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FLEXICURITY AND TURKEY'S NEW LABOR ACT: PROBLEMS AND PROSPECTS

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FLEXICURITY AND TURKEY'S NEW LABOR ACT: PROBLEMS AND PROSPECTS*

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By combining flexibility and employment protection, the 2003 Labor Act of Turkey has become a key element in promoting fundamental employment rights in Turkey, safeguarding workers' employment conditions under flexible arrangements, and improving equality at the workplace. This paper aims to explain the unique process used in drafting this legislation as well as the Act's main dimensions and the problems encountered in practice.

The paper is composed of mainly two parts. Following some background information, the first part deals with the process of drafting the proposal for a new Labor Act. The second part explains the main dimensions of the draft bill and the final text enacted by the Parliament. The paper concludes with a final section on the general evaluation and future prospects for flexicurity in Turkey.

Background

Before the passage of Labor Act no.4857 in 2003, protective labor legislation dealing with the individual employment relationship was governed in Turkey first by the Labor Act of 1936, no.3008, and following it, by the Labor Act of 1971, no.1475, both patterned after a Fordist model of the 1930s' working environment and characterized essentially by the prevalence of open-ended employment contracts with only a minimum degree of job security, (i.e terms of notice to be respected and the payment of severance pay in certain dismissals) as well as rigid rules governing organization of work and working time. With a few exceptions , Act no.1475, which remained in force until the year 2003, covered, like the new Labor Act, all blue-collar and white-collar workers in private and public sectors . On the other hand the status and working conditions of public servants who enjoy stronger tenure and job protection rights are governed by special legislation of public law. (1)

* In this article, for reasons of space economy, only the pronoun 'he', without prejeduce to the pronoun 'she', has been used to denote the third person pronoun which should be construed to mean a person of unspecified sex. For labor law concepts, terminology of the International Labour Organisation has been adopted.

Following the adoption of multi-party democracy by Turkey , labor unions came into existence in 1947, but genuine collective bargaining with the right to strike could not materialize until the Constitution of 1961. With the entrenchment of free collective bargaining during the 1960s and afterwards, unions paved the way for promoting their members' working conditions above and beyond the minimum levels set by the protective labor legislation, but their efforts to enhance employment security for their members, let alone for workers in general, were doomed to failure. However providing workers with job security had become a subject of heated debates in labor and academic circles since the mid-1980s. With the ratification in 1994 of the ILO Convention 158 on the Termination of Employment , enactment of legislation on this matter could no longer be delayed despite strong reactions from employers. Employers were opposed to the rigidities of the Labor Act no.1475 in existence then, and similarly unions seemed reluctant to accept any flexible working arrangements which were being debated at certain platforms since the 1990s. Surprisingly "flexibility" was an unheard term in the Turkish setting until the early 1970s, but early 2000s witnessed increasing demands by employers for the relaxation of existing rigidies on the kinds of employment contracts, organization of work and working time arrangements . Thus, achieving the right regulatory balance between labor market flexibility and employment security had become the subject of debate between successive Turkish governments, employers and labor unions for a number of years.

The introduction of the new Labor Act in 2003 was a step towards addressing these issues.The main motives for the reforms were:

(1) A perceived need on the part of employers for more flexible regulation that would better respond to the changing needs of Turkish business,influenced by globalization and the opening up of the economy,
(2) The need to align Turkish labor laws with ILO conventions and European Union *acquis* following Turkey's international commitments,
(3) The desire of labor unions to bring stronger employment protection for their members and workers in general, and
(4) the attempt to stimulate job creation ,by eliminating the outdated rigidities of the previous legislation whist promoting job security for workers.

Process

It was proposed by Refik Baydur,the president of Employers' Confederation (TİSK) and Yaşar Okuyan, the then Minister of Labor and Social Security of the coalition government, that the tripartite constituents appoint a nine-member committee of academics to draft the legislation on which the constituents would be equally represented (that is, three members representing employers, the TİSK, three members labor (one to be chosen by DİSK,the left-wing labor confederation, one by Türk-İş,the center confederation, and one by HAK-İŞ ,the right wing confederation), and three members representing the government to be chosen by the Ministry of Labor and Social Security. Following the creation of this committee (which has been referred to as the "academic committee" since then), the social partners made a commitment without reservation that they would accept those changes on which the drafting committee could agree unanimously. In a meeting held in Ankara on 7 February 2001 with the participation of the presidents of labor and employer confederations as well as the Minister of Labor of the coalition government in power, agreement was reached on the project, together with the proposed names of the committee members. For labor unions, the promise to inculcate a job security dimension into the system was the most alluring motive, so they readily signed the protocol. For employers the flexibilization of the labor market as well as the expected attenuation of severance pay were the essential motives.

Members were selected on the basis of their past work with the social partners as well as with the government. Despite the members' relative proximity to one of these parties, each was known with his objective approach to labor problems and knowledge of both the Turkish and ILO-EU labor law. The writer of this paper worked in this process as one of the three government representatives.The committee appointed one of the senior government representatives, Professor Metin Kutal, as its chairman.

During the successive stages of the academic committee's work ,each member remained in contact with the organization which he represented, with a view to inform the stakeholders concerned on the developments taking place in the committee's work. After meetings which lasted about three months, the committee completed its draft on employment security and a new version of severance pay, and submitted it to the Minister of Labor and Social Security on 4 May 2001.The part of this draft on job security was passed through the Parliament as Act

no.4773 in 2001. This represented the first phase of the committee's work, pending the completion of the second phase which would include the incorporation of flexibility into the body of the new Labor Act.

The committee spent another year to complete its work on flexibility measures and submitted its draft to the new Minister, Murat Başesgioğlu, on 26 June 2002. It should be noted that reaching unanimous agreement on many issues required making various compromises on important issues which represented conficts of interest among the social partners. For example, the numerical threshold concerning the scope of establishments that would be covered by job security provisions was the subject of heated debates among the members of the committee. While some members insisted on keeping the threshold low (with a view to expand the scope of workers to be covered) on the presumption that it was very likely to be increased anyhow during the legislative process, the employers' representatives favored a higher figure for the sake of keeping small enterprises out of the scope of job security. Another important issue on which disagreement arose in the last minute was related to limiting employment termination cases which would entitle the worker to payment of severance pay so as to make it payable only upon the worker's retirement, as well as the establishment of a "severance pay fund" versus an alternative text which foresaw a considerable reduction in the existing amount of severance pay. The motive behind employers' insistence was their well-known argument that, in the presence of the new job security provisions and the unemployment insurance system in force since the year 1999, the exageratedly high levels of severance pay should now be curbed. As a matter of fact the fate of severance pay system was the only issue on which the committee failed to reach unanimous agreement. This was also the main reason for the delay caused in the submission of the draft text to the Minister.

At the beginning of the process, members made a division of labor among themselves whereby each was to be assigned a subject on which he would write the text of the pertinent articles.While each member made important contributions to the creation of the draft proposal for every chapter of the text, Professor Münir Ekonomi who was a TİSK representative with his in-depth knowledge of European labor law, was instrumental in designing a significant part of the text. Except for two members who quit the committee for personal reasons, the composition of the "academic committee " did not change throughout the whole process.

