

INVOLMENT OF THE LAYPERSONS IN THE TURKEY ADJUDICATION SYSTEM*

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This paper examines the involvement of laypersons in the Turkish adjudication system in the light of U.S. civil procedure and procedural laws of some of the continental jurisdictions.

1. In Turkey only law school graduates may serve as judges and public prosecutors as in many jurisdictions.

2. Laypersons may act as mediator in adjudication in several jurisdictions. The typical example of this trend can be observed in the U.S. mediation system. According to another trend only lawyers graduated from a law school are entitled to serve as mediator. Mediation in Turkey reflects this trend. Only the lawyers having an experience of five years in the legal profession may serve as mediator in civil disputes.

3. In many jurisdictions non-lawyers may serve as arbitrator in domestic and international arbitrations. Under Turkish law, in domestic arbitration if the arbitral tribunal would be composed of three arbitrators, one of the them should be a lawyer having at least experience of five years in his/her field of law. Nevertheless, in cases of international arbitration when the dispute has a “foreign element” non-lawyers may serve as arbitrator.

4. Any person who is not a party may testify on matters that he/she directly witnessed. Witnesses are summoned by the court. The court may allow the parties to bring along witnesses without a summons. The judge may permit parties to direct questions to the witness. Cross examination (Cf U.S. Federal Rules of Evidence, Rule 614), and examination of certain witnesses at specific locations are not allowed under Turkish law (Cf members of the Federal Government or of a Land government in German law).

5. Expert opinions are generally used in the Turkish adjudication by the courts.

At the request of a party or ex officio the court may obtain an opinion from one or more experts (Gutachten) in a case where a specific or technical knowledge is necessary. The court shall instruct the expert and submit the relevant questions to him/her. Experts can be invited to the hearing. The court must give the parties the opportunity to ask for explanations or put additional questions. (Turkish CCP, Art. 266 et seq. Cf. Act on Expert Examination, No. 6754).

6. Under Turkish law the parties to an action may submit private expert opinions (uzman görüşü) taken from experts (private legal opinions or opinions on specific issues or technical matters). Such opinions are subject to the discretion of the judge.

7. At the request of a party or ex officio the court may conduct an inspection in order to see the facts for itself or for a better understanding of the case. The court may summon witnesses or experts to the inspection. (See. Turkish CCP, Arts. 288, 290).

8. This paper indicates that the adjudication system in several jurisdictions is based, in principle, on the professional lawyers. Under Turkish law, only law school graduates may settle the disputes as judges. Non-lawyers may not render a judgment to settle a dispute.

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Arbitration and mediation are exceptions. Non-lawyers may serve as arbitrator and mediator. Laypersons can usually be benefitted as expert, expert witness, and appraiser as auxiliary elements in the adjudication systems.

SUMMARY: 1. Involvement of Laypersons in the Adjudication as Judges and Public Prosecutors - 2. Involvement of Laypersons in the Adjudication as Mediator - 3. Involvement of Laypersons in the Adjudication as Arbitrator - 4. Involvement of Laypersons in the Adjudication as Witness - 5. Involvement of Laypersons in the Adjudication as Expert - 6. Involvement of Laypersons in the Adjudication through Expert Opinion (Uzman Görüşü) - 7. Involvement of Laypersons in the Adjudication in Inspection - 8. Concluding Remarks.

I. INVOLVEMENT OF LAYPERSONS IN THE ADJUDICATION AS JUDGES AND PUBLIC PROSECUTORS

In Turkey under the “*Law on Judges and Public Prosecutors*”, No. 2802 of 24 February 1983 (as amended) *only law school graduates* may serve as *judges and public prosecutors* (yargıç ve savcı) (Article 8).²

Non-lawyers are not entitled, in principle, to render judicial decisions in respect of settlement of disputes.³

II. INVOLVEMENT OF LAYPERSONS IN THE ADJUDICATION AS MEDIATOR

Mediation (arabuluculuk) is one of the *Alternative Dispute Resolution* (ADR). It is a process in which parties, with the assistance of a neutral third party, identify disputed issues, develop options, consider on the alternatives and work to reach an agreement (settlement).⁴

Mediation is becoming an increasingly important tool for resolving civil and commercial disputes. The promotion of mediation is strongly linked to the idea of justice in the 21st century. It has received an important boost and is currently one of the most

² See also By-Law on Appointment and Transfer of Judges and Public Prosecutors of the Republic, 1988 (as amended). For details see B. KURU, *İstinaf Sistemine göre Yazılmış Medeni Usul Hukuku* (Civil Procedure Law revised under Appellate Review System), Istanbul, 2016, p. 65 ss.

