms in all its parts. Generally speaking atypical types of work always existed, but there is a growth since the 1980's leading to the creation of new types of employment relationships that neither encourages longevity nor routine in everyday working life. Today it is common to organize all kinds of working conditions in many different ways, including regulations on working time. This still ongoing process can be regarded as an adjustment in production methods as firms in times of globalization are confronted with increasingly competitive working markets¹². New employment modalities have become so usual that one could say that today «there is nothing normal about normal working times»¹³. Especially the introduction of different types of employment contracts in terms of working time has been the major

⁹ S. **Süzek**, *İş Hukuku*, 8. bası, İstanbul 2012, pp. 19-20.

¹⁰ R. **Blanpain**/P. **Van der Valk**/N. **Süral**, *Flexibilisation and Modernization of the Turkish Labour Market*, Kluwer Law Int., Alphen aan den Rijn, 2006, p. 2.

¹¹ K. **Stone**, *Flexibilization, Globalization and Privatization*, *Osgoode Hall Law Journal*, Fall 2005, p. 80.

¹² **Stone**, *Flexibilization, Globalization and Privatization*, p. 80.

¹³ A. **Coyle**, *Flexibilisation and The-reorganization in Feminized Labour Market*, *The Sociological Review*, Vol. 53, 2005, p. 76.

development in European law and practice in the labour field during the past 15 years and played a leading role in increasing labour market flexibility. The development of flexibilisation resulted with a drastic change of conditions and demands of employees. While before each employee was searching for employment security, now employees are forced to rethink and focus on employability security instead¹⁴. Employees cannot expect to spend their working lives in just one company or one job, but have to acquire skills that will enhance their opportunities in the labour market as whole. The new conditions lead to more insecurity and demanding more self-dependence at the same time. Still it has to be kept in mind that atypical work also brings advantages for employee too. Especially flexible working times can also grant possibilities of combining work and social life outside of the job.

3. Flexibility of Working Arrangements within the European Union

The number of employees within the field of atypical or flexible work is growing steadily within the EU of which most are women¹⁵. Under EU labour law three kinds of atypical work attract particular attention. Part time work (around 21.000.000 in the EU), fixed term work (14.000.000 employees)¹⁶ and temporary agency work. The growth of atypical contractual forms became more and more important since the 1970s as a part of employment and job creation strategies. Since then several directives were released to improve and support the ongoing development. Over the last 20 years flexible forms of work have found widespread implementation not only in the EU but also in other developed countries of the world. The legislative organs of the EU have issued a number of directives which regulate flexible forms of employment. The first directives date back to the 1990's. In 1991 Council directive 91/383/EEC supplementing the measures to encourage improvements in the safety and health at work of employees with fixed term employment relationship or a temporary employment

¹⁴ **Stone**, Flexibilization, Globalization and Privatization, p. 82.

¹⁵ **Blanpain/Van der Valk/Süral**, Flexibilisation and Modernization of the Turkish Labour Market, p. 2.

¹⁶ **Blanpain/Van der Valk/Süral**, Flexibilisation and Modernization of the Turkish Labour Market, p. 2.

relationship was adopted. In 1993 the European Commission issued a white paper on growth competitiveness and employment and concluded that the economic and social problems faced by the community at that time were a result of some fundamental inefficiencies e.g. under use of the quality and quantity of the labour force¹⁷. In 1994 the European Council started a new discourse on the issue of flexibility and stated that the fight against unemployment and the provision of equal opportunity for men and women would continue to remain the focuses of the European Union and its member states. It was agreed on five key objectives to be pursued by Member states in its policies to reach an employment growth due to a more flexible organization of work fulfilling the interests of both employers and employees¹⁸. In 1997 a Green Paper on Partnership for New Organization of Work was issued dealing with the idea that European economy would be better off with new forms of work organization such as flexible firms and introducing the idea of balanced flexibility and security¹⁹. In the same year the social partners of EU level (UNICE, CEEP, ETUC) concluded the European Agreement on Part-Time Work, which implemented in Council Directive 97/81/EV of 15 December 1997.

