A better Judiciary to realise Turkey's potential

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by Legal Business

Mehmet Gün, senior partner at Gün + Partners, examines the difficulties facing the Turkish judiciary and how essential a first-class justice system is to Turkey's progress

In the 1980s, Turkey undertook significant liberalisation of its national economy. Since then, liberalisation has increasingly become a pivotal part of the international economy. Between the 1980s and 2000, Turkey learnt some very important lessons in the form of economic crises and was saved by International Monetary Fund programmes.

Turkey's phenomenal economic success since the 2001 crisis has been strengthened by ever-increasing market liberalism. Crucially, in part due to the lessons learned from the 2001 crisis, Turkey did not suffer in the 2008 global crisis as much as more developed economies. Turkey's post-liberalised economy resulted in the rapid and continuous growth of domestic markets – increasing per capita GDP from around $3,000 at the beginning of 2000, to around $10,000 today. In parallel with the growth of domestic markets, Turkey's international economic relations remain buoyant and production capacity for exports has been increasing. Exports continue to surpass records in previous months. Recent economic statistics also show that efforts to control the trade deficit have been successful as deficit levels continue to drop.

Thousands of small businesses mushroomed all over Turkey and have prospered into so-called 'Anatolian Tigers', becoming small and medium enterprises with viable businesses aiming at both the domestic and international markets. While Turkey attracts investments from other jurisdictions, Turkish investors and entrepreneurs, both small yet bold, large but wise, are active all over the world, penetrating difficult markets and returning home with great success stories. To facilitate and develop international economic relations, Turkey is also enhancing its diplomatic ties all over the world and has signed mutual trade and co-operation agreements with numerous states. This is all to great effect and Turkey's unique strategic position both culturally and economically holds enormous opportunities, for not only the country's businesses, but also for all global investors.

Low confidence

However, despite all these efforts foreign direct investment and GDP are not at desired levels. It is a chief concern that Turkey may get stuck at mid-income levels. Internationally respected economics minister Ali Babacan has openly said that Turkey's further success and avoiding the mid-income trap depends on the improvement of the Turkish justice system. Babacan says that as Turkey joins higher GDP countries, judicial difficulties need to be urgently solved. In a recent meeting organised by Investment Support and Promotion Agency of Turkey (ISPAT), almost all the international law firms in Istanbul identified that shortcomings in the justice system are the main hurdles to effective foreign investment. Exploring and exploiting the country's vast potential to the fullest extent will not

be possible until the justice system and the democratic values it upholds are improved – at a higher speed and ahead of economic developments.

Inefficiency in the justice system and a low level of confidence in the judiciary are likely to cause further deterioration in civil disputes, potential societal unrest and a lack of democratic belief. For example, the Gezi Park protests in Istanbul demonstrated that Turkey's approach to democracy has not satisfied the elite of Turkish society. Judicial inefficiency appeared to limit democratic rights as the court judgment determining that the protesters were right in striving to protect a beautiful park came very late. The Gezi Park protests demonstrated that a lack of timely judicial functioning, while public force is used oppressively against legitimate protest, causes social unrest, resulting in further unfair restrictions of civil and individual rights. That was what turned a peaceful demonstration for Gezi Park into a series of unlawful actions on both sides.

It is no surprise to practising lawyers and jurists that public confidence in the justice system is very low. According to the daily newspaper Milliyet, a public opinion survey showed that in 2013 only 24% of the population consider that the Turkish judiciary is independent. Similarly only 26% trust the judiciary, sharply declining from 39% in 2011 and 33% in 2012. Meanwhile, 58% of the population thinks that the judiciary has become politicised, up from 52% in the previous year.

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This lack of trust in the judiciary is apparent in the flight of high-level disputes out of Turkey. In 2010, the number of ICC arbitration proceedings involving Turkish parties ranked third after France and Germany and the number appears to be on the increase. It is known that large-scale and complex disputes requiring more sophisticated solutions are also submitted to developed judicial systems such as the London courts. A number of International Centre for Settlement of Investment Disputes (ICSID) proceedings are also pending against Turkey. The Turkish constitutional court recently held that in taking ten years to conduct civil proceedings, the Turkish judiciary violated human rights.

Despite the limited improvements to the top judicial structure introduced by the 2011 amendments to the constitution through a referendum, the concerns of opponents that the amendments were insufficient and likely to stir further concerns over the judiciary's independence and impartiality are becoming a reality, as the recent amendments saw efforts to destroy the so-called 'parallel establishment'. Under a controversial change in the law recently and partly annulled by the constitutional court, the Higher Board of Judges and Public Prosecutors, HSYK, was reshuffled and the powers of the Ministry of Justice were reinstated almost to the levels prior to the 2011 amendments. A more recent amendment also failed to achieve its objective, as the Chairmen's Assembly of the Court of Cassation refused to follow the government's intentions to restructure and reshuffle the chambers and duties of the appeal court, the secondary level in Turkish civil and criminal judiciary.

Changes that are forced on society without seeking a compromise, without addressing the concerns of opponents and experts and which attempt to change the structure that controls the top judicial organisations, no matter how rightfully they may be justified, are creating continuous concerns over the Turkish judiciary's ability to operate independently and impartially while it is expected to become more efficient.