Thus, with the hope of making amendments to the severance pay system in the future, this draft, debated extensively before and during the Parliamentary process, was enacted as the new Labor Act of Turkey,no.4857, on 10 June 2003. The previous legislation on job security regulated by Act no.4773 of 2001 was incorporated into Act no.4857 with a few revisions.(2) Article 14 of the previous Labor Act no.1475 would remain in force until further revisions could be made to the severance pay issue in the future within the context of the proposed 'severance pay fund.' Nevertheless, despite the initial commitment of the social partners to the revision of labor legislation by the tripartite academic committee, the same consensus could not be maintained on certain dimensions during the legislative process in the Parliament. While employers kept resenting the introduction of a full-fledged job security system unless drastic changes were made in the existing severance pay levels, labor was opposed to such issues as the establishment of temporary work agencies, transfer of the employment contract and new flexibilization measures in working time and working arrangements. Some articles of the previous Labor Act remained unchanged while employers and labor confederations agreed between themselves to delete certain proposals embodied in the original draft bill. And eventually the legislature made a few changes in the draft during its passage through the Parliament.These interventions notwithstanding, the content of the original draft was accepted to a considerable extent.But the controversy on temporary work agencies as well as the revision of the severance pay system are still on the agenda as evidenced by various attempts of the government in the recent past to pass legislation to regulate these issues. With the exception of these and a few other minor points in the background, most of what the academic committee was engaged to accomplish in the name of flexicurity has become a reality in the format of a modern labor law for Turkey. Certainly the outcome is not flawless, as will be explained in the following paragraphs.

The experience of the last few years shows that , although it has increased the case load of labor courts, the part of the 2003 Labor Act on job security is working with reasonable efficiency. But it is not possible to make a similar assessment with regard to the new flexible working arrangements.Since in the Act most flexibility measures were predicated on the condition of the worker's giving his consent, labor unions, perhaps for fear of the unknown, were reluctant to give their approval in collective bargaining negotiations. However in workplaces where there was no certified union (meaning the bulk of the Turkish economy), employers were able to get the worker's consent by way of new employment contracts or by including a clause for flexible arrangements in the establishment's personnel regulations . In

the opinion of most employer circles as well as national and international assessment centers, the new Labor Act is still saddled with rigidities. (3)

Notwithstanding the various problem points which will be summarized below, in Turkey an agreement signed by the social partners and the government eventually led to the adoption of a contemporary Labor Act. As a successful form of social dialogue at this level, the work of the 'academic committee' was the first and so far the only venture of its kind in Turkey. It is believed that in Turkey a similar method might yield positive results on the proposed legislative reform on freedom of association. (4) Yet the awareness raising phase in the enactment of Act. no. 4857 was not sufficient, as implied by the initial reactions of labor unioms to this effort. Its implementation and further improvement have become an exercise of co-responsibility and social dialogue between the social partners.

Job Security

Articles 17-25 of the Labor Act no.4857 deal with the termination of employment contracts in general, while 18-21 regulate specifically provisions on job security. The said articles were designed by the academic committee along the lines foreseen in ILO Convention 158, but in quite flexible terms, taking account of the special circumstances of the Turkish labor market While the criterion for coverage would cover establishments with 10 or more workers in the committee's original draft, the threshold was later increased by the government, on grounds of providing some flexibility for small enterprises, to 'establishments employing 30 or more workers, with a minimum seniority of six months'. Arguing that the '30 workers' criterion was apt to deny job security to a considerable number workers, labor unions reacted to the said limitation but with no success Workers excluded from the coverage of job security protection continue benefitting only from the relevant articles on notice terms and severance pay if they are eligible, and in the event of abusive dismissals, compensation amounting to three times the wages for the term of notice.

For workers under coverage, the employer must depend on a 'valid reason' in order to terminate the employment contract; 'valid reason' must be connected with the capacity or conduct of the employee or based on the operational requirements of the enterprise, establishment or service.Union membership and participation in union activities are cited

among the cases which shall in no case constitute a valid reason for termination.The worker shall not be terminated before he is allowed to defend himself, except in cases of summary dismissal (for serious misconduct or malicious or immoral behavior) according to Art.25/II , based on the presumption that in such cases the employer has often to take prompt action and the worker may have recourse to the labor court anyhow in order to seek redress for unjustified termination. In practice, however, most employers take the worker's defense in discipline-related dissmissals . But the denial of taking the written defense of the worker in just-cause dissmissals, apparently a paradox in comparison to terminations based on a valid reason, was later criticized in practice and teaching.(5)

The worker who claims that no valid reason was given for his dismissal may apply to the labor court, or if there is an arbitration agreement, to the private arbitrator, within one month. The burden of proof that the termination was based on a valid reason rests on the employer. But if the worker claims that termination was based on a reason different from the one stated by the employer,(e.g. union membership), then the burden of proof shall rest on the worker.The court or the arbitrator shall conclude the case within two months. If the decision is contested, the Court of Appeals shall render its definitive verdict within one month. Where the court or arbitrator concludes that the termination was unjustified because no valid reason was given or the alleged reason was invalid, the employer must reinstate the worker within one month. If upon the application of the worker within ten days of the court's or arbitrator's decision the employer does not reinstate him, compensation to be not less than the worker's four months' and not more than eight months' wages shall be paid to him by the employer. Against acts of anti-union discrimination, a stronger sanction in the form of compensation to be not less than the total annual wages of the worker was foreseen for the dissmissal of union members' and shop-stewards' union related activities. In its verdict ruling the dismissal invalid, the court shall also designate the amount of compensation to be paid in case the worker is not reinstated.(Art.21/I,II) In doing so the judge takes the worker's past work history, seniority and the nature of the alleged valid reason. As these provisions imply, reinstatement was not formulated as an absolutely mandatory requirement in the 2003 Labor Act , which is also revealed as a possible option in ILO Convention158.

For reinstatement in work, the employee must make an application to the employer within ten working days of the date on which the final court or arbitration decision is communicated to him. If the worker does not apply within the said period, termination shall be deemed valid, in

which case the employer will be held liable only for the legal consequences of that termination.(Art.21/IV) The employee is also protected during the court trial period. He shall be paid up to four months' total of his wages and other entitlements for the time he is not reinstated . If advance notice pay or severance pay was already paid to the reinstated employee, these amounts shall be deducted from the above-stated compensations. If, however, in the case of non-reinstatement these payments had not been made to the worker when he was terminated, they should be paid to the employee.(ArtArt.21/III) Provisions in Art.21/I,II,III are absolutely mandatory, meaning that they may not be altered by any agreement whatsoever. However, the scope of job security (i.e. the 30-workers threshold) is held to be relatively binding,construed as meaning that a lower threshold may be agreed to by the parties to the collective agreement.

Paradoxically, however, although strengthening job security was one of its avowed goals, the 2003 Labor Act weakened the employment security of the union shop- steward who falls within the scope Articles 18-21. Previously, the union shop steward was the only category enjoying full employment protection, culminating almost always in absolute reinstatement. However, one unintended consequence of the complicated procedures set out in the 2003 Labor Act was to attenuate the protection of the shop-steward, relegating it only to the payment of compensation to be not less than his annual wages , the same remedy as foreseen in the case of the worker's dissmissal due to his union memberhip or participation in union activities, Presently, this paradox stands out as a loophole which recent draft bills on freedom of association envisage to eliminate.