The 1998 Employment Guidelines were adopted by the Council proclaiming employability as one of the four central themes for member state policy development. A shift from job security to employment security should be fulfilled. This can be seen as a clear step towards greater flexibility. This aim included especially also to reach an increase of flexibility in working time, which was reinforced in the new Employment Guidelines stating that enterprises should become more flexible in order to respond to sudden changes in demand, adapt to new technologies, and be in position to innovate constantly²⁰. Therefore over the last years flexible forms of work have become increasingly familiar in the Member states of the

¹⁷ White Paper on Growth, Competitiveness and Employment: The challenges and ways forward into the 21st century, COM (93), 700 final, Brussels, 5 December, 1993.

¹⁸ F. **Hendricks/K. Sengers**, Flexicurity and the EU Approach to the Law on Dismissal, p. 98

¹⁹ **Hendricks/Sengers**, Flexicurity and the EU Approach to the Law on Dismissal, p. 98.

²⁰ **Plantenga/Remery**, p. 7.

European Union²¹. In line with Lisbon strategy, ten new guidelines of European Employment were adopted by the Council in 2003 of which five concerned flexibility such as job creation, adaptability, female labour, incentives and transformation of undeclared work into regular employment²².

III. EIGHT DIMENSIONS OF FLEXIBILITY AND TURKISH LAW

The term flexibility refers to different concepts such as contract types, payments, and working hours but also to employment possibilities. From an analytical point of view a distinction between flexibility methods can be made. In general there are eight aspects of flexibility in practice.

1. External flexibility

This type of flexibility refers to the use of external workforce and knowledge, such as temporary agency work, on call work, subcontracting, posting of employees. This type of flexibility involves a workforce supply from the outside or the dispatching of a workforce to the outside. The importance of these forms is realized especially in times of crisis²³.

2. Internal flexibility

This type of flexibility refers to employment types and conditions within an establishment, in order to enhance the adaptability to change such as implementation of working time flexibility, for instance the adoption of a balancing period of working hours, the conclusion of definite term employment contracts, job rotation, shift work, involuntary unpaid leave, short time work etc.²⁴

²¹ **Blanpain/Van der Valk/Süral**, Flexibilisation and Modernization of the Turkish Labour Market, p. 2.

²² **Blanpain/Van der Valk/Süral**, Flexibilisation and Modernization of the Turkish Labour Market, p. 15.

²³ **Plantenga/Remery**, p. 19.

²⁴ **Plantenga/Remery**, p. 19.

3. Numerical flexibility

This refers to the employers' ability (or freedom) to adjust the number of employees in an establishment in order to adapt to the sudden needs and challenges of the market²⁵. Companies have to be able to rapidly adapt and respond to market functions by either hiring or firing employees. Mass dismissal, for instance, is a common implementation in this respect. However, resorting to this measure (redundancy) is bound by strict rules in Turkey in line with the EU Directive Nr. 98/59²⁶. If an employer decides to dismiss employees collectively for economic, technological, structural or other reasons of a similar nature necessitated by the requirements of the enterprise, the establishment or activity the employer must inform in writing the regional directorate of labour, The Turkish Employment Organization and union representatives (if there are any) at least 30 days prior to the intended dismissal (Art. 29, Labour Act). A mass dismissal occurs when in an establishment employing between 20 and 100 employees a minimum of 10 employees or in establishments employing between 101-300 employees, a minimum of 10% of employees, or in establishments employing 301 or more workers, a minimum of 30 employees are to be dismissed by giving them notice periods. In case the dismissals are carried out in groups at different dates it is also deemed to be a mass dismissal if the number of terminations reaches the aforementioned number within one month. Notices of termination shall take effect 30 days after the notification of the regional directorate of Ministry of Labour. If the employer wishes to recruit employees for the same kind of jobs within six months he shall reinstate the dismissed employees whose qualifications are suitable. However, this type of termination does not deprive the dismissed employees from filing lawsuit for reinstatement claiming the termination had no valid reason.

Therefore the country's relative rigid job security system (the system of protection against arbitrary dismissal) is a serious obstacle to flexibility. This flexibility form is the most controversial type of flexibility because it may trigger unemployment and contribute to the informal economy.

²⁵ T. **Treu**, Labour Flexibility in Europe, *International Labour Review*, Vol. 131, 1992, No. 4-5, pp. 458-500; **Tuncay**, *Esnekleştirme*, p. 59.

