DEVELOPMENT IN THE COURT MANAGEMENT SYSTEM IN TURKEY[1]

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In the framework of a Joint Programme between the Council of Europe and the European Commission, I had the honour and the pleasure to cooperate with Turkish authorities in a project to improve the court management system in Turkey. I will give a brief explanation of the project and the project activities; I will continue however with a few selected items that may be of interest for the readers of this magazine.

I. THE PROJECT

The name of the project was "Support to the Court Management System" in Turkey[3]. The main goal of the project to improve the organisation of the courts so that speeding up of cases and reducing workload was realised.

The project was funded by the European Commission and implemented by the Council of Europe between the end of 2007 and December 2009. Our primary partner was the Ministry of Justice (particularly judge Birol Erdem, in close cooperation with the project leader judge Mustafa Kemal Özcelik and many others. On our side the resident expert Manfred Buric (Austria) was the first responsible person, supported by the project office of the Council of Europe, first mr Cuneyd Er – until his tragic accident with the Turkish airlines crash near Amsterdam in February 2009, from which he is still recovering – later mr. Yucel Erduran with the assistance of mr. Mehmet Tyriaki. I was acting as the project consultant.

The set up of the project proved to be very important and informative. We organised assessment visits until June 2008 resulting in 6 assessment reports after visiting the following courts: Ankara, Antalya, Bursa, Bodrum, Çorlu, Manavgat, Erzurum, Konya and Şanlıurfa. In total 43

1 This article is not peer reviewed.

2 Judge- Amsterdam Court of Appeals.

3 Details can be found by entering the website http://jp.coe.int[3]

experts participated. 26 were Turkish and 17 International (from Poland, Germany, France, United Kingdom, Austria and Netherlands).

On the basis of these assessment visits a long list of recommendations was drafted. Many of them required legislative amendments, which was in the duration of the project not feasible, so we focused on those changes that could be implanted without changing the law. The project foresaw that proposed changes in the management were implemented in 5 pilot courts: Aydin, Konya, Manavgat, Mardin and Rize.

II. OBSERVATIONS

As you can image, many observations were made, particularly by the Turkish experts. I attach high importance to this as it is my firm belief that each country shapes its own judiciary, according to history, tradition, culture and political priorities. One should not copy any system, just look at why things were arranged or organised in a certain way and determine your won destiny.

On the other hand, also Turkey as a founding member of the Council of Europe cannot neglect development of the last decades in member states, often as a consequence of an increased awareness after the accession of the former communist states and the case law of the ECHR. Two aspects appeared to be important and fundamental issues, discussed broadly among the leadership of these pilot courts and elsewhere:

- Cooperation with Chief Prosecutors

- Introduction of Court managers.

During my visits to courts another aspect caught my eye: people work in the courthouses with much motivation and energy; they are very devoted to their work in the judiciary. At the same time and for that same reason, it struck me that many people – be it judges and prosecutors or clerks and registrars – have very sound ideas as to the way matters need to be organised or structures in the future. It goes without saying that we took much advantage of that.

III. THE RELATION BETWEEN THE CHIEF PROSECUTOR AND THE COURTS

Like all other member states of the Council of Europe Turkey has a constitutional system with the separation of powers: legislative, executive and the judiciary.

In this framework the public prosecutor plays a very special role. I maintain that a prosecutor is a magistrate, who is in a position to decide in independence on prosecution or non-prosecution. Nevertheless he is mostly seen as a (very special) part of the executive power, to be distinguished from the judges and the courts.

In Turkey the prosecutor enjoys a rather independent position. But on the other hand, in a courthouse he is the formally responsible authority for the management and the organisation of the courthouse (the facilities). Heating, lighting, maintenance, security and many other aspects are under his final responsibility, in some aspects with the intervention of the Justice Commission (consisting of two judges and the chief prosecutor).

But in fact, the situation is this that the chief prosecutors decides on all details in the courthouse, where the courts are fulfilling their duties. Also, looking at the court hearings in criminal cases, it has struck me that the prosecutor and the judges are sitting behind the one and the same table. Moreover, prosecutors often complained about the tiny administrative details to be handled, which kept them from their real work: overseeing and coordinating the prosecution in their jurisdiction.