Turkey's judiciary has been neglected since the middle of the 1970s and its limited service capacity has increased very little compared to the huge growth in economic activity. Traditional methods and means used to address disputes in a slow manner did not match the country's fast-changing and growing needs.

Despite these adverse developments and lack of attention and investment in the judiciary, very hardworking judges, many of whom come from poorer and rural parts of society, have achieved high standards in the average dispute. The degree of justice that their hard work, volunteering and diligence delivers to society distinguishes the Turkish justice system from that of similar developing countries. Both in criminal and civil litigation, thanks to the judges' efforts, the Turkish judiciary delivers a high level of justice in traditional offences and average civil matters considering its limited resources. Almost all courts suffer extensive work overload, resulting in considerable delays in all kind of cases. Insufficient human resources, underdeveloped adjudication and advocacy skills prevent the judiciary from dealing efficiently and effectively with complex cases such as business fraud, smuggling and white-collar crime. It would be fair to summarise that the Turkish justice system finds it difficult to function beyond small, average and traditional matters.

The Turkish judiciary does not only lack proper attention and investment, but it also lacks the requisite transparency and efficient working practices from the members of the judiciary. But neither politicians nor society can trespass on the area of judicial shortcomings.

As a result of lack of investment and attention to the judiciary's needs in order to better serve Turkish society, the judicial processes have become a cost to society without necessarily bringing added value, let alone any real value. From the lawyers' perspective, the inefficiency of the judiciary has manifested itself in various forms that are commonly complained of and hopes of obtaining an accurate delivery of justice from the courts looks set to disappear. The judiciary's ability to deliver justice is very much dependent on the parties' voluntary co-operation and good faith, and thus on the parties' behaviour in the judicial process. Instead of seeking uncompromised and accurate justice, the public has begun to look to the judiciary to deliver whatever it can in a timely manner, even though it may be inaccurate. Delays and inaccuracy in judicial services have caused wide-ranging abuses of the right to access to justice, which in turn resulted in an overburdened workload on courts that further chokes the system in a worsening vicious circle.

Furthermore, trust within the legal profession has been long lost: the judges do not trust the lawyers' submissions, lawyers have no right and obligation to ensure that party declarations are full and

frank. Withholding the truth and evidence from the court in judicial proceedings is tolerated as if it were a legitimate right while perjury and obstruction of justice are not recognised offences. Courts are required to adjudicate accurately where the parties are not effectively obliged to disclose the whole truth and evidence accurately.

Identifying the problem

There are a few root causes to the current problem. However, attempts to restrict the judiciary's function and to exert political influence avoid identifying the correct issues and addressing the real causes.

Distrust in the judicial organs, people and processes is very high. The judiciary over-relies on the independence of its members to the extent that they are considered to be immune from civil and criminal liability and lack accountability. Particularly at appeal level, the judiciary has failed to establish proper transparency. The appeal courts have long complained of a heavy workload and insufficient resources to deal with the overwhelming number of appeals against almost all first instance court decisions. However, they fail to acknowledge the fact that almost all appeal decisions lack proper examination and reasoning, and this has effectively deprived society of its right to appeal. In 2011 the First Chairman of the Court of Appeal openly stated that the Court of Appeal would have only two minutes to deal with each appeal – that is not even sufficient time to open the cover of a file. The Minister of Justice also stated that some chambers in the Court of Appeal and Council of State had only one to three minutes to allocate to each case, acknowledging that it would not meet the expectation of justice. The situation has not improved since the 2011 amendments.

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Squeezed by the workload, the Court of Appeal led the first instance courts to palliative solutions, requiring them to effectively delegate judicial duties and authorities to so-called court-appointed experts. The extensive reliance on court-appointed experts as an easy solution to the workload has corrupted the experts' institution, which in turn has seriously damaged justice by limiting the functioning and the discretion of judges in first instance courts. Court of Appeal precedents and their weight on the performance assessments of the first instance judges have almost reduced their role from adjudicating in disputes to the role of arbitrating the parties' struggle with unskilled, arbitrary and irresponsible court-appointed experts. Yet the rule makers in the country aim to protect the corrupt expert system more than judges by granting the experts immunity from any liability during their conduct in civil litigation. Recently, a civil IP court in Istanbul rejected an action against the court-appointed experts who were sued for damages due to issuing a false report in civil proceedings. The court reasoned to the extent that experts are immune from liability even for issuing false report. Thus the delivery of justice is conditional upon the discretion of court-appointed experts

and whether they do a proper assessment of the case and come up with a fair and accurate recommendation to the judge.

Those who have created this situation are also immune from liability. They are not liable for their poor and incorrect performances, they are not liable for their negligence and omissions or miscarriages of justice. They do not give account of their successes or failures while, in the eyes of the public, the latter prevails most. Until the enactment of the new civil procedural code in 2011, the appeal court judges could not be held liable for damages they caused unless they were criminally convicted. In reality, this precedent made it impossible to hold them liable because it is de facto impossible to criminally indict an appeal court judge.