²⁶ N. **Çelik**, *İş Hukuku Dersleri*, 25. bası, İstanbul 2012, pp. 303-307.

Further the Maritime Labour Act of 1967 and Press Labour Act of 1952 remain outmoded and far from the concept of flexibility.

4. Functional flexibility

This means the ability to change employee's job descriptions in an establishment in order to adapt them to changed production technologies and to increase production efficiency rapidly without hiring new workers²⁷. This type of flexibility is the most difficult type of flexibility to apply. As a matter of fact it does not involve the numerical (quantitative) size of the establishment but involves the quality, ability and productivity of the workforce. In this type of flexibility the workers in an establishment are required to work at various types of jobs. Job description is not important in this type. Teamwork is essential in this form. However the trade unions are strictly against this type of practice. This type of flexibility is not a widespread practice in Turkey.

5. Flexibility of payment

This refers to a wage payments system based on awarding the success, ability, or efficiency of employees through extra payments, premiums, bonuses etc. By implementing such a system, employers encourage employees to work more efficiently and productively. This type of wage policy is relatively widely implemented in this country. In case of economic hardship, employers may seek ways to decrease wages. However, statutory obstacles (for example principle of equal treatment) will restrict their choice. The only way to decrease wages is by the mutual consent of the social partners, namely through social dialog and collective agreements²⁸. Agreeing upon *échelle-mobile* system can be an effective resort in this respect. It is to be recalled that a minimum wage policy prevails in Turkey, covering all employees working under an employment contract no matter to which law they are subject. The wages in Turkey may not be less than the minimum wage in effect no matter the kind of job. Minimum wages are determined

²⁷ Treu, Labour Flexibility in Europe, pp. 505-507; Tuncay, p. 61.

²⁸ Treu, Labour Flexibility in Europe, p. 507.

and adjusted every two years at the latest by the Minimum Wage Fixing Board of the Ministry of Labour and Social Security (Art. 39, Labour Act).

6. Atypical employment models (or flexible forms of employment)

In order to realize flexibility in employment relations, new models of employment have been introduced, such as contracts for definite term, part-time work, on-call work, temporary employment contracts, job sharing, telework and home working which are the most usual models. However, current Turkish Labour Law regulates only definite term employment contracts, part-time work, on-call work and temporary employment, and excludes the other forms of atypical employment. However, there is no legal obstruction to applying job sharing, teleworking, home working as far as they do not contravene the imperative rules of Labour Law.

The Labour Act of Turkey Nr. 4857 redefined the fixed term employment contract inspired by the provisions of Council Directive Nr. 99/70 (The Framework Agreement on Fixed Term Work). According to the new stipulation (Art. 11) a fixed term employment contract is a written contract between the employer and the employee for a specified term which is based on objective conditions such as the reaching of a specific date, the completion of a certain task or the occurrence of a certain event. In cases where there is no objective condition for a definite term employment contract then it is deemed to have been made for an indefinite period because compared to fixed term contracts indefinite employment contracts are considered essential and more protective for employees. An objective reason must exist even for the first time of concluding a fixed term employment otherwise it is considered an indefinite period contract. If there is no objective reason which necessitates making repeated (chain) contracts then it is deemed to have been made for an indefinite period from the first day of employment. The stipulation of Art. 11 gives the impression that an objective reason is also required even for the first conclusion of the fixed term contract in contrast to some EU jurisdictions. The law forbids the differential treatment of employees employed for a definite period and

indefinite period if there is no justified reason for the differential treatment²⁹. In general during economic crisis periods concluding fixed term employment contracts and extending them is considered more advantageous.

Part-time work has been stipulated in Turkish legislation for the first time. The Labour Act Nr. 4857 stipulates that an employment contract is considered part-time if the normal weekly working hours of an employee are considerably shorter than a comparable employee working fulltime (Art. 13). This stipulation took the stipulation of Part Time Work Convention Nr. 175 of ILO as model. The basic criterion is thus a comparison with the normal weekly working hours of a fulltime employee³⁰. The vagueness in this criteria has been clarified in the legal reason (argumentum) of the provision involved by the explanation «shorter than normal weekly hours means the hours less than at least two thirds of the normal fulltime working week». It means practically less than 30 hours working in a week since the normal working week is 45 hours in Turkey. The law forbids differential treatment to a part-time worker in comparison to a comparable fulltime worker unless there is a justifiable cause for the differential treatment. This type of work is not a widespread employment model in Turkey as it is in Europe.