These, and maybe not only these, lead to a practice that does not meet the actual standards of judicial independence. After long and deep discussions the conclusion was drawn that these powers needed to be separated also in a visible way. That led to the consequence that, when feasible, a better and visible separation of the two judicial functions should be put in place: the prosecutors office has its own part in the courthouse and the courts have theirs.

But then, another issue needed to de resolved: who performs the administrative duties in the courts.

IV. THE INTRODUCTION OF THE COURT MANAGER

The person to take responsibility for the administrative duties for the courts, formerly belonging to the Chief Prosecutor, should be someone else. Mostly it is assumed that a judge – to protect his independent position – is not in a position to take administrative duties, so one must find someone else.

For these reasons – and also for reasons of a certain decentralisation of the management of courts – in many countries in Europe the function of the court manager was introduced.

From experience I can say: this person was introduced but with much suspicion. In my country in the beginning he was seen as a spy from the Ministry of Justice, who was suspected of trying to influence the judiciary where and when it could. To be honest, this was not the case, but that is another story.

Introduction of the court administrator of court manager also had a relation with budgets, big or small. The increasing numbers of cases, judges, courts staff and challenges, led to the insight of judges that managing the facilities and courthouses, was not any more judges work but the work of a professional. Provided that this person would be loyal to the court (i.e. independent) and the judiciary in general.

The numerous discussions with the leadership of the five pilot courts led to the idea that it would be useful to start an experiment with a court administrator. In a three day-meeting they made in inventory of duties that were of administrative nature. On the basis of this selection, tasks were transferred to the court administrator; as I said as an experiment. Experience must show if this has an added value and if and how this position may be extended or broadened. In any case, the purpose is: allow the prosecutor to perform the duties in which he is the expert and give the opportunity to the courts to concentrate on their judicial work.

In this context a legal and organisational problem came to light. Experts on management will use the word “delegation” when tasks are transferred to another person, while the (formal) responsible person still has its responsibility. In legal terms delegation means however that one gives away tasks and is not in a position to take them back again. So, this needs to be solved in such a way that the formal responsible person mandates the court manager to perform certain tasks and duties, with all the powers that are connected to it, but he is still in a position top take theses takes back again when necessary. Thus the position of the court manager in the framework of the project will be arranged.

V. JUDICIAL ASSISTANT

This “delegation”-problem brings me to another topic, which came out as a part if the experiment at the pilot courts: the idea of the judicial assistant.

One aspect may be clarified here: in this context many partners were coming up with the possible introduction of the so called “Rechtspl-

fleger", known in Austria and Germany. Later I will say something more about this, while explaining why there is a huge difference between this functionary and the judicial assistant.

In my view the essential task of the judge (or the court) is: to sit and to decide. That means that only the judge has the formal and substantial power to order a hearing, according to procedural law, preside or assist at the hearing, asks questions, demands evidence and/or explanation and gives parties the opportunity to say what they deem fit to defend their cases. This also constitutes the image, the visibility of the administration of justice, an essential element to promote the confidence and trust in the judicial system. Only the judge can do that, nobody else. Secondly, separation of powers means that in the administration of justice, only the judge can take a final decision in civil, criminal and administrative cases, put before him. The essential is: the judge decides, nobody else, and in independence and impartiality.

Having said that, it implies that all other things can (not must) be done by others, if that is convenient or more efficient. I can give an example.

As a court president I sat in injunction cases, provisional measures of civil and commercial kind, often with far reaching impact. As such I sat as a judge and next to me sat my judicial assistant (having a law degree, often with much experience in drafting documents and judgements). During the hearing, parties and their lawyers plead their case, give additional information, answers questions by the president; finally the president closes the hearing and announces that the judgement will follow in a week. Parties leave the court room, I stay behind with my judicial assistant. My first question to her or him is what he or she thinks, then we discuss and finally I give the decision, and the judicial assistant will go to his desk, prepares the draft judgement in accordance with what we discussed and what I decided, sends it to me by e-mail; I can make some amendments, maybe discuss a few aspects that we may have overlooked, and then the judgment in its final form is ready, will be signed, pronounced and sent to parties. So, the drafting is done by someone else than me; it allows me to hear many more cases (as I said that can only be done by the judge), decide many more, while drafting and writing can be done by others. This judicial assistant is bound to secrecy by his oath about all that happened in chambers, particularly where it deals with the discussions about the decisions. And this oath

goes far: it also means that other judges will never be told what happened, including the court president!