³ Nevertheless, there are some exceptions relating to *compulsory arbitration*. For details see B. KURU, *İstinaf Sistemine göre Yazılmış Medeni Usul Hukuku* (Civil Procedure Law revised under Appellate Review System), Istanbul, 2016, pp. 929-930.

⁴ On several concepts related to “*mediation*” see K.K. KOVACH, *Mediation in A Nutshell*, Thomson/West, 2003; K. K. KOVACH, *Mediation: Principles and Practice*, 2000; ROGER S. HAYDOCK, *Mediation and Arbitration for Now and Future*, “*The Arbitration Process*” (Dennis Campbell, Gen. Ed.), Center for International Legal Studies, Kluwer Law International, Special Issue, 2001, pp. 1-27; C. MOORE, *The Mediation Process: Practical Strategies for Resolving Conflict*, II ed., 1996; J.M. NOLAN-HALEY, *Alternative Dispute Resolution in a Nutshell*, 2nd Edition, St. Paul, Minn., 2001; J.M. NOLAN-HALEY, *Court Mediation and the Search of Justice Through the Law*, 74 Wash. U.L.Q. 47, 1996; N. ROGERS/C.MCEWEN, *Mediation: Law, Policy, Practice*, 1994.

topical issues in the field of dispute resolution. National and international legislators offer new responses in this area with the aim of providing the parties of legal relationships to resolve their disputes outside state courts.⁵

In several jurisdictions *any person* (non-lawyers) may act as *mediator*. This kind of mediation can be seen in the U.S. Moreover under the “*Austrian Law on Mediation in Civil Law*” (Zivirects-Mediations-Gesetz: ZivMediatG) mediator can be a non-lawyer (Section 8).

Opposite to this trend, in some jurisdiction mediation activities can only be carried out by *lawyers graduated from a law school having some certain qualifications*. According to “*Law on Mediation in Civil Disputes*”, No. 6325 of 7 June 2012 in Turkey only *lawyers graduated from a law school and having a five year of experience in the legal profession* may serve as mediator in civil disputes (Articles 20.2.b; 22-23).⁶

III. INVOLVEMENT OF LAYPERSONS IN THE ADJUDICATION AS ARBITRATOR

In many jurisdictions non-lawyers may serve as *arbitrator* in domestic or international arbitrations. For instance, under *Swiss Civil Procedure Code* (Article 360 et

⁵ In EU law *Directive 2008/52/EC* on certain aspects of mediation in civil and commercial matters has laid down the fundamental principles of mediation for the EU law. This Directive has been transformed to the national laws of the EU Member States.

⁶ Turkish “*Law on Mediation in Civil Disputes*”, No. 6325 is based on several foreign laws. The Drafting Commission for the Law on Mediation has examined in-depth some contemporary regulations on mediation law and mediation practices in several countries. The following texts and laws were examined and taken into account by the Drafting Commission: (i) *UNCITRAL Model Law on International Commercial Conciliation (2002)*; (ii) *Green Paper on Alternative Dispute Resolution in Civil and Commercial Law* (Commission of the European Communities, *Green Paper on Alternative Dispute Resolution in Civil and Commercial Law*, COM(2002) 196 Final); (iii) *EU Directive 2008/52/EC of the European Parliament and Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters* (Official Journal of the European Union, 24.5.2008; L 136/3 vd.), and (iv) *Austrian Federal Law on Mediation in Civil Matters* (Bundesgesetz über Mediation in Zivilrechtssachen (ZivMediatG) of 06 June 2003. The Drafting Commission has examined also *German Baden Württemberg Conciliation Act (1999)* and *Bavarian Act on Mandatory Alternative Dispute Resolution in Civil Law (2000)*. For details see E. ÖZSUNAY, *Some Remarks on the Turkish Law on Mediation in the Light of Recent Developments*, in *Mélanges en l'honneur de Sypridon Vl. Vrellis*, Nomikh BibAIOOHKH, 2014, pp. 639-658; M. ÖZEKES, *Paper submitted to the “International Workshop on Practices of Mediation in Civil Disputes*, p. 9; A. INGEN-HOUSZ (Ed.), *ADR, in Business-Practice and Issues across Countries and Cultures*, Kluwer Law International, 2011 (Turkish Law by M. Seçkin Arıkan, see p. 587 et seq.); *TBB, Dünyada Arabuluculuk Uygulamaları Konferansı* (Conference on Mediation Practices Around the World), 11 Mart 2011, Ankara, 2012. Further for a general view on the Alternative Dispute Resolution in *GSÜHFD*, E. KUNTALP'E ARMAGAN, 2004/1, pp. 261 et seq.; M. ÖZBEK, *Avrupa'da Arabuluculuğun İlkeleri ve Uygulanması* (Principles and Practice of Mediation in Europe) (Festschrift for Prof. Dr. Özer Seliçi), Ankara, 2006, pp. 441-502; M. ÖZBEK, *Alternatif Uyuşmazlık Çözümü* (Alternative Dispute Resolution), Ankara, Yetkin Yayınları, III ed., 2013.

seq.), *German ZPO* (Section 1035 et seq.), and *Austrian ZPO* (Section 586 et seq.) non-lawyers can be appointed as arbitrator.