On call work is a special form of part-time employment contract regulated by Art. 14 of the Labour Act. This form was adopted from Part Time and Fixed Term Employment Contract of Germany (Art. 12)³¹. It defines on call work is an employment contract which foresees the performance of work by an employee upon the emergence of the need for a service as agreed to in the written contract. Work on call was not unknown in past Turkish practice and was referred to as a special form of part time employment contract in various decisions of the Court of Cassation³². In the event the length of the employee's working time has not been determined by the parties the weekly working time is considered to have been fixed at 20 hours, and the employer is obliged to employ the employee at least four

²⁹ For further information see: **Süzek**, p. 251 f.; **Dereli**, p. 81; Ü. **Narmanhoğlu**, İş Hukuku, Ferdi İş İlişkileri, 4th Ed., İstanbul 2012, pp. 215-226.

³⁰ **Süzek**, 275 f.; **Dereli**, p. 83.

³¹ See M. **Löwisch**, Arbeitsrecht, 8. Ed., Düsseldorf 2007, sec. 939-942.

³² **Süzek**, 280 f.; **Hendricks/Sengers**, p. 98; **Dereli**, pp. 84-85.

consecutive hours a day. The employer must inform the employee at least four days before the work begins. The reason for this is to make the employee not feel himself ready for call indefinitely. This type of employment is seen mostly in the tourism, agricultural, translation, media and transportation sectors.

Art. 7 of the Labour Act refers to the temporary employment relationship. But this is not the temporary work normally understood as temporary agency work in the west. However the temporary agency work has not been regulated, although private employment agencies are recognized in Turkish legislation (The Labour Act Art 90). In Europe this form of employment on a triangular relationship in which an employer rents its staff members to companies when needed. On November 19, 2008 a directive on temporary agency work was issued in order to regulate this employment model. The aim of this directive is to ensure protection of employees, to improve quality of the work, ensuring the principle of equal treatment, recognizing temporary work agencies as employers, while taking the necessity of a framework, creations of jobs and developments of flexible work into account. Temporary work agencies thus are defined as real or legal persons who in compliance with national law conclude employment contracts with temporary agency employers in order to assign them to user (transferee employer) to work there temporarily under its supervision and direction³³. A 1999 Report indicates that approximately 6.5 million individuals gain work experience through temporary work agencies each year. The UK leads the EU market followed by France, the Netherlands and Germany³⁴. In contrary to the European practice this sort of employment refers to so called «staff lending» or «secondment of personnel» (Leiharbeitsverhältnis) whereby an employee is transferred to another establishment (transferee) temporarily while retaining his contractual status as in the transferor establishment without the involvement of a private employment agency. In Turkish legislation the temporary employment relationship is based on a triangular employment relationship where the employee of an establishment is transferred to another establishment within

³³ R. Blanpain, *European Labour Law*, 12th Ed., the Netherlands 2010, pp. 467-480.

³⁴ Hendricks/Sengers, p. 99.

the structure of a holding company or the same group of companies on condition that the written consent of the transferred employee is obtained at the time of the transfer³⁵. After such a transfer the employment contract between the employee and the transferor employer continues, but the employee is obliged to perform work for the transferee employer while the transferor's obligation to pay the employee's wages continues. This type of relationship must be concluded in written form and may not exceed a period of six months; however, it may be renewed twice if required. This type of employment relationship is a familiar practice in Turkey generally for the purpose of meeting the needs of a related group of companies for skilled labour force or for realizing certain projects³⁶.

Home working has been regulated for the first time in the new Code of Obligations (Art. 461) in the employment contract part which has been translated almost identically from the Swiss Code of Obligations (Art. 351). Although there was no explicit rule before concerning home working, it was a very widespread practice in Turkey, especially in handicraft production and the textile industry. This type of employment relationship refers to the employee performing his or her work at his or her home or elsewhere determined by the employee alone or by involving his or her family members in return for a wage. Apart from the article 4(d) and (e) on domestic workers that are left outside of the scope of the Labour Act, no regulation on this type of work exists in the Turkish Labour Act. Therefore whether this relationship is in the scope of the Labour Act too is debatable³⁷.