Though not widely used, arbitration of grievances and collective rigths disputes was a known practice in Turkey based on the pertinent provisions of theTurkish law on legal procedures. In an attempt to alleviate the work load of labor courts , the draft of the academic committee and then Act no.4857 brought as a new avenue recourse to collective agreement-based arbitration clauses for job security disputes as well. But the Constitutional Court , relying on the principle that the right to court trial must never be denied to the individual, overruled the validity of collectively bargained arbitration in the settlement of job security disputes.(6) But, for the system's speedy adjudication and viability in settling security disputes , the arbitration clause voluntarily included in the collective bargaining agreement by the parties should, due to the supremacy of the collective agreement over employment contracts, be binding on both the worker and employer in governing the execution and termination of the employment

contract. One could argue that the Constitutional Court's decision was misplaced for a number of other reasons as well.(7) However the decision for nullity does not affect the employer's and worker's jointly agreeing to arbitration . In other words the Court upheld only the unconstitutionality of collective agreement-based arbitration in job security disputes. But with the restriction of the mandate of arbitration by the Constitutional Court's ruling, the case load of labor judges has increased at an ever-increasing rate since the year 2003.

In an effort to justify their valid reasons for terminations, a notable tendency of employers has been the importance they attach to making elaborate performance appraisals for their workers, a process which was often neglected before court litigations for job security began increasing at staggering rates.

Art.22 of the 2003 Act deals with the unilateral changes to be made by the employer in working conditions or the location of the workplace set out in the employment contract, rules of work or personnel regulations. 'Any change by the employer in working conditions may be made only after a written notice is served by him to the worker concerned. Changes that are not made in conformity with this procedure and/or not accepted by the worker in written form within six working days shall not bind the employee.If the worker does not accept the offer for change within this period , the employer may still terminate the contract by respecting the terms of notice , provided that he indicates in written form that the proposed change was based on a valid reason.' In this case the worker may file a job security suit according to the relevant provisions of the Act. By mutual agreement,however, the parties may always change working conditions.

Under the previous system the worker could terminate the contract for just cause if the employer made essential alterations in working conditions which he did not accept. But the outcome for the worker was to lose his job. Now Art.22 aims to regulate change in working conditions by providing some continuity in the employment relationship. Controversy arose, however, on the application of Art.22 as to what action should be taken if in the employment contract, the collective agreement or personnel regulations the employer had reserved his right to make essential alterations in the workplace or working conditions. The High Court of Appeals ruled that the dissenting employee should still have access to to Art.22 and request the termination of his employment contract by the employer to be held invalid.(8)

When the employer contemplates collective layoffs for reasons of economic, technological, structural or other reasons of a similar nature, he must provide the union shop stewards, the regional directorate of labor and the Employment Organization (İŞKUR) with written information to that effect at least 30 days prior to the intended layoff. Art.29 of the Labor Act citing the numerical and administrative requirements is consistent with the principles set out in ILO C. 158 and the relevant EU Directive 98/9/EC for collective dismissals. Consultations that must be made within the 30-day notification period shall deal with measures to be taken to avert or reduce the layoffs or to mitigate or minimize their adverse effects on the workers. The draft of the academic committee had foreseen the election of workers' representatives for the said consultations in establishments where shop-stewards appointed by a certified union did not exist, which in fact applies to the greater bulk of the Turkish economy. This was also conceived of as a step paving the way for the establishment of an information-consultation mechanism, as envisaged in the relevant EU directives. But due to strong reactions by labor unions that saw this proposal as a threat to weaken their presence and organizing drives in workplaces, and because the employers also readily agreed with them, election of workers' representatives in non-unionized plants was cast off altogether.(9) Under the present system, therefore , due to this void, how the process of consultations will work in non-union plants is unclear.

In addition to its regulations on job security, Act no.4857 also brought new clauses in the following dimensions:

- More detailed provisions on the prevention of discrimination . Article 5 requires equal treatment of workers regardless of their contractual arrangements as well as in terms of gender, race, religion, language,etc. Sanctions have been foreseen for violators who shall be subject to compensation penalties or fines.
- With a view to prevent abusive practices by employers, Article 2 further reinforced the restrictions placed on the use of subcontract labor which had long been a vexetious issue besetting labor unions and workers. It established new rules and strict criteria for the establishment of the 'employer-subcontractor relationship' whereby the employer and the sub-contractor are to be held jointly liable for the payment of claims by the subcontractor's workers stemming from labor legislation, employment contracts or the collective agreement.
- Where there is no written employment contract, the employer is required to provide the worker with a written document that sets out the general and special working conditions as foreseen under EU law.

- The new Act also brought increases in favor of the worker on annual leave with pay and naternity leave.
- The worker whose wage has not been paid within 20 days of the date on which it was due, except for *force majeure*, may refrain from working. Even where this conduct takes on the character of a concerted action, it shall not be treated as an unlawful strike. Workers shall not be dismissed; no replacements shall be hired, nor may the functions of such workers be performed by others.(Art.34)
- Further, the Act's chapter on occupational safety and health has been overhauled considerably. It is particularly important as it paved the way for detailed regulations on the employer's duty to protect workers, to employ workplace phycians and safety engineers, to provide safety training, and to establish occupational safety and health boards and related services.
- And last but not the least, Act no. 4857 established the 'tripartite consultation board' in Art.114 as a new mechanism for social dialogue. In the past few years this committee has proven to be an effective avenue for tripartite consultations, especially in preparing draft bills for the amelioration of the collective bargaining system of Turkey.

Flexibility

I. Types of Employment Contracts

1. Fixed-term vs. Open-ended Contracts; the ongoing controversy

While open-ended employment contracts (contracts with an indefinite term) were generally the norm in Turkey in continual (permanent) employment relationships, pre-2003 labor legislation included provisions also on contracts with a definite (fixed) term,but only at a minimal level.The draft for the 2003 Act had to deal with this latter form of employment relationship as a flexible form of work generally more convenient for employers but at the same time with a motive to protect the worker and to prevent abuse. However both the definition and scope of fixed-term employment contract turned out to be somewhat different from the wording of the academic committee's draft. Art.11/I of Act no. 4857 provides that ' an employment contract is deemed to be open-ended (i.e. to have been made for an indefinite term) where the employment relationship is not based on a fixed term. A fixed-term contract

is one that is concluded between the employer and worker, in written form, for work requiring a ‘specified term’ or based on objective conditions like the completion of certain work or the occurence of a certain event’ As seen from the way the Article is formulated, it seems that, in Turkey, there should be an objective reason necessary even in the first-time conclusion of a fixed-term contract or employment relationship.

But in setting out the general principles and minimum requirements for fixed-term employment contracts , the main motive behind the EU framework agreement of the social partners on 18 March 1999 (which was given legislative effect through Council Dirctive 1999/70/EC) was the desire to improve the quality of fixed-term work by ensuring the observance of the principle of non-discrimination and to establish a framework to prevent abuse from the use of successive fixed-term employment relationships.In the exact text of the framework agreement there is no requirement for the establishment of objective reasons for the first use of fixed-term employment contracts,and most likely this was a deliberate choice as the framework agreement on fixed-term contracts obviously aimed at facilitating the use of such contracts.(10) The prevention of abuse is regulated only with regard to successive fixed-term contracts.