This function developed in The Netherlands from about 1955. Indeed, one of the hesitations with the judges at that dealt with the question whether these people could be trusted as they were hired by the Ministry of Justice and paid and promoted by that same Ministry. And there is that Dutch saying: "Whose bread one eats, his word one will speak". For that reason the distinction was made between formal and functional hierarchy. Formal means that the formal power to appoint, dismiss determine the work, giving orders and assess a civil servant is with the formal power (the Registrar of the Court, strictly spoken a person in the service of the Ministry of Justice). But functional power means that the judge can instruct the judicial assistant how and when to assist him and how the judgement or the report of the hearing must be made. In these situations the "right things to do" are not determined by the formal and hierarchical chief, but by the functional head. In other words: The formal power determines that the work of the judicial assistant is done well if the functional power – the judge – tells that he is done his work well.

Besides, the protection of the judicial assistant and the registrar of the court were laid down in law, with the simple provision: "The registrar assists the court in its work".

But back to the project. In the first place there was much hesitation as to the introduction of this function exactly because of the fear of undue influencing the independent position of the judge. This has to be taken serious, so we had to find a solution. It appeared that the magistrates, receiving their initial training and education at the Academy of Justice in Ankara, might be willing and interested to act as judicial assistants during their internship period. They were given the opportunity to express their interest, and many of them did. Subsequently they were stationed at the five courthouses, working and assisting both judges and prosecutors. By the end of the project, the period had not yet ended, but from the forts reactions, both from magistrates and the trainees, we learned that both parties like their cooperation a lot. Further experiences may lead to broader insights.

I promised to return to the "Rechtspfleger", a function sometimes used in the framework of this discussion. The fundamental difference between

this functionary and the judicial assistant is that the latter has no delegated powers: the judge or the court gives the decision.

This is different with the Rechtspfleger: according to law some judicial decisions of (what is considered) more or less simple kind are left to this judicial officer: alimony for children, registration of land, court fees. The judge has no power to decide these cases.

Briefly, when one discusses assistance to the judge or the court, we literally mean assistance to the judge, but no delegation of judicial powers.

VI. OUTSIDE ORIENTATION

As I said, the administration of justice must be seen; it goes for the prosecutor although his visibility is all right, but also for the courts.

This visibility relates directly to the confidence of the people in a fair administration of justice. According to Idil Elveriş [4]about 42% of those who had experience with courts, were satisfied with the experience; I take it that this is about the percentage of people who have trust in court. This seems to be rather low, but comparison with other countries shows that it is not alarming. According to the Justice Euro- Barometer in Europe the percentages above 50% were found only in Denmark, Sweden Germany and The Netherlands, while scores below 50% were found in Turkey, United Kingdom, Italy, Spain, Belgium and France.

Confidence in the administration of justice is a key issue all over the world. On the other hand, we have to cope with different attitudes of society: one expects much more, one is more critical and the developments in the media (papers, radio, TV but particularly internet with its unlimited possibilities like the social websites, mobile phones with picture functions and You Tube) create an increased awareness.

One cannot solve every problem at the same time, but it will be useful to show a changed attitude towards the involvement of the general public. First of all the services that UYAP has to offer are an important step in this respect, but also – to our opinion and those involved in the project – other methods needed top be used. For that reason a number of brochures have been printed and disseminated (now also available through UYAP), which appeared to be a success. But there is more. In the five pilot courts

4 Judicial Proceedings at Istanbul Civil Courts, Istanbul 2009, page 151

near the entrance the public was received by an information desk, manned by trained court staff. There people could get these brochures, but also additional information of practical nature: where to go, where to wait. People hat come to court for a hearing mostly are more or less tense, for instance on the way they will be treat3ed but also if they will be on time in the right courtroom. For that reason attendants were trained and employed who, like ushers, take care of the people for these kinds of practical aspects. These kinds of measures show that the organisation cares for those who are dependent of the services the court has to offer.

