Should Constitutional Court hand individual complaints over ?

By Mehmet Gün / 24 November 2022, Thursday / Published In Politics

TCC Chair Zühtü Arslan demanded the growing workload of the top court because of the individual applications to be handed over to the ministry of justice.

Turkish Constitutional Court (TCC) throws in the towel and says there is an overload of complaints of violations from individuals regarding rights to fair trial. Howbeit TCC has the least workload among the higher courts in Turkey. Including the rapporteurs, each judge sitting at TCC has 300 cases, excluding the inadmissible applications, whereas Court of Cassation has 1,051, State Council has 656, regional appeal courts have 708 and the first instance courts have 1073.

TCC Chair Mr. Zühtü Arslan discloses three quarters of complaints pertain to rights to fair trial. He says that more than 77 percent of the 30,000 violations since 2012 relate to rights to fair trial and more than 60 percent relate to the right to be tried in reasonable time.

“Reasonable Time” is violated due to structural problems

TCC asserts that the reasonable time is 4 years. Four years is exceeded in almost all lawsuits therefore violating the right to be tried in reasonable time. Indeed, in all types of lawsuits exhausting the first instance, appeal and cassation levels easily takes 4 years, while commercial court and serious crimes cases, in average, takes 4 years in first instance while becoming final after appeal and cassation stages reaches to almost 10 years. Any reversal in the course easily doubles the length.

Inability to conduct trials in a reasonable time is a result of structural problems of the Turkish judiciary as Chair Arslan remarks. Judicial statistics show that Turkish courts postpone approximately 35 percent of their workload to following years. In fact, in 2021 courts postponed 3 million 299 thousand out of 11 million 651 thousand of total cases to 2022. It can be estimated an average case would take 5 to 9 years to try.

Turkish judiciary’s diverse structural problems range from the poor judicial administration crippling the system to arbitrariness, lack of accountability and integrity of judicial professionals, unreliable disclosure of facts, dragging production, collection and lack of quality and assessment of evidence, corrupted procedural laws and habits restricting implementation of single trial hearing.

Perjury, lack of trust and inefficiency in trials

Lying to the court in trial and attempts to mislead and to miscarriage of justice is tolerated considering the lying is a defence right. It has almost made impossible to collect evidence efficiently and establish the facts of the lawsuits.

Distrust prevails between the essential parties of the trial, i.e., judges, lawyers and prosecutors. The mentality that sees the judiciary consists of judges and prosecutors and treating lawyers as aliens among where in reality lawyers propel the system to function. This attitude interferes with the rights and authorities of lawyers to establish the truth, to collect the evidence, locate expert witness and obtain evidence, and entrust 9/10 of the work in cases onto judges and prosecutors despite they are only 1/10 of the judicial workforce while idling lawyers the 9/10 of the workforce. Due to the foregoing disposition, judges, prosecutors and the judicial administration have acquired de facto immunity and become a privileged group despite they cannot perform their duties properly.

Because the integrity of the parties involved in trials have been heavily neglected as no procedures and mechanism, in order to ensure the full and frank disclosures to the court and production of evidence have been established creates an awful environment of distrust between the principal client and his attorney, between attorneys of counter parties, between attorneys and judges and finally between judges and principals. Lawyers greatly suffer from lack of respect, work and income.

As a consequence, courts try to adjudicate lawsuits on their own accord with some ill-developed pragmatical manners rather than following the law and logic but in any event fail to perform their duties.

Forced system of court appointed experts

Following years of evidence gathering in all cases courts, at their own discretion appoint expert witnesses thus interfering with the parties' rights of proving their arguments thus restricting them. It goes on and on as the court struggle to find suitable experts, instruct them, address parties' objections against often faulty and inaccurate so called "expert reports" by finding and instructing second set of experts and then third set of them in order to address differences between the first and the second expert reports. Thus, lawsuits are postponed indefinitely for years.

Courts have developed the court appointed experts into de facto assistant judges summarizing arguments, evidence, making calculations and recommending conclusions that are very often adopted by judges and court's adjudication despite it is unconstitutional and illegal. The judicial system unduly protects court appointed experts with a de facto immunity. As a result, all maladies of the experts have been transfused into the judicial system.

Replacement of judges during trials

As also criticized about the politically motivated cases in almost all lawsuits that run through years judges are replaced with new ones thus violating the natural judge principle and newly appointed judges struggling to familiarize with already developed cases end up in delivering inaccurate decisions.