As regards Turkish law, under the Turkish “*Code of Civil Procedure*”, No. 6100 of 12 January 2011 (Turkish CCP) *in domestic arbitration* if an arbitral tribunal would be composed of three arbitrators (hakem), one of the arbitrators should be a *lawyer* who has at least experience of five years in his legal practice (Article 416.1.d).

Nevertheless, in *cases of international arbitration* when the dispute has a “foreign element”, *non-lawyers* may serve as arbitrator under the “*Law on International Arbitration*”, No. 4686 of 21 June 2001 (Articles 1-2 and 7.A;B.1-4).⁷

IV. INVOLVEMENT OF LAYPERSONS IN THE ADJUDICATION AS WITNESS

4.1 Witness Testimony under Turkish Civil Procedure Law in the Light of Some Jurisdictions in Europe

According to the Turkish *Code of Civil Procedure* each party is under the burden of proving the facts to support his claim or defense. Under the Turkish CCP any person who is not a party to the proceedings may testify on matters that he/she directly witnessed. Turkish CCP has detailed provisions on witness testimony (Zeugnenbeweis) as in other jurisdictions.⁸

⁷ For details see E. ÖZSUNAY, R.M. ÖZSUNAY, *Turkish International Arbitration Act 2001* (Its Structure and Salient Features), Turkish National Report submitted to the Conference for “The 50th Anniversary of the Chamber of Arbitration at the Bulgarian Chamber of Commerce and Industry”, Sofia, 12-14 September 2003, 24 pages; E. ÖZSUNAY, R.M. ÖZSUNAY, *The Relationship Between Arbitration and Other Forms of Private and Public Forms of Justice*, Turkish National Report submitted to the “XIIth World Congress of Procedural Law”, Mexico, 22-26 September 2003, 15 pages; E. ÖZSUNAY, R.M. ÖZSUNAY, *Arbitration in Turkey: An Analysis of Turkish Arbitration Legislation in Light of the UNCITRAL Model Law*, ICC International Court of Arbitration Bulletin (Paris), 22:2:15-30, 2011; E. ÖZSUNAY, R.M. ÖZSUNAY, *International Arbitration and Mediation in Turkey*, in *Croatian Arbitration Yearbook* (Zagreb), 19:209-238, 2012; E. ÖZSUNAY, R.M. ÖZSUNAY, *Arbitration in Turkey under the Act on International Arbitration*, No. 4686 (2001) and The Code of Civil Procedure, No. 6100 (2011), Turkish National Paper submitted to the Conference on “Arbitration Court: The Past, Present, and Future”, Nowy Tomyśl; Poland, 15 April 2011, 29 pages; M.R. ÖZSUNAY, *Principles and Rules of the UNCITRAL Model Law as Essentially Adopted by the Turkish Act on International Arbitration*, in *Austrian Arbitration Yearbook 2008*, C. KLAUSEGGER and others (eds), Wien, Manz’sche Verlags- und Universitätsbuchhandlung, 2008, pp. 343-368; M.R. ÖZSUNAY, *The Turkish 2009 Draft Code of Civil Procedure, Eight Decades after the Voluntary Adoption of the Swiss-Neuchâtel Code of Civil Procedure*, in *The Supreme Court Law Review*, Second Series Volume 49, 2010, pp. 150-151.

⁸ Cf *German ZPO*, Sections 373 et seq.; *Swiss CPC*, Article 169 et seq. (Zeugnis).

Witnesses (tanık, Zeuge) are normally summoned by the court. The court may allow, however, the parties to bring along witnesses without a summons. A witness shall be cautioned to tell the truth before being questioned (Articles 240-265).⁹

Under some jurisdictions, examination of certain witnesses can be done at certain locations. For instance, according to German ZPO the members of the Federal Government or of a Land government are to be examined at their official residence (Section 382.1: Vernehmung an bestimmten Ort). Likewise, the members of the Bundestag, of the Bundesrat, of a Land parliament or of a second chamber are to be examined at the venue of that assembly while they have their abode there (Section 382.2).

According to Swiss law, “a witness may be questioned at his or her place of residence. The parties must be notified thereof in advance” See. *Swiss CPC* Article 170.3.