Article 11 of Act no.4857, by restricting the freedom of the parties to freely fix an expiration date in the first use of a fixed term conract, was apt to limit the scope of flexibility. While most EU jurisdictions have not required the presence of essential resons for the first-time conclusion of fixed-term contracts, the Turkish Labor Act has gone further than the Directive in protecting the fixed-term worker by requiring an objective justification for making the fixed term contract. But this was not an option in the original draft of the academic committee – which simply mentioned for fixed- term contracts the phrase ‘ whose duration is determined by the parties in terms of time and date’ , rather than ‘for work of a specied term or duration.’ The reasons for Art.11 cited in the government’s text submitted to the Parliament also attests to the fact that the underlying rationale did not imply a requirement for the objective justification for the first conclusion of a fixed-term contract, although some academic circles had supported the opposite view.

The prevention of abuse was regulated only with regard to successive ‘ so-called chain’ contracts. Art.11/II provides that ‘ an employment contract for a definite term must not be concluded more than once except when there is an essential reason which necessitates making

repeated (chain) contracts. Otherwise the contract shall be deemed to have been made for an indefinite term from the very beginning.' This means that the first renewal will transform the contract into an open-ended one. 'Chain contracts based on essential reasons shall maintain their status as fixed-term contracts.' In fact rulings of the Court of Appeals had confirmed this view even before the passage of Act no.4857. It should nevertheless be noted that in the labor law of current Member States of the EU, a maximum total duration of successive fixed-term contracts or the number of renewals of such contracts which prevent those chains from being modified into open-ended contracts is often given.It appears that the Turkish Labor Act does not offer this flexibility in its present structure.

The stipulation in Art.11/I that all fixed-term contracts must be made in written form is clearly ill-conceived and contradictory to Art.8/I which states that the written form is required only for fixed-term contracts of one year or more. According to one opinion, 'combined with the presumption laid down in Art.11 (first sentence), a fixed-term contract which is not in writing will be presumed to be an open-ended contract.' (11) Yet this does not eliminate the said contradiction. The only solution to deal with the contradiction brought by Art.11/I could be to treat the new 'written form' notion of Art.11 as a broad concept relating to the duty of the employer to provide the worker with a written document in cases where no written contract (fixed-term or open-ended) has been drawn up.(12)

Parallel to to the relevant provisions of Art.5 on the principle of 'equal treatment (non-discrimination)', Art.12 deals with the limitations on the distinction between fixed-term and open-ended employment contracts .'An employee working under a fixed-term employment contract must not be subjected to different treatment in relation to a comparable employee working under an open-ended emplyment contract.' 'Divisible amounts for a certain time period relating to wages and monetary benefits to be given to a fixed-term employee must be in proportion to the length of time during which the employee has worked. In cases where seniority in the same establishment is treated as the criterion in order to have access to an employment benefit, the seniority criterion foreseen for a comparable employee working under an open-ended contract shall apply to an employee with a fixed-term contract, unless there is a reason justifying the application of a different seniority criterion for an employee working under a fixed-term contract.' (Art.12/I,II)

These principles on equal treatment envisaged by Art.12 are consistent with EU Council Directive 99/70. Since they were not included in previous legislation , the interpretation of 'the 'comparable employee' has been causing complications which are often resolved by expert opinion and court decisions.In the past the same principles were used in the computation of employees' severance pay and entitlement to paid annual vacation. So practice and judiciary are familiar with applications.

As for the restriction in the definion of 'fixed term contract' which makes flexible practice somewhat difficult, it is advisable in a future amendment to the Act to carefully reconsider the definion of fixed-term contract to the extent that an objective reason need not be demonstratated in its first use, whereby the parties must be able to freely determine its duration and/or expiration date.

2. Part-time employment contracts

The previous legislation, Act no.1475, did not carry any clarity on part-time work although this kind of employment was known in Turkish practice.The void was filled by court decisions. With a view to protect as well as to encourage part-time work for employment creation, Act no.4857 brought provisions on this matter consistent with relevant EU norms. Domestic services, cleaning and preparatory work, work by company physicician, lawyer , work by women and students in supermarkets were typical examples of part-time work in Turkey.

Art.13/I of Act no.4857 has provided that 'the employment contract is to be considered 'part-time' if the workers's normal weekly working time has been fixed considerably shorter than a comparable worker working full-time.' In an attempt to clarify the meaning of 'working time having been fixed considerably shorter than the normal weekly working time' , statement of reasons for Article 13 refers to 'work which is less than at least two-thirds of the normal weekly working time. 'Aiming to ensure non-discrimination, Art.13/II stipulates that 'an employee working under a part-time employment contract must not be treated differently in comparison to a comparable full-time employee solely because his contract is part-time, unless there is a justifiable reason for differential treatment. The divisible benefits to be appropriated to a part-time employee in relation to wages and other monetary benefits must be computed according to the length of his working time proportionate to a comparable

employee working full-time. The comparable employee is the one who is employed full-time in the same or similar job in the establishment. If there is not such an employee in the establishment, an employee with a full-time contract performing the same or similar job in an establishment which falls into the same branch of activity shall be considered to be the comparable employee' (Art.13/II,III) Thus a part-time employee will have access to all the fringe benefits(i.e. bonuses, premiums, allowances, holiday pay) granted to full-time employees but only in terms of divisible amounts proportionate to the length of his working time. Part-time employment may be based on an open-ended or fixed-term contract. In the computation of the worker's length of service for various entitlements (for example to severance and notice pay) the total period between the beginning and ending dates of his employment contract shall be considered rather than the total working time actually worked. And termination of part-time employment contracts is subject to the same rules foreseen for full-time employees. Part-time workers have access to all the entitlements of freedom of association and collective bargaining. Adhering to the principle of equal treatment, their remuneration may be determined freely by the parties, provided that the wage to be paid for a given time period must not be less than the legal minimum wage corresponding to the same time slice.

In line with the Council Directive 97/81, Art.13/IV provides: 'if there are vacant positions suited to their qualifications , employees' requests to move into full-time from part-time jobs or vice versa must be given due consideration; and vacancies must be announced without delay.' The underlying motive is to further employment expansion by encouraging the transfer of part-time workers to more stable employment. Yet the above-mentioned Matra Project did not find this article concrete or sufficient enough to meet the expectations of the said EU directive.(13)

3. On-call work contracts

On-call work or call work is a special form of part-time employment. Differing from part-time work mainly with its irregular and casual character,it was not unknown in past Turkish practice either. It was referred to as a unique kind of part-time work in various decisions of the Court of Appeals. The 2003 Labor Act has chosen to regulate it as a flexible working arrangement to be accompanied by certain protective measures. As Art.14 states,'employment relationship based on the performance of work by the worker upon the emergence of a need

for his service, as agreed on by the parties in the written employment contract, is an on-call part-time contract . If the worker's working time has not been determined by the parties in terms of time slices such as a week, month or year, the weekly working time shall be considered to have been fixed as 20 hours.' The worker must be paid his wages irrespective of whether or not he is engaged in work during the time announced for on-call work. Implicit here is the notion of flexibility in both' working time and wage ', construed as meaning the possibility of the parties' agreeing to a period longer or shorter than 20 hours. However some writers believe that the '20 hours' should be treated as a binding minimum rather than a fixed mandatory time slice, meaning that shorter hours may not be decided in individual contracts or collective agreements.