It is obvious even to the ordinary citizen that the first way to address TCC's workload complaint is to solve the violations of rights to fair trial. However, authorities are blissfully ignorant to the obvious…

Back in 2012 Turkey was at the top of the countries convicted of human rights violations. In an attempt to conceal this bad image, former minister of justice Mr. Sadullah Ergin, in consultation with the European Court of Human Rights (ECHR) architected the system direct complaints to TCC disregarding criticism at the time. He now says that unless the public is satisfied with delivering justice overwhelming flow of complaints will continue and the TCC may loose its accreditation.

Single hearing in trials

Turkish Ministry of Justice published three judicial reform strategy documents in 2009, 2015 and 2019. Despite the former minister Mr. Abdülhamit Gül made public statements and the ruling parties has a clear majority in the parliament "single hearing" principle has not put in place. This is another proof of the English proverb "I want chocolate, does not get it!"

In order to realise the "single hearing" in trials first the parties' integrity in trials need to be established through safe and sound mechanisms and procedures that ensures the full and frank disclosures of fact and production of evidence during the trial, thus collecting quality evidence efficiently and without interfering the parties' defence. Only then lawsuits can be maturely prepared and single trial can be doable by making sure that all relevant parties appear in the court a hearing date and remain at courts' disposal.

Save for the accused's right to remain silent and prohibition of self-incrimination this must be realized in all civil, criminal and administrative trials.

Modern, proactive dispute management mentality

Lawyers must be empowered to establish the full facts and collect the evidence a new court should be formed with a duty to oversee the preparations for a lawsuits helping attorneys and citizens to prepare their cases while preventing abuses and making all necessary preliminary precautions, we at Better Justice Association propose this court to be named as "Judicial Preparatory Courts".

Only then, the courts having received well prepared files promptly set dates for single hearing immediately after exchange of well-prepared pleadings, properly try all evidence and deliver judgement at the end of the hearing. Thus, trials currently taking 4 to 5 years may be resolved efficiently within 3 to 4 months in typical cases, or 40 to 50 days in simpler cases. This can easily be done as shown in this short video.

When a system is established that makes honesty and quality prevail in the trials it will enable us to culminate abundance and progress from conflicts as suggested by our association.

Judiciary will be enabled to produce added value only when a modern proactive dispute management system is established causing the disputes to be resolved by reconciliation of the parties while making the court trials is the last resort.

TCC has no right to seek to transfer its workload

Despite it is the institution that will analyse the complaints piling up on its door and to find the root cause and seek solutions TCC is seeking to transfer complaints to an administrative body. Ignoring the fact that it declares almost 80% of complaints inadmissible the Chair Arslan, also employing a logical fallacy by saying that since 2012 when it was incepted 428 thousands complaints have been filed pinpoint accurately described that “reasonable time violation” complaint should be previewed by a commission within the Ministry of Justice. It appears that the MOJ has taken steps to include such a provision in the draft in an omnibus law called judicial pack.

It proposes to transfer 68,000 complaints to the commission, aiming to further frustrate the applicants through formalities: First the TCC files will be closed and applicants will be invited to apply to the commission, then the commission will offer negligible compensations, those wo refuse to accept will have to file a new complain with TCC, which will probably be found inadmissible and if they are still alive and insane applicant will apply to ECHR. The main aim is to frustrate applicants and make them drop out instead of helping them. Would it not be smarter and easier to invite the commission to review those 68,000 complaints and to try and settle with the parties amicably without forcing the applicants through the garden path in wild goose chase? No, it is not intending to do that! It is because the comfort and affluence of being a public servant prevail their patrons, over the nation’s righteous interests. Isn’t it resembling to Srebrenitsa where innocent Bosnians were delivered to Serbians by so called peace keeping soldiers?

The capacity increase of TCC is a necessity

The TCC’s capacity to deal with complaints must be increased immediately, because ECHR, – though unethically – made TCC procedure a precondition. For this purpose, a dedicated chamber in TCC will be sufficient. Together with this, TCC’s other problems can be solved. Its capacity should be at least doubled by increasing members from 15 to 30 members, organizing it with 3 chambers and general assembly. Accessible competition involving the public should be adopted in the delegation and appointment of members thus also addressing politicization of the court. Here are Better Justice Association’s proposals.

I am hoping this article also serves to convince minister of justice and the chair of the TCC to honour my request for an appointment and listen to our innovative solutions that we have prepared in one year with intense work of 9 people distilling our knowledge accumulated over 10 years, opened up for discussion in Turkey and internationally and have been receiving very good feedback so far.