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VIRTUAL JUSTICE IN TURKEY:

Where We Are and What to Expect From the Future?

Contents

Introduction

We are in an era where every sphere of our lives is, willingly or unwillingly, shaped or at least touched by technology. As the new norm, technology sets the boundaries for the concept of "normal." Unavoidably, every profession had to revisit, transform, and technologize its traditional practices and rules to some extent in order to catch up with this new normal.

Judiciary, with its long-standing traditional practices and historic roots, is one of the most conservative fields which have resisted to implement the new normal in. On the other hand, judiciary has always been a field which has to answer growing demands of the society for a swift and equal access to justice anytime and anywhere. This back and forth between the traditional and the technological seemed to be in a draw until an unexpected last-minute game changer, COVID-19 took the stage and broke the tie. Upon the appearance of COVID-19, even most conservative mindsets found themselves questioning the traditional methods of justice and embracing the technology to maintain judicial services. As a result, it is undeniable that justice is more virtual now than ever, and a complete way back to traditional seems to have already been closed.

Following the global trend, Turkey has adopted significant reforms for more virtual, remote, and digitalized justice. While the reforms aim to reach a greater extent in the upcoming years, they are, nevertheless, entangled in issues towards reconciliation of the new normal with the long-established principles of procedural law.

In this publication, we will have a quick look at virtual justice as a global trend, and then explore Turkey's efforts to keep up with this worldwide phenomenon so far. Only national court related services will be touched upon, and alternative dispute resolution methods which are not offered as a public service will not fall under the scope of our insight. There is no doubt that alternative dispute resolution always stays one step ahead of national justice in terms of embracing technology. Indeed, a look at the future of virtual justice is the best way to conclude this insight which leaves us with a great curiosity for upcoming developments.

Virtual Justice As a Global Trend

Jurisdictions around the world are increasingly embracing digital technologies for the purposes of more efficient, less expensive, fairer, and accessible justice systems. Online platforms were introduced in a large number of states in order to enable judges, attorneys, parties, court clerks, and court-appointed experts to access case law, initiate and manage court cases,access case documents,make filings and payments, andattend hearings. In addition, online conciliation and mediation platforms enabling the parties to settle their disputes amicably in advance of court proceedings (e.g. Medicys in France which is designed to resolve consumer disputes online) are offered.

The most remarkable development is, undoubtedly, the launch of platforms enabling the law practitioners and parties to attend hearings remotely. In fact, even before the emergence of the outbreak, e-hearings had been held in different jurisdictions such as the United States of America (“USA”), the United Kingdom (“UK”), China, Singapore and New Zealand. However, during the COVID-19 outbreak e-hearings have gained a widespread practice in those countries. For others which were not familiar with online justice services, the pandemic has brought unprecedented interest and attention to remote justice.

Methods adopted bystates for offering e-hearing services include, using third-party applications such as Zoom, Teams, WebEx, WeChat, BT MeetMe, Skype for Business, or creating brand new platforms for the purpose (e.g. TOL in Italy, CIMS in Canada).

Compared to the other jurisdictions, UK's remote hearing procedure was definitely a very fast adaptation to the upheaval of COVID-19, and it served as a model. In order to ensure that the courts continued their operation, sections concerning the usage of video and audio technology by courts and tribunals were included in the Coronavirus Act 2020, which received Royal Assent on 25 March 2020, and, accordingly, Civil Justice in England and Wales Protocol Regarding Remote Hearings ("Protocol") was issued by the Judiciary of England and Wales on 26 March 2020. Before the Act and the Protocol, video hearings were possible technically, however they were held at the discretion of the conducting judge, which was a rather rare occasion. The Protocol sets forth that all remote hearings shall be held in public. Possibilities in this regard are listed as relaying the audio or video of the remote hearing to an open court room, allowing a media representative to log in to the remote hearing, and live streaming the remote hearing online.

Concerning the issue of the recording of the hearings, the Protocol suggests that can be achieved by recording the audio or video relayed to the open court room, recording the hearing by using the tools of the online system being used to conduct the hearing (e.g. BT MeetMe, Skype for Business or Zoom), or recording the hearing by using a mobile phone. In addition to setting out the basics of the remote hearing proceedings, the Protocol lists the available methods to hold virtual hearings non-exhaustively, which includes court video link, BT conference call, and ordinary phone calls in addition to the ones mentioned above.