While the appeal court deals with its workload in its own way, to the extent of overlooking its duty to manage appeal rights effectively, and excusing itself from the workload, HSYK deals with the management and allocation of the country's judge and prosecutor resources according to the workload and statistics. HSYK's functioning is far from transparent and accountable as it exercises absolute discretion as to its function and decisions. Probably because of this very fact, the board is under heavy influence from the government through the Ministry of Justice, which is given the responsibility to make the board function. The board, composed of judges, lacks the professional skills to manage such a large organisation or appreciate society's expectations of the judiciary. It is not surprising that it first dismantled the three judging panels in the commercial courts a couple of years ago into one judge's chambers only to merge them back into three panels, albeit with a slight improvement this year. But perhaps making and revoking changes to the commercial courts structure is an innocent example. The promotion, rotation and relocation, further training of judges and prosecutors are all heavily criticised.

But there is one common goal that the judiciary and the Court of Appeal have agreed upon: cases must be resolved as fast as possible as they believe 'delayed justice is not justice', thus overlooking many important aspects of proper justice, specifically the delivery of accurate justice, at whatever cost. Those who ignore that justice should be delivered regardless of cost force the judiciary to speed up the procedure, delegate judicial powers to non-judicial experts and cause and contribute to the failure and corruption of the system.

Cultural barriers

However, the root cause is not the judiciary. The human resources of the judiciary are humble; they are simply unable to deal with the workload and are not skilled to manage either their workforce or the work. The actual root cause of the problem is the culture in Turkish society and the rules shaping it.

Take the Civil Procedure Law as an example: Turkey is a country where truth is withheld from the court while the court is expected to establish full truth and to deliver spotless justice. Lying to the court is considered a legitimate right of the defence and parties' withholding evidence is considered

a human right. The lawyers' role and duty has been shifted from establishing the full truth for the most accurate delivery of justice to safeguarding their clients' personal interests. The rules that determine the public's behaviour in judicial proceedings cause distrust between judicial players and remove co-operation. While the parties cannot be forced to make full and frank disclosure of facts and evidence, the burden of establishing the truth is charged on the courts, despite the judges being bound by the parties' statements.

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The principle in Turkey's civil procedure is 'the onus is on the parties to prove their claim'. While the collection of evidence from the parties is under the judge's control, the lack of full disclosure has resulted in a wide range of abuses of access to justice as well as an immense workload for both the courts and its judges. The majority of participants are dissatisfied with the procedure and press for a comprehensive judicial reform.

In 2011, Turkey renewed its Civil Procedural Code, based on local experience and developments in Germany, Switzerland and France, while preserving the main principles. Although the new code introduced the obligation to act honestly and to tell the truth to the court, there remain no mechanisms or sanctions to ensure that parties provide honest statements and truthful evidence. Indeed, the party preparation principle excuses the parties from bringing the truth to court if it is contrary to their interests. Accordingly, the lack of full and frank disclosure in the Turkish civil procedure remains the root cause of the Turkish judiciary's many shortcomings.

The Turkish judiciary has fallen into the trap of blindly following Germany, one of the most expensive judicial systems in Europe. When comparing Germany's judicial performance with the UK, the distinction is stark. The European Commission for the Efficiency of Justice (CEPEJ)'s country statistics show that in 2010 Germany spent some €8.5bn; the UK's budget is less than 20% of that. With 24.5 judges per 100,000 people, the German judicial system performs far worse than the UK, which only employs 3.5 judges per 100,000, despite the fact that English judges receive the highest number of cases per judge. The UK judiciary settles 97% of cases, whereas Germany settles only 38%. The secret behind the UK's exceptional performance is its effective disclosure system, which is reinforced by effective mechanisms and serious criminal sanctions, penalising those who withhold the truth from the judiciary and make false statements to the courts. It is time for Turkey to look beyond the expensive and cumbersome German system in devising further judicial reform to create a modern and effective European state.

Disclosure shifts the burden of workload in judicial processes from the courts to the disputing parties. The judge can focus on resolving the parties' differences and the legal issues while they can focus on establishing the truth. The counterparties' control over disclosure improves and disciplines their

behaviour during dispute resolution; thus abuses of access to justice can be eliminated while increasing the efficiency of the courts.

According to Professor Alan Uzelac of CEPEJ, the extensive powers of judges in Mediterranean jurisdictions often turn into the main generator of delays. Heavy duties placed on the judges in judicial proceedings, while limiting the judge's ability to extract a full account of facts and relevant evidence from the parties, has created a peculiar dispute resolution culture in Turkey and resulted in a burdensome workload. Instead of identifying and addressing the actual root cause of the excessive workload, the Turkish judiciary has turned to extensive reliance on a corrupt experts system that further erodes the judicial system.

Turkey's true potential can be realised by eliminating limitations and restrictions preventing or hindering the judiciary's independent functioning. The obstacles in the way of solving Turkey's major problems and preventing the country becoming a first-class democracy, are mostly due to not having a first-class justice system operating impartially and independently of the state. However, first the members of the judiciary and the judicial system need to move towards full accountability, who in turn may make executives in state bodies accountable.