When the employer needs the service of the worker, he must make the said call at least four days in advance unless the contrary has been decided. If the daily working time has not been decided in the contract, the employer must engage the worker in work for a minimum of four consecutive hours at each call.(Ar.14/III,IV) Legislation has thus recognized freedom to the parties of on-call work while at the same time bringing protective measures to apply in the absence of explicit agreement.However labor was quite critical of on-call work during the legislative process on grounds of its alleged infringement on secure and stable employment. In practice due to the unions' refusal to accept it as an acceptable employment form, on call work does not seem to have gained much acceptability in the formal and organized sectors of Turkey. Besides, where applied , the official inspection mechanism falls short of implementing a sufficient monitoring of such work both in terms of the sufficient collection of social security contributions and implementation of working time arrangements.

4. Temporary employment contract

The original draft of the 'academic committee' had foreseen in Article 93 the creation and licensing of temporary work agencies , but as a result of strong reactions by labor against this proposal , Art.93 of the proposal was deleted from the text of Act no.4857. In Art.7 of the 2003 Act at present, therefore , there is a legal basis only for the staff leasing process between the employers within the structure of a holding company or the same group of companies . In Turkey this was a known practice anyhow whereby employers of related companies occasionally met their needs for skilled labor on joint projects or in their efforts to head off layoffs.

Act no.4857 has brought clarity to this somewhat controversial issue. From the wording of Art.7, however, it is inferred that temporary work agencies which normally assign their workers to third parties (user enteprises) on a professional basis are not permitted to function. As Art 7 provides, ‘ a temporary employment relationship is established when the employer transfers his employee, after obtaining his written consent, to another establishment within the structure of the same holding company or the same group of companies...Temporary employment relationship which must be concluded in written form may be established for a period not to exceed six months, and if needed, it may be renewed twice, and the worker’s consent must be taken at each renewal.’ Therefore the contract may be effective only up to 18 months. Art.7 also provides other details relating to this relationship,(i.e. certain limitations on implementation, duty of equal treatment, health and safety training, joint liability requirements for wages and social security contributions, union and collective bargaining rights). However,employers who seem happy for the legal clarification of this practice complain about the relatively short time span of using it envisaged by the Labor Act.

On the other hand,the failure to legislate on temporary work agencies to operate with a view to create employment has been a matter of controversy, deplored both by the government and employer circles as a factor barring the further flexibilization of the Turkish labor market. However this type of triangular temporary work relationship is still practiced as a commercial activity by various private employment agencies but informally and with no legal protection for the worker . In so doing these agencies rely for the most part on the general provisions of the Obligations (Contracts) Act, or the principal employer-subcontractor relationship, which by way of its quite different nature and the restrictive clauses brought by Article 2 of the 2003 Labor Act, leads to controversial court cases. In an attempt to legalize temporary work agencies, a draft bill annexed Art 7-A to Act no 4857 in order to regulate temporary work agencies in accordance with the guidelines of EU Directive 2008/104/EC. But due to active lobbying by labor unions the President vetoed Art.7-A on a number of grounds, among them basically for the void in respecting the principle of equal treatment. Following this, the draft for the Act of February 2011, no.6111 revived Art.7-A with more elaborate provisions on non-discrimination, but this proposal too was struck out during the final legislative process, again mainly for political reasons. Labor unions call temporary work ‘slave labor’ and assert that temporary workers are doomed to employment mainly in less paying,substandard jobs with no employment protection. In addition to the difficulties encountered in organizing them, unions believe that this category of work clearly violates the

Constitutional principle of the State's duty to provide a 'just wage' for the working people. These views notwithstanding, the submission of this isuue to the agenda of the Parliament in the near future is quite likely. As a matter of fact, the Ministry of Labor and Social Security has prepared a new draft on temporary work agencies in November 2011 and submitted it to the assessment of social partners.(14) However,the text of this draft has already raised a few controversial points.It must be noted that in this effort matters like the optimum number of temporary workers to be employed in an establishment, their right to organize and bargain collectively, designation of the industry branch wherein they can organize, their job security as well as the 'equal treatment' principle should be given due consideration.

II. Working Time Arrangements

1. Normal working time and flexibility measures

The maximum weekly normal working time which was 48 hours before was reduced to 45 hours by Act no. 2869 in 1983. But the working time arrangements of the Labor Act, no.1475, were quite rigid and the need for flexibilization was often voiced by employer circles during the 1990s. In responding to such demands as well as considering the relevant EU directives, the new Labor Act did bring various flexibilization measures and different types of more flexible employment contracts. In general terms, weekly working time is 45 hours maximum which the parties may freely agree to reduce. Unless the contrary has been decided, 45 hours shall be divided equally by the number of days worked at the establishment. (Art.63/I) So, as in the previous system, working time may be divided by the number of days on an equal basis. If work is done six days of the week, daily working time is 7.5 hours. If work is only 5 hours on Saturday, daily working time shall be (45-5=40:5=8) 8 hours.

Provided that the parties have so agreed,however,working time may be distributed over the days of the week in different modalities, on condition that the daily working time must not exceed 11 hours in any case. So within these limits, the practice of 'compressed work week' is possible. But within a period of two months, the average weekly working time of the worker must not exceed the weekly normal working time (45 hours); otherwise the employer must execute a transaction called the 'balancing act'. Thus in so far as the weekly average does does not exceed 45 hours, there shall be no need to apply the so-called balancing even if

the daily working times may have varied. This balancing period may be increased up to four months by collective agreements. (Art.63/II) Bringing flexibility to working time in this manner is consistent with EU directive 93/104. In this connection, the possibility exists to raise the weekly working time above 45 hours in some weeks , provided that within a two month period the average weekly working time of the worker must be equalled to 45 hours. Thus the implementation of 'compressed workweek' is applicable. The workers' consent may be obtained by way of new or changed individual employment contracts or by jointly inserting pertinent provisions into the establishment's personnel regulations or collective agreements.As for the workers concerned, balancing can be carried out on the basis of the whole establishment, or in a section thereof or on the basis of individual employees.

The balancing period is the time span (which may vary between two to four months) beginning from the first day of the application of the compressed week. The employer is held to have the iniative here through implicit or explicit agreement of the employees or through joint decision making by way of collective agreement. Because working time is a non-monetary issue, changes in the distribution of working time and adjustments to be made in respect to the balancing act are binding not only on the members of the signatory union but on all employees in the establishment in view of Art.31 of Act no.2821 on labor unions. Looking into major collective agreements, it is safe to say that, in conrast to many flexibility provions of the 2003 Labor Act which require the workers' consent, 'compressed work week is, relatively speaking, more easily used, either by individual or by collective agreement. The collective agreement,if there is one,shall take precedence in any case, as it does have an automatic and binding effect on individual employment contracts. A collective ageement provision may foresee the distribution of weekly working time to workdays –not to exceed 11 hours daily – equally or on a differential basis.The ceiling on the length of the balancing act is of course mandatory and can not be altered. In the balancing process the employee is not entitled to overtime pay even when his weekly working time exceeds 45 weeks in some weeks due to the application of 'compressed workweek'.(Art. 41/I) Because of the the flexibility it carries, the 'compressed workweek' is more beneficial to the employer than to the worker.However, the necessry adjustments to be made in the balancing process are complicated and require experise in in time management. Turkish firms were ill-equipped for such new functions. Employers would prefer a longer time span for the ceilings concerned. In fact the draft on Act no.6111 foresaw bringing an increase to the time span within which the

balancing act is to be executed, but due to pro-labor reactions the proposed change was deleted from the draft text.

