IN SEARCH OF A SMART JUDICIARY IN TURKEY AND EUROPE

Mehmet Gün, senior partner at **Gün + Partners**, Istanbul, traverses the gaps in Turkish and continental civil procedure, where inefficient disclosure rules are choking an overloaded justice system arguably leading to double procedural standards and high budgetary costs for some EU member states

Turkey's desire to join the **European Union** is well-known. Lesser known is the response of the EU policymakers to issues that arise from the same root cause as in the Turkish justice system.

The European Union's November 2015 progress report did not go beyond general remarks describing Turkey's Revised [Judicial] Reform Strategy for 2015 to 2019 as a "very general planning document"; particularly in the sections in chapter 23 on the *Judiciary and Fundamental Rights* and chapter 24 on *Justice, Freedom and Security.*

However, it is difficult to understand why these two chapters are not at the forefront of the EU-Turkey accession talks, if not preconditions to any accession talks, given the EU has always criticised Turkey for failing to establish the rule of law and an efficient justice system.

Is the absence of a prescribed formula for the chapters, one expected of EU reform strategies? Or perhaps an inability to see past the exploitable economic and security benefits of modern Turkey? In this author's opinion it is because, much like Turkey, the EU is itself in need of 'smart justice'.

Turkey and the EU should work together for smart justice to function efficiently; ensuring proper access to justice for all citizens and responding to complaints across both Turkey and EU member states, ranging from abuses of – and restrictions and limitations to – the right of access to justice.

This undertaking is vital for the EU, because of security concerns and the economic potential that Turkey holds, as well as to further improve economic success and achieve wider prosperity for the nation, it needn't be dismissed as outrageous to suggest that both sides meet half way.

Since the 1980s Turkey has considerably improved upon and grown into its liberalised economy. Having lived through several financial crises, Turkey has strengthened its banking system, ▶

raised its GDP and increased exports, a process of economic growth that has been evidenced time and time again. Turkey was able to pass through the 2008 global financial crisis relatively untarnished, at least compared to other developed economies.

Its unique position, geographically adjacent to vast yet unstable developing markets, presents Turkey with enormous opportunities at home and abroad. Sharing a common cultural heritage with this diverse neighbourhood of nations brings Turkey unique advantages – as is evident in many multinationals entrusting EMEA responsibilities to Turkish talents.

Turkey's main trading partner has been the EU and is itself a major market for European exports with a population of almost 80 million at mid-level GDP. However, EU interest does not lay only in reciprocal trade with Turkey. With the recent instability brought about by conflicts in Ukraine and Syria, the role of Turkey as a NATO member firmly within the "buffer zone" has been fundamental in keeping peace and preventing further escalation.

There should be a common consensus that the EU, in order to fully reap the colossal economic and security potential Turkey has proven itself to possess, and to ensure the stability that Turkey provides should make its main priority the strengthening of the country's current democracy going forward.

The EU has long identified the hindrances to Turkey's democracy; namely the limitations and restrictions on the independent, impartial and efficient functioning of its justice system. As such, Turkey must be encouraged to make improvements.

Struggling to keep pace

Some practitioners feel that the capacity of Turkey's judiciary does not match the country's fast-growing needs. Relatively higher standards in prosecuting traditional offences and small and average civil matters achieved through the diligence of volunteer hardworking judges, distinguishes the Turkish justice system as being a better prospect for improvement, compared to similar developing countries.

However, there is no question that the system has been choking from an extensive workload, with limited resources preventing the judiciary from effectively dealing with complex cases involving business, banking, securities fraud and other white-collar crimes. Flaws in judicial service thus cause wide-ranging abuses in access to justice, which in turn feeds into a deteriorating cycle.

In the author's opinion, there is one major culprit behind a workload that is potentially choking the system. Turkey's 'Wild West' civil procedural principle that the "parties have the onus to prove their claim", has made the judiciary dependent on parties' voluntary good faith. This is in spite of the fact that the disputing parties have no obligation to promote the upkeep and healthy and functioning of the judicial process, and are excused for their disruptive behaviour.

To some, lying to the court is considered a

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Comparison of judicial budgets

Source: Official judicial statistics CEPEJ website

Number of judges per 100,000 inhabitants

Source: Official judicial statistics CEPEJ website

legitimate defence, and withholding evidence seen as a human right, while unfortunately, perjury and obstruction of justice are not recognised as criminal offences. Evidence can be withheld from the court by parties, depriving the courts of full truth and evidence on the one hand, and failing the courts to deliver spotless justice on the other.

Consequently, the requisite trust among judicial actors has been long lost. Judges do not trust lawyers' submissions, and lawyers have no right, means and obligation to ensure that their clients' declarations are full and frank. Thus, the role of lawyers has shifted from assisting the courts, to an onus of blindly safeguarding their clients' interests.

In the absence of smart solutions, the public has given up on uncompromised justice, and is instead seeking hasty court decisions in its place. Focused on a 'fast and furious' erosion of the heavy workload, the judiciary largely relies on so-called court-appointed experts almost to the extent of the judiciary delegating their judicial duties to them. Seen as saviours, these non-judicial consultants are considered fully immune from liability even in the event they issue false opinions.

Hidden behind many contributing factors, the root cause of the problem is the lack of proper rules ensuring the full and frank disclosure of facts and evidence in the adjudication of disputes; either between civil parties, or between citizens and the state.

Comparative provisions

Both Turkey and EU members are bound by article 43 of the Trade-related Aspects of Intellectual Property Rights (TRIPs). This legislation reflects the common law principle of "full and frank disclosure of facts and evidence", requiring that the judicial authorities shall have the authority to order the disclosure of evidence under possession of the other party.