In several jurisdictions the Codes of Civil Procedure lay down *specific provisions in respect of examination of the person subject to the duty of official secrecy*. In such cases the court hearing the case must procure the corresponding permission and make this known to the witness.¹⁰

Under Turkish law, if a witness is a *public servant* and under the duty to keep secret some information because of his function he cannot testify without the permission of the official authority to which the secret information relates. This rule applies even after the retirement of the public servant (Turkish CCP, Article 242). Witnesses are heard before the court. The witness may not use notes when he is heard by the court (Turkish CCP, Article 261.2). Evidence of witnesses may not be presented in the form of written statements signed by them. Nevertheless, the court may decide to send a questionnaire to the witness to be replied in written instead of hearing the witness. If the court decides that the written reply of the witness is not satisfactory, it requires him to attend the hearing to be heard (Turkish CCP, Article 246).

Cross-examination of witness does not exist in the Turkish civil procedure.¹¹

⁹ For details see B. KURU, *İstinaf Sistemine göre Yazılmış Medeni Usul Hukuku* (Civil Procedure Law revised under Appellate Review System), Istanbul, 2016, pp. 399 ss.

¹⁰ See German ZPO Section 376: Vernehmung bei Amtsverschwiegenheit). Cf. *Austrian ZPO*, Section 331: “Zeuge in einem öffentlichen Amte oder Dienste”.

¹¹ Cross-examination is a *concept of common law procedure*. It refers to the oral questioning by counsel on behalf of one of the parties of a witness called by another party during a trial. Cross-examination is part of an oral procedure. Cross-examination is always performed by counsel, questioning of a witness by a judge is not cross-examination.

Under Turkish law, *determination on the relevance, materiality and weight of the witness evidence* belongs to the court. Witness testimony is a means of evidence subject to the *discretion of the judge* (Turkish CCP, Article 198).¹²

4.2. “Witness Testimony” and “Expert Witness Testimony” under American Evidence Law

a) Witness Testimony under American Evidence Law

Under *Federal Rules of Evidence* courts can call ordinary witnesses, but this power is rather rarely used. As regards *opinion testimony by lay witnesses* (i.e. lay opinions) under American evidence law, it should be noted that this concept is alien to the Turkish civil procedure law.¹³

In the American evidence law many older cases allowed only expert witnesses to offer opinions and limited *all other witnesses to testifying about “facts”*, not inferences or conclusions. All witnesses, moreover, were often barred from expressing opinions on the “ultimate issues” to be decided by the jury.

Nevertheless, modern evidence law largely abandoned these restrictions. *Lay witnesses* -i.e., witnesses who do not testify based on some special expertise, *are free to offer opinions*, even on *ultimate issues*. To be admissible, though, the opinions expressed by a lay witness must be helpful to the jury, and –critically- they must be based on the witness’s firsthand observations.¹⁴

b) Expert Witness Testimony under American Evidence Law

Expert witnesses present evidence based on knowledge acquired through specialized study or unusual training and experience that permits them to generate, piece together, or interpret data in a manner that would not be readily apparent the fact finder.

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¹² For details see B. KURU, *İstinaf Sistemine göre Yazılmış Medeni Usul Hukuku* (Civil Procedure Law revised under Appellate Review System), Istanbul, 2016, pp. 398, 407.

¹³ See *Federal Rules of Evidence*, 2017 Edition, Rule 701.

¹⁴ For further details see D.A. SLANSKY, *Evidence - Cases, Commentary and Problems*, Aspen Publishers, 2003, p. 439-440; ALLEN, KUHNS, SWIFT, *Evidence - Text, Problems, and Cases*, Third Ed., Aspen Law & Business, 2002, p. 716 et seq. ; C.B. MUELLER, L.C. KIRKPATRICK, *Evidence Under Rules*, Eight Ed., Wolters Kluwer, 2015, p. 637 et seq. “Lay Opinion Testimony”

¹⁵ See ALLEN, KUHNS, SWIFT, *Evidence - Text, Problems, and Cases*, Third Ed., Aspen Law & Business, 2002, p. 732; D.M. MALONE, P. ZWIER, *Effective Expert Testimony*, National Institute for Trial

Testimony by expert witnesses has been regulated by *Federal Rules of Evidence* (2017 Edition) under Rule 702. In the U.S. trial lawyers and trial judges have long felt that witnesses with specialized skills or knowledge can offer helpful testimony even if they have no firsthand knowledge of the facts in a particular case. Therefore, expert witnesses, unlike lay witnesses, are allowed to offer opinions based in whole or in part on information they have received secondhand.