Also, in view of Art.67/II, 'depending on the nature of the work or activity, the beginning and ending times of work may arranged differently for workers.' Thus, making flexitime arrangements is possible.

2. Overtime work and work at extra hours

Overtime work is work which , under the conditions specified in Act no.4857 (i.e.normal overtime work, compulsory overtime work, overtime work in emergency situations), exceeds 45 hours a week.In cases where the balancing act mentioned above is applied, work which exceeds a total of 45 hours a week shall not be considered overtime provided the average weekly working time of the worker does not exceed the normal weekly working time.(Art.41) . It follows from this definition that the criterion for overtime work is work that exceeds 45-hour weekly (but only up to three hours) rather than work which lasts longer than the daily working time, -which was the case under the previous Labor Act, no.1475 when any work up to three hours daily in excess of the daily working time ,and not to be carried out more than 90 days in a year, used to be treated as overtime.-

The 2003 Labor Act also brought a new concept, namely 'work at extra hours'. As Art.41/III provides, 'in cases where the weekly working time has been set by the employment contract at less than 45 hours, work that exceeds that agreed upon average weekly working time ... and which may last only up to 45 hours weekly is deemed to be work at extra hours.'

In normal overtime work, the worker's consent must be obtained. The requirement to receive the permission of the regional directorate of labor which existed under Act no.1475 no longer exists. The worker's consent must be obtained also in the case of work at extra hours. If the worker who has given his approval refuses to do do overtime work, the employer may break the employment contract for just cause according to Art.25/II (h) unless there is a collective agreement provision to the contrary.
Art.41/VIII states that the total overtime work shall not be more than 270 hours in a year. As stated above, Act no.4857 does not refer to any daily ceiling with respect to the maximum length of overtime The three hour maximum that was foreseen in the draft bill was struck out

during the legislative process, as this would conflict with the notion of 'compressed week'. Recalling that even in the application of the ' compressed work week' the worker's maximum working time must not exceed 11 hours daily (Art.63/II), the 11-hour daily maximum shall be included in the overtime hours that can be worked in a day, provided the total overtime worked in a year must not exceed 270 hours. Unlike Act no.1475, Act no.4857 has not foreseen any penal sanctions for overtime work done in excess of the 270 hours maximum. The only remedy is legal action where courts compell the employer to defray legal overtime wages in excess of this maximum. Thus, many stipulations on overtime work which had to be respected for the past six decades or so were relaxed considerably by the 2003 Labor Act.

Wages for each hour of overtime work must be remunerated at one and half times the normal hourly (or corresponding piece) rate. In work at extra hours, each extra hour shall be remunerated at one and a quarter times the normal hourly rate. (Art.41/II,III) If the employee who has worked overtime so wishes , instead of receiving overtime pay, he may use as free time one and half an hour for each hour worked overtime and one hour and 15 minutes for each extra hour worked (Art.41/IV). The employee shall use the free time within six months, within his working time and with no deductions from his wages.

Though workers are inclined to accept doing overtime with a view to increase their earnings, the high degree of flexibility brought to overtime work is certainly more beneficial to the employer. Thus, the new Labor Act has brought a considerable degree of flexibility to overtime work which is generally more beneficial to the employer. Having his workers do overtime in excessive amounts will increase the total production and profits of the employer under normal conditions rather than the labor productivity in the sense of outpur per man hour worked. In a quantitative field study conducted on the chemical and petroleum-plastics firms in Turkey, non-uniuon firms were found to be more productive than unionized firms. In interviews, repondents referred to the strict application of working time regulations in unionized plants because of the union's monitoring function while non-union firms were much more flexible in the application of overtime work.(15) It seems that, despite all these detailed regulations, the new overtime arrangements are also quite difficult to control and monitor through the official inspection mechanisms. The maximum ceilings are usually violated partly due to the absence of penal sanctions for violators.

3. Short-time work

In an attempt to head off mass dismissals in crisis situations, many employers even before the year 2003 allowed their workers to take paid or unpaid leaves or put them on a shortened workweek. To provide a legal framework for such initiatives,Act no.4857 envisageed new rules in Article 65 under the title 'short time work and its pay.' This provision was later transplanted, by way of a reference made, to Act no.4447 on Unemployment Insurance. It provides that 'in cases where work is suspended or short-time work is performed for at least four weeks due to a general economic crisis or *force majeure*, employees shall be paid short-time work benefits from the Unemployment Insurance Fund corresponding to the time not worked. To call on short-time work, however, the employer must fulfil certain procedures. He must communicate this matter, along with the reasons, immediately to the Employment Organization, İŞKUR, and to the union signatory to the collective agreement, if there is one. The acceptability of the request shall be decided by the Ministry.The relevant methods and procedures were indicated in the regulations of the Ministry of Labor and Social Security published in 2004 and 2009.

Among the flexibility measures of the Labor Act, short-time work proved to be a widely used practice in times of economic crisis and especially after the 2008-2009 amendments.(16) The regulations of the Ministry brought clarity to implementation. For example, the concept '.... time considerably shorter than ...'should be understood as reduction of working time at a ratio of at least one-third of normal working time'.The notion 'general economic crisis' would refer to economic recession of a national or international scope as well as a sectoral crisis which impacts the national economy to a considerable extent. *Force majeure* refers to unanticipated events (e.g. fire,earthquake, flood or war) which are not attributable to the employer's mismanagement and which partially or entirely disrupt the operation of the plant. The Ministry shall make a determination as to whether or not the case qualifies as an economic crisis or *force majeure* . Recourse to judicial process is possible against the determination of the Ministry. Because short-time work was supported by workers as well as employers, it was encouraged further by the publication of new regulations mentioned above. By annex articles to Act no.4447, the maximum period of the availability of short-time benefits which was three months was elevated to six months and the rate of benefit was accorded a 50 percent increase for the years 2008,2009 and 2010. For *force majeure* short-time work must not exceed three months in any case.In order to be entitled to benefits, the

worker must meet the conditions required for having access to unemployment benefits both in terms of his length of employment and the number of days for which unemployment insurance contributions should have been paid. In the event of *force majeure*, payment of benefits shall commence after the lapse of the one week period envisaged in subsection III of Article 24 on termination of the contract by the worker for *force majeure* and Article 40, (that is, payment of half-wages up to one week).The employer may close the plant within the duration or at the end of the short-time work practice.

Afterwards,an amendment to the Unemployment Insurance Act by Act no.6111 of February 2011 bringing amnesty and restructuring to certain social insurance debts enlarged the scope of short-time work to include also cases of regional crisis siuations and increased the rate of daily benefits to 60 percent of the daily gross earnings of the worker computed as the daily average of the worker's last 12 months' earnings. Further, the government was empowered to extend the duration of short-time work benefits up to six months as well as to decide whether or not they will be deducted from unemployment benefits.Still further, a new Regulation was issued on 30 April 2011 replacing the regulation of 13 January 2009 and further clarifying the relevant provions on short-time work.The employer contemptlating to implement short-time work for the above-stated reasons shall communicate his request to İŞKUR as well as to the labor union concerned, identifying also the workers who will do short-time work . The employer's request shall be evaluated and then its feasibility decided upon by the management board of İŞKUR rather than by the inspectors of the Ministry of Labor -which was the case under the previous regulation-. To have access to benefits, the worker's application is not required. The duration of the benefit is equal to the length of short-time work actually carried out, provided that it shall not exceed three months, to be computed monthly on the basis of the lengh of short-time work actually done. Its amount is the same as in the aforemenioned Act no.6111.