VII. LAY OUT OF THE COURTHOUSES

During the study visits in the framework of the project, not only the brochures but also the lay out of the courthouses was a matter that drew great interest among the participants. Also the existing twinning between the Courthouse in Aydin en the Dutch first instance court in Roermond (The Netherlands) was helpful and informative I the following aspect.

When visiting a courthouse in Turkey, foreign experts sere struck by the high numbers of persons that visited the courthouses and their need to find the right courtroom or registry, so that the total impression of the Turkish courthouse was one of crowded, and not quiet. Also the judges and registrars in the courthouses we visited, complained about the number of interruptions in their work from all kinds op people entering working spaces and for questions. The number of interruptions have a clear influence on the productivity of all those that work in the courthouse, on all levels. Also there is a matter of security involved. For this reason one sees in the more modern courthouses in Europe a partition between

1. closed areas (for judges, prosecutors and the main part of the registry) where only authorized people (employees mainly) are allowed to enter through electronic passes and key-cards);

2. public areas (public parts of the registry; courtrooms, waiting lounges)

3. areas for general purpose (with the information desks, security control, service areas).

These were introduced in the five pilot courts, where it showed that because of the peculiarities of each courthouse a suitable solution had to be found.

In this matter a complicated issue has arisen, where the opinions differ: which is the position of the practicing lawyers? I myself am not in favour of allowing lawyers to have an unlimited access to the closed areas, but also in The Netherlands this has been a highly disputed issue.

In the first place one argues that the lawyer for reasons of equality of arms should have the same position as the prosecutor, who has an unlimited access to the closed area as he works there himself. I would say that the comparison is not fully applicable. Prosecutors are not a party in he criminal procedure in the proper sense: it is a public officer acting in independence in handling the criminal cases and deciding on prosecution and investigation exclusively. The lawyer assisting his client as a defence counsel has a far more private position: he is able to do what he deems fit in the interest of his client.

Secondly, I understand that also for reasons as from the existing legislation, an individual lawyer must see the judge in his working room, to deliver documents. This implies that, even during a contradictory case, usually the judge is met by an individual lawyer without the presence of the lawyer of the counterpart, which is contrary to the concept of equality of arms and/or the independent and impartial image of the court. Such a situation would not happen in Europe (or: should not happen).

If you were a party in a highly disputed case, and you, while sitting in the courthouse to wait, saw the lawyer of your counterpart just stepping out of the courtroom of the judge? How would you feel? The least one can say, is that such a situation harms the impartial image of the court.

At the end of the day, in The Netherlands indeed private lawyers don't have access to the judge; they only see the judge in the courtroom. Unless for different reasons he might have an appointment with the judge, as may happen when the lawyer is acting as an official receiver in a bankruptcy, to meet the supervising judge.

But this will be a matter to be decided by the competent authorities in Turkey. But this aspect may be important when new courthouses are designed and built: this concept of separation of workings spaces in courts has a clear influence on the architecture in the future!

VIII. SPEEDING UP CASES

The ultimate goal of the project dealt with handling the huge caseload of the Turkish courts. This has to a certain extent to do with the way judges are allowed to do their work: they have to obey the law, evidently!

As I said, the duration of the project was not long enough to make any amendment of legislation possibly, but some features can be mentioned.

In the first place in criminal cases, when the suspect is accused of multiple crimes in different jurisdiction, his cases must be heard in each of the courts, while one sees elsewhere that these cases are combined into one case with many accusations on the act of indictment, to be heard by only one court at the same time. Indeed, this may imply that possible victims must travel to that one courthouse, but this is mostly considered as not serious enough to act otherwise. It rather seldom happens in reality, that victims appear in court to have their say; they prefer not to be confronted with the past any more.