The provision of article 6(1) of the EU Directive 2004/48/EC headed "Evidence" is identical to article 43(1) of TRIPs with the same heading. Additionally, parallel to TRIPs, article 7(1) of the said Directive allows for applications to produce and preserve evidence prior to or during judicial proceedings, and enables the preservation of evidence quickly and efficiently.

TRIPs' requirement (and the EU Directive) are met by the UK effectively by means of *Anton Piller* orders, while France adopted *Saisie Contrefaçon* decisions peculiar to the civil law procedure system. In a similar way Germany enacted an 'exceptional' rule in article 140 of the German Patent Law, diverting from their civil procedure requiring the production of evidence only after the commencement of proceedings.

In Turkey, it can be argued that articles 29 and 219 of the Civil Procedure Code together provide for more than TRIPs and the EU Directive.

However, these two provisions are arguably obsolete and are not capable of being implemented, because they lack any mechanisms or deterrent. They function at the discretion of the counterparty's good faith and cooperation. The party holding the evidence who refuses to produce it cannot be forced to do so, meaning that "proving to the court what that [witheld] evidence would prove" is physically impossible to realise.

This is why Turkey needed to adopt, in article 65 of the Trademark Decree Law, Article 139 of the Patent Decree Law, and articles 76 and 77 of the Copyright law, special and exceptional means, one normally alien to Turkish civil procedure; entrusting judges with extraordinary authorities such as obliging parties to produce relevant evidence and "to order the opening or closing of premises or the seizure of things".

A step closer?

Forced by the powers of global trade organisations, like the **World Trade Organisation**, the EU, through its continental members, and Turkey have edged closer to the common law concept of full and frank disclosure. However, this has only occurred in matters concerning intellectual property rights (IPR).

Having approached thus far only for one category of civil matters, it may feel as if EU members' ▶

conventional civil procedural rules are about to become redundant. Obviously, it is illogical to distinguish between civil matters when applying special rules to one category, like IP civil litigation claims,and dealing with the others in the old ways.

It is a universal truth that any problem-solving process requires and involves two stages: fact-finding (disclosure of facts and collecting the evidence to prove the facts), and adjudication on differences.

Adjudication of disputes is a logical activity which should not differ in different systems. However, methods of fact-finding do differ in this event. On the one hand we have full and frank disclosure of all facts and evidence coupled with plain honesty; and on the other, the arbitrary disclosure of facts that could be proven with the evidence in one's possession.

A system that presents smarter justice may be more costly, due to the burdens of the proper disclosure of facts and evidence. However, costs can be contained but the injustice cannot.

Civil law and common law compared

Common law and civil law concepts both aim to achieve accurate disclosure of facts, but it is rare they can establish the same level and detail of the truth. The complaints in these jurisdictions are such that civil law systems may compromise on the accuracy of facts and evidence, falling short of what is needed to properly defend rights, thus hindering the delivery of accurate justice.

On the other hand, common law systems torture parties with pre-trial disclosures, resulting in disclosure of facts and evidence beyond the requirements of the dispute and the hindrance of first access to justice, and eventually, the establishment of justice.

The full and frank disclosure systems that common law jurisdictions implement shift the workload burden of establishing the facts and collecting evidence from the courts to the disputing parties. Counterparties' control of the other's disclosure directly improves and adds discipline to the parties' behaviour during the dispute resolution process, eliminating abuses of access to justice while increasing the efficiency of the courts.

The secret behind the UK judiciary's exceptional performance in regard to producing the settlement of almost 98% of disputes at a budget which is one sixth of that of Germany lies in the effective enforcement of disclosure obligations by allowing serious criminal sanctions, penalising those that withhold the truth from the judiciary and make untrue and false statements to the courts.

The inquisitorial civil law principle of having one's onus to prove his own claim to the extent the judge will allow it, as in the Turkish example, turns judicial proceedings into a game of Russian roulette, where you take your chances on winning or losing in the event that you cannot present your own evidence, on the opposing party's decision to cooperate and offer voluntary disclosure.

Turkey and the EU, in search of making their justice systems more attractive to both domestic and international users, should learn from the UK system. Turkey and continental EU members should work together to achieve the same level of standards for disclosure across all EU members. To achieve the same level of standards for disclosure, at least, in civil proceedings, the facts must be disclosed fully and frankly, and evidence produced in the early stages of litigation, in advance of judicial proceedings, while addressing hindrance to access to justice in the UK from the extent of disclosure rules.

For Turkey, this is a simple task. The government could easily remedy the issues outlined in this article by making articles 29 and 219 of the Civil Procedural Code applicable for all cases. Where these two provisions ensure integrity and the onus of telling the truth, and an obligation is imposed for parties to produce all relevant evidence at, or prior to the commencement of legal proceedings, disputes reaching the court would rapidly decrease to what an estimate of approximately 20% of the current workload.

Judges would benefit, with a considerable amount of time being freed up to hold more effective hearings and to produce well-reasoned judgments. For EU reforms would be even easier as it could simply extend the scope of the Directive 2004/48/EC beyond IPR matters to apply to all civil disputes. ■

– The views and opinions expressed are solely those of the original author.

About the author

Mehmet Gün is the senior partner of Gün + Partners, one of Turkey's largest and the leading independent law firm founded in 1986. He brought it to international recognition for its full commercial and corporate law and intellectual property rights services. During a professional career of over 30 years he has is now recognised as one of Turkey's top international commercial lawyers and the country's leading IP lawyer. He actively participates in domestic and international seminars and conferences and campaigns vigorously for the common law principle of full and frank disclosure in the Turkish judicial system.

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