4. Compensatory work

The rigidies which existed in the Labor Act of 1971, no.1475, did not permit employers to call on compensatory work in order to offset the time lost due to recession, *force majeure*, or similar reasons.The flexibility foreseen by Act no.4857 makes this possible now. Article 64 of the new Labor Act provides that 'in cases where time worked has been considerably lower than the normal working time, or where operations are stopped entirely due *force majeure*, or

on the days before or after national and public holidays, or where the employee has been granted time off upon his/her request, the employer may call on compensatory work within two months in order cover the time lost due to unworked periods'. The Regulation on Working Time provides that the employer must specify according to which reason(s) indicated in Article 64 compensatory work shall be executed. Compensatory work shall not be considered overtime work; the wage the employee is entitled to receive is his normal wage. It may be performed before or after the emergence of the said conditions. Compensatory work shall not exceed three hours daily, and in any case it must not be more than the maximum daily working time (11 hours). It shall not be carried out on statutory or contractual holidays (Art.64/II,III). Notwithstanding this restriction, it should be noted that, for employees who work five days of the week, thereby using the sixth day (say, the Saturday) as free time,compensatory work may be executed on Saturdays provided the daily working time on Saturday must not exceed 11 hours.

Research on Flexibility Implementations

Turkey seems to have been quite successful in eradicating the adverse effects of the global crisis. Among the G20 countries, the highest rate of employment creation was achieved by Turkey The unemployment rate which had risen to 14 per cent in 2009 diminished by March 2011 to 10.8 per cent , which was the pre-crisis level. Of course it is difficult to measure how much of that employment creation was due to the impact of the new Labor Act.

But the dominance of the informal labor market is a serious problem in Turkey, as emphasized in the progress reports on the projected EU accession of Turkey. Research studies show the share of informal employment as being 41.3 per cent of total employment. This is one of the reasons why overregulation of working conditions is often criticized for its adverse effects on the possible expansion of the formal market.

As for flexibility, the limited research done so far shows that, perhaps after short-time work in its present form following the recent amendments ,compensatory work is the most widely used flexibity measure in Turkish practice. Research conducted by MESS, the largest employers' union in metal working industries , has yielded disappointing results concerning the effects of flexibility measures of the Labor Act no.4857.(17) MESS research has shown that in 97 percent of the establishments the working time is still distributed equally by

workdays,so the practice of compressed workweek is only minimal; the balancing act is executed in only 20.1 percent of the workplaces. Short-time work is not practiced in 97 percent of establishments.(It should be noted, however, that this research was done before the new flexibility rules were brought in 2009 and after.) On the other hand, the most common and popular flexible measure applied in MESS-affiliated establishments proved to be compensatory work.

Among the reasons cited by the MESS report which account for the insufficient level in the application of flexible work forms are the lack of awareness on the benefits of flexibility and the absence of applicability of short-time work in regional and sectoral crises –which, as mentioned above ,were later provided for and led to more extensive use of short-time work.-

A more recent study made jointly by the Ministry of Labor and Social Security and the Turkish Personnel Management Association PERYÖN) on 216 firms found that, of the 455 thousand employees, only 5.9 per cent were working flexible.(18) Of the female respondents, 3.4 percent stated they were working according to a flexible arrangement; the ratio of male respondents was 2.5 per cent. 30.5 per cent of the respondents indicated that flexible work models help reduce their labor costs; 26.6 percent mentioned increases achieved in their performance levels and competitiveness; 26.6 percent referred to flexible work as being instrumental in adjusting working time to changes in their work load. Other reasons cited by the respondents are as follows: flexible working conditions are more compatible to working conditions desired by new generations; they are better able to solve work-family conflicts as employees are not restricted by official working hours; and they are helpful in planning the monthly working time of the enterprise.

In response to the possible reasons accounting for the limited use of flexible arrangements, it was found that the 56 per cent of the establishments covered were not acquainted with the meaning as well as the pros and cons of flexible work models; 27 per cent believed that flexible work applications lead to losses in wages and employee benefits; 24.7 referred to loopholes in legislation; 26.3 said that flexible work was not compatible with the nature of their operations. In terms of ranking the mostly used flexible work types , ‘compensatory work’ topped the list with 24 per cent of the firms in the sample, followed by ‘short-time work’ with 18 per cent. Services and office work is the branch of activity where flexible arrangements were most widely implemented. The research report concludes with a strong

emphasis on the need to revise Act no. 4857 with a view to further flexibilize its relevant provisions on flexibility.

Concluding Remarks: Evaluation and Prospects

The various problems mentioned above notwithstanding, one could safely say that the 2003 Labor Act of Turkey, a product of tripartite agreement based on social dialogue and mutual trust, is a piece of legislation more modern compared to the labor acts of the pre-2003 era. But has this Act been able to realize its avowed goal of achieving the right regulatory balance between flexibility and security ? The answer can be only a qualified 'yes'. In fact the 2003 initiative qualifies merely as a step towards approaching that balance. Comparing the rather limited scope of job security against the somewhat overregulated flexibility measures (except for the relaxed rules on overtime work), a reasonable degree of balance seems to have been struck. In passing, here it should be noted that, in order to approach that balance, the social partners must, to the extent possible, strive to implement flexicurity through the collective bargaining process between themselves.

In so far as the successful transplantation of contemporary EU and ILO labor law into Turkish legislation is concerned, the draft of the 'academic committee' was certainly successful.(19) But one can hardly say the same thing for the final text. A number of intervening factors led to 'unanticipated consequences' for the 'academic committe' and the stakeholders concerned, 'unintended dysfunctions' so to speak. Due to intensive lobbying of the social partners before and during the legislative process, some articles were struck out or modified considerably; definition of the fixed-term employment contract, scope of job security, deletion of the proposed 'workers' representatives from the final text' altogether, obstruction of the collectively bargained arbitration in job security disputes by the Constitutional Court's ruling, failure to legislate on the reform of the severance pay are only a few examples one could cite in this regard.

The Act's job security dimension was weakened by employers' pressures while labor was responsible for the restrictions brought to flexibility measures, (e.g temporary work agencies, fixed-term work , obstruction of the proposed reform in the severance pay system). How a relatively weakened labor movement , weaker in comparison to the pre-1980 times, could

lobby so effectively is an interesting question. It should be recalled, however, that the preparation and enactment of that legislation and subsequent amendment initiatives coincided with the holding of national elections.

Achieving a right balance in mathematical terms is certainly inconceivable in social relations. One can only think in terms of an ideal model for which the Dutch system is often cited as an example. (20) But one must recall that the Dutch model was started and developed in a milieu where employment security was already solid and labor unions relatively stronger.