During the past several decades, as more and more trials have involved scientific or technical issues, expert testimony has become increasingly common and increasingly important.

One solution might be for judges rather than parties to select *expert witnesses*. Judges in fact are authorized to appoint experts, but they rarely do, because the practice fits poorly with American system's general delegation of investigation and witness selection to the parties and their lawyers.

The *Federal Rules of Evidence* (2017 Edition) now try to prevent shoddy expert testimony in a different way: They require a trial judge to exclude expert testimony unless the judge concludes it is "*reliable*". This requirement codifies the holdings of three cases decided by the Supreme Court in 1990s: *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (509 U.S.579, 1993); *General Electric Co. v. Joiner* (522 U.S. 136, 1997), and *Kumho Tire Co. v. Carmichael* (526 U.S. 137, 1999).¹⁶

Under *American evidence law expert testimony* is the subject of Rules 702-706 of *Federal Rules of Evidence* (2017 Edition). Under these Rules several standards are required for a reliable expert opinion:

aa- *Qualified expert:* First of all, a witness must *qualify as an expert to be able to testify as such* (Rule 702). Rule 702 refers to a witness "qualified as an expert" through "knowledge, skill, experience, training, or education". It is only such persons who can give "opinion" testimony on "scientific" or "technical" matters or offer "specialized knowledge".

In general, *qualified and skilled experts* in different cases are *physicians (paternity cases, malpractice, medical liability, determination on physical disability etc.), psychiatrists (insanity, power of*

Advocacy, 2000, p. 5 vd. In the field of evidence is respect of *expert witnesses and expert opinions* the approach of the Turkish civil procedure law is essentially different from the *American evidence law*.

¹⁶ For details see A. SLANSKY, *Evidence - Cases, Commentary and Problems*, Aspen Publishers, 2003, p. 446-447.

discernment), real estate appraisers, engineers (machinery, construction, auto accidents etc.), bankers (financial matters, banking transactions etc.), landowners (testifying to land values), farmers and ranchers (for estimation of crops and livestock), bookkeepers, accountants etc.

bb-*Helpfulness standard*: An expert may provide opinion testimony under *Federal Rules of Evidence* only if it would “*help the trier of fact*” *understand the evidence or determine a fact* (Rule 702).

cc-*Reasonable reliance standard*: Often experts testify on the *basis of personal knowledge*. Unlike lay witnesses (who must have such knowledge), however, Rule 703 allows experts also rely on *hearsay or other material*, provided that other experts in the field “*would reasonably rely*” on such information.

dd-*Mental state restriction*: Under *Federal Rules of Evidence* (2017 Edition) experts may not give opinion testimony that the accused “*did or did not have mental state or condition that constitutes an element of the crime charged or a defense*” (Rule 704(b)).

ee- *Stating opinion directly*: Under *Federal Rules of Evidence* (2017 Edition) an expert may provide opinion testimony “*without first testifying to the underlying facts*”, which represents a purposeful departure from conventions that generally attend the presentation of testimony (Rule 705).

ff-*Reliability standard*: American courts require *scientific and other technical evidence* must be “*generally accepted*” in the pertinent scientific community. Universally, the standard was known as “*Frye standard*”.¹⁷

In the last decade of the 20th century things changed. The *Supreme Court* decided the *Daubert case* in 1993, discarding “*Frye*” for federal courts in favor of a *more flexible approach* that was still designed to insure the *reliability of scientific evidence*.

Later the Court decided *Kumho Tire* in 1999, extending the *Daubert standard* to *all expert testimony* presenting technical or specialized material.

¹⁷ See *Frye v. United States*, 293 F. 1013, 1014 D.C. Cir. 1923) (rejecting lie detector evidence). For details see C.B. MUELLER/LAIRD C. KIRKPATRICK, *Evidence Under Rules*, VIII Ed., Wolters Kluwer, 2015, p. 645 et seq.

Further, Rule 702 of *Federal Rules of Evidence* (2017 Edition) was amended in 2002 “in response to *Daubert*”, so it formally requires expert testimony to rest on *sufficient facts or data*, reflect reliable principles and methods, and reliably apply these principles and methods.¹⁸

As regards court appointed expert witnesses a court may appoint an expert witness on its own motion as well as on request by a party. Nevertheless, in fact this power is rarely used in American practice.¹⁹

V. INVOLVEMENT OF LAYPERSONS IN THE ADJUDICATION AS EXPERT

5.1 Expert Opinion under Turkish Procedure Law

Under Turkish CCP Article 266 at the *request of a party* or *ex officio* the court may obtain an *opinion from one or more experts* (bilirkişi) in a case where *a specific or technical knowledge* is necessary.²⁰

Expert opinion (or report) is a typical aspect of the Turkish adjudication system.²¹ *Act on Expert Examination* (Bilirkişilik Kanunu), No. 6754 of 3 November 2016 has laid down the principles and procedures relating to the qualification, training, appointment and supervision of experts. An *Advisory Board on Expert Examinations* (Bilirkişilik Danışma Kurulu) and a *Department on Expert Examination* (Bilirkişilik Daire Başkanlığı) have been established in the Ministry of Justice in order to carry out the abovementioned duties (Articles 4 et seq.). A *special register for experts* and *Lists of Experts* are maintained by the relevant authorities (Articles 10 et seq.).