An interesting topic deals with the small civil claims: the mobile phone bills, the credit card claims, the premiums for insurances, etc. Often the financial interest of the claim is not high: maybe YTL 1000 or 2000. In these cases the court in Turkey has to examine the case, ask for justification, documents etc, before the decision can be taken, even if the defendant does not appear in court.

As I said, it deals with civil claims, and to our concept, it deals with rights over which the parties have at their free disposal: if they agree to settle this case, or not to bring the case to court, it is their decision and their freedom. In The Netherlands , and not only there, the general attitude then is, that if you, as the defendant, don't take trouble to appear in court, we consider the case and the factual grounds as undisputed, and decide accordingly. The claimant just has to put in the statement of claim sufficient facts that support the claim; these facts go as undisputed and he will be condemned to pay the sum that was claimed. In reality, for these sorts of claims, the judgment is given immediately and is available the next day for enforcement by the bailiff. In my court in The Netherlands (Zwolle-Lelystad) this was the case in about 17000 cases.

A comparable situation exists in Germany where in the framework of the "Mahnverfahren" one can – after submitting the claim to a limited number of courts, even digitally - judgment of the court - if one does not

object within, as far as I remember, 2 weeks after delivery of the claim to the debtor[5].

Such a situation does not exist in Turkey, although the situation at the enforcement court is more or less comparable, but not very efficient as there are many obstacles in the framework of the enforcement.

The workload of court would be seriously alleviated in case of introduction of a system to judge undisputed claims in a comparable way as described above, of course fitting in the Turkish traditions. One of the complications might be the updating of the civil registry so that one can know the correct name and address of the debtor.

Secondly, I talked about settlement. It struck me that although the law stipulates that the judge or the court should try to find an amicable solution, an attempt towards settlement between parties in the civil procedure, this is seldom practised.

It is not for nothing that both in the US and in Europe much attention is paid the last 10, 15 years to alternative dispute resolution, ADR. Although I don't believe that this is the solution to reduce the workload of courts, it strongly believe in attempts both in court as outside court to try to bring parties to an amicable solution. The court system en the judge play an essential role there. He is in a position to ask the parties for information listen to the analysis by parties and their lawyers, paint the procedure that might be following and as parties to consider a peaceful solution. Decennia long experience with this more active role if the civil and commercial judge shows that in more than 30% of the contradictory cases a solution is reached, of the within 6 months from the start of the proceedings. This might maybe also call for a different approach of sorts of hearings.

IX. THE COURT PRESIDENT

Much more can be told and many more observations can be shared on this project, but I would likt to limit this contribution, but not after having said something on the following.

Almost everywhere in Europe one will find the function of court president or chief justice of a court or tribunal.

5 see www.gerichtliches-mahnverfahren.com).

With this function I mean that in a certain jurisdiction, with a courthouse where judges are doing their work, criminal, civil, commercial and sometimes also administrative cases. As the "primus inter pares" the first among his equals, one finds the court president as a coordinating person. I can tell long stories about this function, but I would just like to point out that in any professional organisation (prosecutors offices and courts can be classified as such) a professional should be the coordinating person, chairing meetings of judges, being the natural counterpart in organisational issues for the local Bar, the Chief Prosecutor and other public authorities. In addition, he can act as the spokesperson and the representative of the court to the Ministry of Justice. Briefly the external face of the court and internally the coordinating body in the courthouse for all judges.

In Turkey this function exists for all courts, except the regular courts (civil, commercial and criminal). Introduction of this function is advisable, also with a view of quality control, and to prevent situations that the Judicial Inspection must perform its duties.

CONCLUSION

The project allowed us to share many of our experiences with Turkish judges and judicial; authorities. We found an open eye and an open ear for our observations, but we were always welcomed with an open and interested attitude.

It was a joy to work with many talented judges and prosecutors! We hope that there will be opportunities shortly to catch up on our findings an work towards a better judicial system for the benefit of Turkey and its inhabitants and for the judiciary and for all those talented and hard working colleagues that work there!