Learning from the lessons of the last decade's practices and considering the criticisms raised by the social partners, the Ministry of Labor and Social Security, following consultations with the social partners in the Tripartite Consultation Board in November 2011 , has come up with new amendment proposals. At he time of this writing, two such proposals were already in place. Of these, in an effort to bring new atypical work categories, the draft amending Act no.4857 has foreseen to include in its scope also 'distant work' (or work from home, telework or telecommuting), as well as 'on call work' and 'work sharing', both formulated now in more precise and concrete terms. But there is again a tendency to regulate these issues in terms stronger than the relevant EU norms.

For further clarity in 'flexitime', the new draft has defined the notion of 'core time'which shall be determined by the employer, and stated that the worker may distribute the working hours which fall outside 'core' time to the worked days of the week, provided that the daily working time shall not exceed 11 hours; the worker can spend these times without working, but in this case a balancing act must be implemented within one month. However in this draft text the requirement for the presence of an essential or objective reason in the first- time conclusion of a fixed-term contract still remains.

The second draft proposal aims to design temporary work to be carried out on a professional basis by licensed private employment agencies. The draft enumerates the cases for which such workers can be posted to user undertakings. These are " 1.in order to temporarily replace the permanent workers of the establishment who are unable to perform their duties for certain reasons (e.g. maternity, military duty, illness,etc).; 2. in the case of an unforeseen increase in the workload of the undertaking; 3. for short term works of an intermittent nature; 4. in cases of an urgent need to take safety measures; 5. in jobs of an unroutine character; and 6. in

seasonal jobs. Art.5 of the draft proposal provides that in the first conclusion of the temporary employment contract, duration of the relationship shall not exceed four months. Where the need for the temporary worker continues , the contract can be renewed three times at the most, provided that the total duration shall not exceed twelve months. The number of temporary workers to be employed must not exceed one-fifth of the permanent workers of the user undertaking.

Again, adhering to the in-built tradition of being protective towards labor, the draft bill seems to overregulate temporary work , a point which is at present the subject of ongoing controversy and criticism.(21) Also, the same draft on temporary work lacks an important dimension emphasized by the EU and CIETT (International Confederation of Private Employment Agencies) , that is, regulations on temporary work must encourage the movement of temporary workers into permanent jobs of the user undertaking. Similarly, in Art.7(A) of the draft, the provision that the temporary worker may benefit from the terms of the collective agreement in force in the user undertaking by paying dues to the signatory labor union has also led to controversy, as it seems contradictory to the notion of temporary workers' organizing and collective bargaining processes to be visa-vis the temporary work agency itself, which is their main employer.

It is not clear at this point when and how the proposed changes will materialize. But one thing is certain. The search for a better balance between security and flexibility is very likely tocontinue for some time in Turkey's labor relations discourse.

Endnotes

(1) For the pre-2003 system, see T.Dereli, **"Turkey", in International Encyclopaedia of Labour Law and Industrial Relations**, ed. R. Blanpain, The Netherlands Kluwer Law International, 1997 edition.

(2) For the present system of labour law and industrial relations in Turkey, see T.Dereli, "**Turkey" in International Encyclopaedia of Labour Law and Industrial Relations**, ed. R.Blanpain, The Netherlands, Kluwer Law International, 2012. For a detailed evaluation of

Act no.4857 and related legislation, see M.Uçum, R.Çakmakçı, **Gerekçeli Karşılaştırmalı İş Kanunu**, İstanbul: Legal, 2003.

To have background information on the creation, politics and operation the 'academic committee' from the viewpoint of employers, see R.Baydur, **Zirvede 15 yıl**, Ankara: Sinemis, 2006.

(3)"What we had expected from you was the flexibilization of our labor legislation; on the contrary, you have overregulated it." TİSK representative Erdoğan Karakoyunlu's statement to the 'academic committee' in a meeting of the committee with the social partners, held at Abant,Bolu,in December 2002. See also ILO and OECD, "Short-term employment and labour market outlook and key challenges in G20 countries. A statistical update for the G20 Meeting of Labour and Employment Ministers", Paris, 26-27 September 2011. For the evaluations of the OECD claiming that Turkish labor legislation is still rigid, see the various issues of **Economic Survey** published by that organization.

(4) T. Dereli,"The Benefits of Freedom of Association for Turkey: Selected Cases" Paper presented to the ILO Conference at the ILOInternational Training Center in Turin, held on July 22-23, 2010.

(5) S.Süzek, **İş Hukuku**, İstanbul: Beta, 2008, pp. 553-555.

(6) Ruling of the Constitutional Court, 19 October 2005, 66/72, Official Gazette 24 November 2007, no.26710.

(7) For a debate on the Constitutional Court's decision, see T.Dereli, **op.cit**. 2012 edition, pp.160-161.

(8) Court of Appeals, 9th Division, 26 Jan. 2004, 23105/1204; General Council Decision, 11 Nov. 2006,9-613/644; 9th div., 28 Jan.2010, 14809/1480.

(9) Statement of DİSK and Türk-İş representatives to the writer in a television interview on 17 March 2004.

(10) F.Hendricks, “Flexible Work in EU Labour Law; Challenges for Turkey,” Unpublished paper submitted to the 2006 congress of the Turkish Industrial Relations Association, pp.6-7.

(11) **Ibid**.p.9.

(12) Dereli, **op.cit**, 2012 edition, p.82.

(13) F.Hendricks, K.Sengers, “The Implementation of Flexible Work Provisions in the Labour Act”, **Flexibilisation and Modernisation of the Turkish Labour Market**,(Report on the MATRA project), ed. R. Blanpain, The Netherlands:Kluwer Law International, 2006, pp.92-93.

(14) See the proposals of the Ministry of Labour and Social Security for amendmens to the Labour Act, November 2011.

(15) Responses to interview questions indicate the extent of violations in working time regulations, ranging from rest breaks to overtime rules. “In contrast to the previous Labor Act no.1475,Act no.4857 loosened the regulation of overtime work, thus paving the way for making workers do overtime in excessive hours more easily. In firms where there is a labor union which oversees the application of legal rules and collective bargaining terms, this is more difficult for the employer. Obviously this makes it possible for nonunion firms to reach higher production levels. In the so-called balancing period no overtime premium is required, provided that the daily working time does not exceed 11 hours.” Response of an employer’s representative in the chemicals and petroleum sector to an interview question, in N.K.Yılmaz, “The Relationship Between Unionization ,Productivity and Efficiency: Evidence on the Chemical Industry in Turkey,” Unpublished Ph.D.thesis, Işık University, December 2011.

(16) “The amendment to short-time work in 2009 made it possible for many firms to make use short-time work extensively and led to the protection of thousands of jobs.” **MESS İşveren Gazetesi**, no.844, March 2010.

(17) MESS project on Working Time, in Affiliated Establishments, reported in **MESS Üyelerinde Çalışma Süreleri Araştırması**, İstanbul:MESS 2008..

(18) "Esnek Çalışma Modelleri Bilinmiyor, **PERYÖN** dergisi, no.38, Jan.-Feb.2012, pp.16-17

(19) **MATRA Project**, op.cit., p.117.

(20) For the Dutch model, see F. Hendricks, "Challenges for Turkey",op.cit., pp.11-14.

(21) Süral, "Esneklik Düzenlenirken," **MESS İşveren Gazetesi**, January-February 2012, pp.4.

Ş.Aktekin, "Atipik ve Esnek Çalışma Biçimleri Bakanlığın Gündeminde," **MESS İşveren Gazetesi**, Jan. 2012, p.6.