In a concrete case the court instructs the expert to examine the case and to analyze certain issues specified by the court and to deliver his written opinion (report)

¹⁸ For *reliability standard* see C.B. MUELLER, L.C. KIRKPATRICK, *Evidence Under Rules*, VIII Ed., Wolters Kluwer, 2015, p. 663-664.

¹⁹ See *Federal Rules of Evidence* (2017 Edition), Rule 706.

²⁰ “*Expert witness*” (Sachverstaendige Zeugen) and “*expert examination*” (Sachverstaendiger) are different concepts. *Swiss CPC*, Article 175 lays down provision on “testimony of an expert witness” (Zeugnis einer sachverstaendigen Person) “if a witness has special expertise”. According to this provision “the court may also ask him or her questions about his or her assessment of the facts of the case”. Under the *Austrian ZPO*, provisions on witness testimony apply also to testimony of expert witness (Sachverstaendige Zeugen) (Section 350). The *German ZPO* has also a similar provision (Section 414).

²¹ For *Act on Expert Examination* (Bilirkişilik Kanunu), No. 6754 see Official Gazette, No. 29898 of 24 November 2016. Cf. “*Evidence provided by experts*” (Beweis durch Sachverstaendige) is regulated by Sections 402-414 of the *German ZPO*. In principle the rules relating to *witness evidence* apply mutatis mutandis to the *evidence provided by experts* (Section 402).

within a certain period of time specified by the court (Turkish CCP, Article 273-274). The expert must tell the truth and must submit his written opinion within the deadline set by the court (Articles 271, 273.1).²²

Experts can be invited to the hearing. The court gives the parties the opportunity to ask for explanations or put additional questions.²³

As explained above *expert's examinations and opinions* are commonly used in the Turkish adjudication by the courts. The courts usually apply to *several independent and autonomous organizations, official authorities, professional associations and universities* to suggest the names of experts in several kinds of disputes (e.g. *Saving Deposit Insurance Fund; Banking Regulatory and Supervisory Agency; Securities and Investment Board; Radio and TV Supervisory Council; Chambers of Commerce; Turkish History Institution; Chambers of Architects and Engineers*, and several professional associations for the protection of copyright of musicians, performers, film artists etc.).

In the practice in some fields of law expert opinions are of great importance. Particularly expert opinions play an important role in resolving disputes handled by courts of first instance. If solving a dispute requires technical or specialist knowledge and cannot be resolved by the judge's legal and professional knowledge and experience, the court appoints an expert or a panel of experts. Appointment of expert or panel of experts is made on the *court's own motion* or *upon the request of the parties*. The court requests the expert or the panel of experts to examine certain issues of facts and present their *written report with reasoning* within a specified period of time determined by the court. Legal issues cannot be directed to expert for expert examination and opinion. However, in practice particularly in complex cases experts are requested to examine even legal issues (Turkish CCP, Articles 273 et seq.)

Expert reports are *not binding* on judges. They are evaluated by the court (Turkish CCP, Article 282). Nevertheless, in practice many courts render their decisions in compliance with expert opinions.²⁴

Expert examination is usually requested in most cases relating to *infringements of patent, utility model, geographical indication, industrial design, and trademark*. In spite of existence

²² Cf *German ZPO*, Section 410 (placing the expert under oath); Section 411 (written opinion).

²³ For details see B. KURU, *İstinaf Sistemine göre Yazılmış Medeni Usul Hukuku* (Civil Procedure Law revised under Appellate Review System), Istanbul, 2016, p. 409 et seq. For German law see *German ZPO*, Section 411.3: The court may order the expert to appear before it for the purpose of explaining the written report.

²⁴ For details see B. KURU, *İstinaf Sistemine göre Yazılmış Medeni Usul Hukuku* (Civil Procedure Law revised under Appellate Review System), Istanbul, 2016, p. 409 et seq.

of specialized intellectual property courts, in practice these courts usually appoint an expert or panel of experts to determine the qualification of a *patent* or a *trade mark* or whether a *trademark is well-known* or there is a *risk of confusion*. *Patents* need usually to be appraised for accounting and transactional purposes in situations *sales of businesses* or *company mergers* or *bankruptcy actions*. These issues require specific technical knowledge and experience. Likewise, *trademark appraisals* and trademark valuations are complex issues. In cases of disputes courts need *dependable, accurate and objective trademark appraisals* that is performed by reliable and experienced experts.