Turkish legislation did not regulate job sharing and tele working. However job sharing refers to a working model where two or more employees share one full time job. Between the two or more employees there seems to be a de facto partnership³⁸. They can split up their activities on a daily or a weekly basis and are in fact part-timers in terms of the number of

³⁵ Çelik, pp. 110-115.

³⁶ Süzek, 295 f.

³⁷ Süzek, p. 284.

³⁸ Job sharing is regulated in Part Time and Fixed Term Employment Contract Act of Germany, Art. 13 (*Arbeitsplatzteilung*): Söllner/Waltermann, p. 172; Löwisch, sec. 943-944.

hours worked. If agreed upon, the employees shall fill in in case the other cannot work at a given time. Since it is considered a type of part-time work the general rules on part-time work and the principle of *pro rata temporis* shall apply to job sharing³⁹.

Tele working is defined as a form of work using computer technology in the context of an employment contract where work is either performed at a worker's home or in a premise or a satellite office away from the employer's regular establishment⁴⁰. Although the work is carried out away from the regular establishment teleworkers benefit from the same rights as comparable workers at the employer's premises. As a general rule the necessary equipment is provided and maintained by the employer and the employer is responsible for the protection of the health and safety of the teleworker⁴¹. Despite the lack of relevant rules in the legislation it can be practiced in Turkish working life with the help of rules concerning home work⁴².

It should be mentioned that a new draft bill that will amend the Labour Act has been prepared by the Ministry of Labour and Social Security whereby other forms of atypical employment such as telework, job sharing, home working, temporary agency work and flexible working time are regulated. If this draft becomes law, all these employment relationships will be subject to the Labour Act. In this amendment the establishment of temporary work through private employment agencies is recognized in the case of vacancies occurring due to the military service, pregnancy, illness, annual leave etc. of an employee. However, the temporary employment relationship shall not exceed one year and may be renewed at most three times.

³⁹ N. **Süral**, Reorganization of Working Time and Modalities of Employment under the New Turkish Labour Act, *Middle Eastern Studies*, Vol. 41, No. 3, May 2005, p. 415.

⁴⁰ http://europa.eu/legislation_summaries/employment_and_social_policy/job_creation_measures/index_en.htm; M. **Kandemir**, İş Hukuku ve Sosyal Güvenlik Hukuku Açısından Tele Çalışma, İstanbul 2012, pp. 38 f.

⁴¹ **Kandemir**, pp. 129-133.

⁴² **Süzek**, p. 289.

7. Geographical flexibility

This concept is based on the movement of the employees from one country, state or region to another. This type of flexibility can be useful because balances work force offer and demand at the regional level⁴³. Realization of this kind of flexibility needs the lifting of restrictions standing before the migration, traveling and settlement possibilities of the employees. The level of geographical flexibility is much higher in the US than in Europe. Rigidity of residence and renting market conditions plays an important role in this form of flexibility. This type of flexibility is not much taken into consideration in Turkey.

8. Flexibility of working time

Flexibility of working time is maybe the most important method in employment strategy particularly in the developed industrial countries. Enterprises should become more flexible in order to respond to sudden changes in demand, adapt to new technologies and be in a position to innovate constantly to remain competitive. Employees also express a growing need for more flexibility in the time allocated to their private lives in order to respond to their changing needs and responsibilities such as learning, family care and leisure. Flexible working arrangements boost productivity, enhance employee satisfaction and employer's success in the market⁴⁴. There are diverse working time arrangements varying from country to country, from company to company and from industry branch to industry branch. Balancing periods, staggered working hours, compressed working week, flexi-time, working hours banking, overtime work, compensatory work, short time work, shift and night work are the most common models in European Labour Law.

There is also a trend toward annualized hour schemes and weekend working. The annualisation of working time refers to actual working hours averaged over a specified sub-period of the year such as six or 12 months. Compressed working week arrangement mean employees work three or four

⁴³ TISK Avrupa'da Esneklik Uygulamaları, 4.2.2001, pp. 32-35.