Moreover, when a case is brought before a court with the request of cancellation of a decision of the “*Turkish Patent and Trademark Authority*” (Türk Patent ve Marka Kurumu) an expert panel is usually appointed by the court to examine the case and submit its opinion.²⁵

Likewise, in practice disputes related to *copyright* are usually submitted to expert examination. In such cases calligraphy and graphology experts (graphologists), law teachers on intellectual property, actors, singers, performers, graphic designers, printers, publishers and authors serve as experts. Disputes related to *computer programs*; *cinematographic works (films)*; *videos*; *performers’ rights*; *phonograms* and *rights of broadcasting organizations* are usually resolved by means of experts’ examination.²⁶

Another area in which expert examination is required is related *road and sea traffic accidents*. In such cases traffic engineers, professors on insurance law, assessors and experts serving in insurance business are requested to examine the accident and submit their reports on the *degree of negligence* (grave or light) and *amount of the damage* (value of the property).

In *cases related to construction disputes* experts are usually architects, construction engineers, and contractors as well as lawyers working on construction law. Courts usually

²⁵ Cf *Act on Industrial Property* (Sınai Mülkiyet Kanunu), No. 6769 of 22 December 2016. See also *Paris Convention for the Protection of Industrial Property* of 20 March 1883 as amended several times. Turkey is a party to this Convention. For details see E. ÖZSUNAY, R.M. ÖZSUNAY, *Intellectual Property, Turkey*, in *International Encyclopaedia of Laws*, Kluwer Law International.

²⁶ Cf *Act on Intellectual and Artistic Works*, No. 5846 of 5 December 1951 (as amended and revised several times). See “*Berne Convention for the Protection of Literary and Artistic Works*” (9 September 1886 as revised several times). Paris version of the Convention was ratified by Turkey by Act, No. 4117 of 7 July 1995. Further see the *Universal Copyright Convention* of 6 September 1952 (as revised at Paris in 1971), and *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*” (Rome Convention of 26 October 1961). Turkey is a party to Rome Convention. It was ratified by the Act, No. 4116 of 7 July 1995. For details see E. ÖZSUNAY, R.M. ÖZSUNAY, *Intellectual Property, Turkey*, in *International Encyclopaedia of Laws*, Kluwer Law International.

apply to the professional organizations in order to get information on experts to be appointed for expert's examination (e.g. *Chamber of Commerce and Industry* [Ticaret ve Sanayi Odaları], *Turkish Contractors' Association* [Türkiye Müteahitler Birliği], *Turkish Union for Architects and Engineers* [Türkiye Mimar ve Mühendis Odaları Birliği], etc.).

In *disputes relating to health law and particularly medical liability cases* courts request experts from the "*Turkish Physicians Union*" (Türk Tabipler Birliği) and *Faculties of Medicine*. In practice not only medical doctors, but also experienced lawyers practicing in medical and health law were usually appointed for expert examinations. Nevertheless, the *Act on Expert Examination*, No. 6754 has laid down specific provisions relating to medical expertise (Articles 24-27).

Land and real estate disputes need also expert examination. In such disputes courts usually appoint retired officers from the *Land Registries*, land survey experts, real estate dealers, land brokers, and lawyers practicing in land and immovable cases.

In *disputes related to banking transactions* (e.g. credit cards, consumer credits, loan agreements, letter of credits etc.) experts are requested by courts from several specialized professional organizations like "*Türkiye Bankalar Birliği*" (Union of Banks of Turkey , TBB), "*Banking Regulatory and Supervisory Agency*" (Banka Düzenleme ve Denetleme Kurulu, BDDK) , "*Saving Deposit Insurance Fund*" (Tasarruf Mevduatı Sigorta Fonu, TMSF), "*Securities and Investment Board*" (Menkul Kıymetler ve Yatırım Kurulu, MKYK), etc.

In Turkish practice *non-lawyer experts* used to play an important role with regard to resolve disputes in many fields. When a panel of experts was appointed by court a lawyer was usually included to the panel in order to assist other experts regarding legal issues of the case. After the entry into force of the *Act on Expert Examination*, No. 6754, this situation has been changed. Under this Act, persons who are *law school graduates* cannot be appointed as expert unless it is certified that they are experts on some specific areas outside the field of law (Article 49 and Turkish CCP, Article 266/1 as amended by this Act). Moreover, experts are not allowed to make *legal qualifications* (*Act on Expert Examination*, No. 6754, Article 45 and Article 67/3 of the *Code of Criminal Procedure* (Ceza Muhakemesi Kanunu), No. 5721 as amended by this Act).

VI. INVOLVEMENT OF LAYPERSONS IN THE ADJUDICATION THROUGH EXPERT OPINION (UZMAN GÖRÜŞÜ)

Under the *Turkish CCP* the parties to an action may submit *expert opinions* taken from experts (usually legal opinions or opinions on specific issues or technical matters examined by experts: uzman görüşü) (Article 293). Such expert opinions are *not binding* on the courts, but they usually assist to clarify complex legal or technical issues. If an expert does not attend the hearing in spite of the summons by the court, his report is not taken into account and evaluated by the court (CCP Article 293.c).²⁷

VII. INVOLVEMENT OF LAYPERSONS IN THE ADJUDICATION IN INSPECTION

According to *Turkish CCP* at the *request of a party or ex officio* the court may conduct an *inspection* in order to see the facts for itself or for a better understanding of the case. The court may summon *witnesses or experts* to the inspection (Articles 288-291).²⁸

VIII. CONCLUDING REMARKS

1. As is seen Turkish adjudication is usually based on the *professional activity of lawyers*. Only law school graduates may settle the disputes as *judges or mediators*. *Non-lawyers* may not render a *judgment* to settle a dispute.²⁹

2. *Non-lawyers* may act as *arbitrator* in domestic arbitration (Turkish CCP, Article 416). Nevertheless, if the *arbitral tribunal is composed of three arbitrators*, at least one arbitrator should be a *lawyer who has experience of five years in his field* (Article 416.d).³⁰

²⁷ For details B. KURU, *İstinaf Sistemine göre Yazılmış Medeni Usul Hukuku* (Civil Procedure Law revised under Appellate Review System), Istanbul, 2016, p. 426-427.

²⁸ See B. KURU, *İstinaf Sistemine göre Yazılmış Medeni Usul Hukuku* (Civil Procedure Law revised under Appellate Review System), Istanbul, 2016, p. 430-433.

²⁹ For the exceptions relating to *compulsory arbitration* see B. KURU, *İstinaf Sistemine göre Yazılmış Medeni Usul Hukuku* (Civil Procedure Law revised under Appellate Review System), Istanbul, 2016, p. 929-930.

³⁰ For details see B. KURU, *İstinaf Sistemine göre Yazılmış Medeni Usul Hukuku* (Civil Procedure Law revised under Appellate Review System), Istanbul, 2016, p. 939.

3. *Non-lawyers* may also act as *arbitrator* in *international arbitration* under the *Act on International Arbitration* (AIA), No. 4686 of 21 June 2001. *Foreign nationals* can be chosen as arbitrator (Article 7).

4. In Turkish civil procedure *non-lawyer lay persons* may act as *arbitrator*, *expert*, *witness*, and *appraiser* as auxiliary elements of the adjudication system.

As emphasized above in Turkish practice particularly *non-lawyer experts* play an important role with regard to resolve disputes because many courts render their judgments in line with experts' opinions.

LEGAL SOURCES and ABBREVIATIONS

Act on Expert Examination: Bilirkişilik Kanunu, No. 6754 of 3 November 2016; **Act on Industrial Property:** Sınai Mülkiyet Kanunu, No. 6769 of 22 December 2016; **Act on Intellectual and Artistic Works:** Fikir ve Sanat Eserleri Kanunu, No. 5846 of 5 December 1951 (as amended and revised several times); **Act on Judges and Public Prosecutors:** Hakimler ve Savcılar Kanunu, No. 2802 of 24 February 1983 (as amended); **Act on International Arbitration (AIA):** Milletlerarası Tahkim Kanunu, No. 4686 of 21 June 2001; **Austrian Law on Mediation in Civil Law:** Zivirechts-Mediations-Gesetz (ZivMediatG); **Austrian ZPO:** Austrian Code of Civil Procedure (Gesetz über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten (Zivilprozessordnung) (as amended); **Cf:** compare; **Federal Rules of Evidence:** 2017 Edition, U.S.A.; **German ZPO:** German Code of Civil Procedure (Zivilprozessordnung) as promulgated on 5 December 2005 (as amended); **Law on Mediation in Civil Disputes:** Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu, No. 6325 of 7 June 2012; **Swiss CPC:** Swiss Civil Procedure Code (Schweizerische Zivilprozessordnung) of 19 December 2008; **Turkish CCP:** Code of Civil Procedure (Hukuk Muhakemeleri Kanunu), No. 6100 of 12 January 2011.