⁴⁴ **Plantenga/Remery**, p. 19.

days a week longer than normal working days but not exceeding the maximum daily working hours (11 hours a day in Turkey) so that they work a few hours less on the rest of the week days or do not work and benefit from time off⁴⁵. In other words workers condense the entire working week into fewer weekdays (up to a maximum of four days a week).

Flexible working time schedules have some other categories: In staggered (sliding) working hours employees start and finish work at slightly different times, fixed by themselves or the employer. This implies that the employee has some opportunity to fix the hours himself but they remain unchanged. However employer and the employee will usually agree on a core working time within this model the employee can choose to work between zero and ten hours every day. This model brings some advantages especially for the employee who can decide when to work more or less unilaterally⁴⁶. In flexi-time, workers fix their starting and ending times and the number of hours that they work in a particular week. A very new concept is a working time banking arrangement. In working time banking employees accumulate the hours they worked for longer in the week or year not exceeding the maximum daily working hour periods and then the accumulated overtime work is compensated by time off rather than remuneration⁴⁷.

It should be noted that not all these models have been regulated by law in Turkey, however, they can be implemented by the mutual consent of social partners through individual employment contracts or collective agreements as long as they do not exceed the maximum daily working hours (11 hours) and remain within the balancing time period of a maximum of two months (Labour Act art. 63/2) as stated in the following. Moreover Art. 67 of Labour Act sets forth that depending on the nature of the activity, the beginning and ending times of work may be arranged differently for employees.

In general the working week in Turkey is a maximum of 45 hours (Labour Act Art. 63). Unless the contrary has been decided, working hours

⁴⁵ **Plantenga/Remery**, p. 24.

⁴⁶ **Zöllner/Loritz/Hergenröder**, § 32, VII. See also **Narmanhoğlu**, p. 611.

⁴⁷ **Plantenga/Remery**, pp. 25, 35.

shall be divided equally by the days of the week worked at the establishment. This means if the parties agree, the working hours may be distributed over the days of the week in different forms (unequally) on condition that the daily working hours do not exceed 11 hours. In this case within a time period of two months, the average working week of the employee shall not exceed the normal weekly working hours. This practice is called «balancing time» and may be increased by up to four months by collective agreement. The Labour Act therefore brought a balancing period (two months) for the first time inconsistent with the EU Directive 93/104 for realizing flexibility. If the parties agree upon balancing period then the time worked by employees exceeding 45 hours a week but not exceeding averagely 45 hours in a time period of 2 months shall not be considered overtime work. If balancing time is agreed then a compressed work week is applicable. As can be seen, implementation of a balancing period is voluntary but its length (two or four months) is mandatory and cannot be altered. In the balancing time period employees shall not be entitled to overtime pay even when their weekly working time exceeds 45 hours in some weeks. However the annualisation of working hours seems to be not applicable in Turkey due to its length.

Shift and night work as well as «compensatory work» are regulated in the Labour Act⁴⁸. In cases where the time worked has been considerably lower than the normal working hours or where operations are stopped entirely due to *force majeure* or on the days before or after national and public holidays or where the employee has been granted time off upon his request, the employer may call upon compensatory work within two months in order to compensate for the time lost due to unworked periods. In any case compensatory work may not be carried out on holidays and may not exceed the maximum daily working hours (11 hours) (Art. 64 of Labour Act). It should be noted that implementation of compensatory work shall not be permissible on statutory or contractual holidays⁴⁹.

Likewise the Labour Act regulates «overtime work» and «work at extra hours» as well (Art. 41). If the working week exceeds 45 hours where no

⁴⁸ See Labour Act, Art. 64, 69, Maritime Labour Act, Art. 26/2.

⁴⁹ **Dereli**, p. 110.

balancing period has been agreed it is called overtime and the employee who worked the overtime shall be entitled to increased (50% more) pay. In cases where the working week is set by contract at less than 45 hours work that exceeds the average working week but not 45 hours is called «work at extra hours» and the employee who worked at extra hours shall be entitled to 25% increased pay for each extra hour work. Instead of getting increased pay, the employee has the right to use free time, 1 hour and 30 minutes for each hour worked overtime and 1 hour and 15 minutes for each extra hour worked.

Working on weekends (Saturdays and Sundays) is also recognized by the relevant laws (Weekly Rest Act of 1924, Nr. 79; National and Public Holidays Act of 1981, Nr. 2429) on condition that the maximum working week must not exceed 45 hours.

It can be said that almost all kinds of flexible working hours models no matter whether they are regulated or not comply with Turkish Labour Law as far as they are agreed by collective or individual labour agreements except annualized hour schemes, because (as it was cited before) this model exceeds the balancing periods of a maximum of two or four months.

Finally another flexibility measure, short time work, has also been arranged by Turkish legislation. This measure can only be resorted to if there is an economic crisis. Main reason of short time work is its being a counter measure in order to avoid the sacking of workers. Due to economic hardship or a crisis situation under the rigid rules of the previous Labour Act some employers compelled their employees to take unpaid leave or put them on a shortened working week rather than resort to mass dismissals. This practice put employees in a very insecure position and upset the working atmosphere in the establishment and create serious legal conflicts. For a better solution to these problems The Labour Act of 2003 Nr. 4857 introduced new rules in Art 65 under the title «short time work and its pay». But after a period of seven years in order to extend its coverage to other employee groups (employees subject to the Press Labour Act, the Maritime Labour Act and the Code of Obligations) and to make the implementation conditions easier this regulation has been transferred to the Unemployment Insurance Act Nr. 4447 in 2011 by the Act Nr. 6111. According to the new stipulation (Annex Art. 2) an employer who temporarily shortens the working week or suspends work entirely or partially due to a general, sectoral or regional crisis may

resort to short time work not exceeding three months⁵⁰. The employer does not have to agree with the employees to decide to implement short time work. This decision is discretionary. However, this request must be communicated immediately to the Employment Organization of Turkey, to the signatory trade union (if there is one) and to the Ministry of Labour and Social Security. The acceptability of the request shall be decided by the same Ministry. The maximum duration of three months of short time work may be extended up to six months by the government. In practice this period was extended in previous years, 2008, 2009, 2010 and 2011. During this period the employees affected by short time work shall be paid a “short time work benefit” which amounts to 60 percent of their monthly gross earnings by the Unemployment Insurance Fund. The short time work was applied widely in the year 2011.

IV. CONCLUSION

As we have left almost 10 years behind since the enactment of the Labour Act Nr. 4857 it is unfortunately obvious that employment life in Turkey is still far from flexibility. The most important reason of this is the fact that there are still too rigid rules and applications even though they are based on some EU and ILO labour standards. For example balancing period has been stipulated two months which can be extended to 4 months with collective agreement, while the working time Directive of EU (93/104) foresees a balancing period of 4 months which can be extended to 6 months with collective agreements.

Also fixed term employment contracts are used primarily because of the uncertainty about future, because of the fluctuating demand for labour force and because of the rigidity of the legislation concerning dismissals. As a matter of fact in Turkish Labour Law they have been bound by rigid conditions as Turkish legislation requires reasons like specified term completion of a certain time and emergence of a certain event even for the first time.

⁵⁰ C. Tuncay/Ö. Ekmekçi, Sosyal Güvenlik Hukuku Dersleri, 15. bası, İstanbul 2012, pp. 527 f.; Narmanlıoğlu, pp. 634-635.

Although part time work has been regulated relatively in line with the European and ILO norms, application of this working time is still quite limited. The generous severance pay implication is another obstacle to the flexibilisation and job security of the employees generates a heavy burden on establishments. Lack of some atypical employment forms in the legislation such as job sharing, establishment of temporary working relations through private employment agencies, teleworking etc. and extremely long working hours especially in the formal sector are a big hindrance before flexibilisation. Even cultural reasons and traditional habits prevent the flexibilisation of working time. Further high taxes and social security contributions are another obstacle before flexibilisation. On the other hand, trade unions still insist on detailed legislation granting greater protection for employees⁵¹. Briefly it can be said that flexibilisation of employment remains behind employment security of employees. However it must not be underestimated that too much protection weakens the competitiveness of establishments.

⁵¹ **Blanpain/Van der Valk/Süral**, *Flexibilisation and Modernization of the Turkish Labour Market*, p. 54.

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