China's execution of virtual justice is yet another remarkable example. Taking it one step further, China founded three Internet Courts in Hangzhou, Beijing and Guangzhou since 2017. Internet courts of China handle civil and administrative cases that are particularly related to Internet since the country is home to several e-commerce giants. These courts deal with issues such as contract disputes concerning online shopping, copyright and infringement lawsuits, and domain name disputes. In addition to dealing with internet related cases, Internet Court proceedings are conducted online to a large extent. Internet Courts have a customized platform that enable the parties to file lawsuits, mediate, exchange petitions, submit evidence, hold hearings, and announce judgements online.

All those developments certainly reduced paper-based work, physical visits, court workload, and costs. However, those platforms are still offered as supportive mechanisms and they do not allow a complete departure from the traditional systems based on physical appearances at the court houses and hard copy filings yet. Even in the UK model, remote hearings are possible and encouraged, but the parties are free to choose (i) to adjourn their cases if a remote hearing is not possible and proceedings in court are unviable, or (ii) to hold the hearing in court with appropriate precautions.

Where Does Turkey Stand?

Following the global trend, Turkey's judicial system has been subject to continuous reforms to enhance its efficiency. The reforms have brought, among others, significant technological and structural novelties. Within the scope of those reforms, Turkey has already offered several online services introduced below to render the justice more effectively, swiftly, accessibly, and paperlessly. However, Turkey does not seem content with the offered services and aims for the better in virtual justice. Accordingly, the latest Judicial Reform Strategy dated May 2019, of the Ministry of Justice ("the Strategy")1 sets 9 targets to render the judiciary more effective and fairer in Turkey. More particularly, Target 4 of the Strategy is determined as "to increase performance and efficiency." Tools for reaching the main target are, inter alia, defined by the Ministry as:

- By benefitting from technological means, justice services will be provided in a citizen-oriented manner (Target 4-Item 7)
- IT systems in justice will be developed. (Target 4- Item 10)

In line with the above objectives, the Ministry of Justice continues to take significant steps for digitalization of justice in Turkey. Accordingly, the last significant improvement was the launch of online hearing possibility which was planned for a while but occurred as a necessity due to measures implemented to prevent the spread of COVID-19.

[1] Available at https://sgb.adalet.gov.tr/Resimler/SayfaDokuman/23122019162931YRS_TR.pdf

A. Available Online Services and Legislative Framework

1. UYAP

Turkey's most remarkable technological reform in justice was, undoubtedly, implementation of the National Judiciary Informatics System ("UYAP"). UYAP is an online network which ensures interconnection between all departments of the Ministry of Justice including, courts, public prosecutors' offices, enforcement offices, and the central organization. UYAP is introduced and described in Article 445 of Civil Procedure Code ("CPC") titled "Electronic Transactions," which defines the system and lists its functions in civil proceedings. There are also other laws that provide a legal basis for the use of UYAP by listing the instances in which it should be utilized such as the Code on Criminal Procedure ("CCP") and the Code of Enforcement and Bankruptcy.

All judiciary units were connected to each other via a sole central network. This connection was provided through territorial lines and satellite which substitute for each other. UYAP software is managed from a Central System Room located in Ankara. In order to establish the technical infrastructure of UYAP, PCs, laptops, laser printers, uninterruptable power supplies, and laptop printers and scanners, were supplied to Ministry of Justice staff. UYAP is also available through Virtual Private Network (VPN) where the cable network is not established yet.

The system is backed up through a disaster center which becomes active in case of extraordinary situations. Further, a help desk serves the users with immediate assistance requests lodged through e-mail, telephone, and fax.

UYAP has received multiple awards, including the 2017 International Data Corporation prize, the 2016 WSIS prize, and second place at the 2012 United Nations Public Service Awards.[2] UYAP has been consistently developed and supported through new features which enlarge its area of usage and improve itsexisting services. According to the updated statistics provided by the Ministry of Justice, the number of total UYAP users is 4,780,430.

UYAP constitutes the main gateway where different actors of justice access the portals and systems specifically designed for their use, and where online services are made available. UYAP is also integrated to E-Government and allows users to reach information found at E-Government. Portals and services available via or connected with UYAP are mainly defined and regulated in the Regulation Concerning the Conduct of Administrative and Editorial Services of Regional Court of Justices, First Instance Courts for Jurisdiction, and Chief Public Prosecutor's Offices. Significant available portals and services are briefly introduced below:[3]

[2] UYAP has received third prize in the Best Innovation Project category in the 2017 International Data Corporation Awards, first prize in the in the E-Government category in the 2016 WSIS Awards and UYAP SMS Information Systems received first prize in the 2012 United Nations Public Service Awards, see https://www.uyap.gov.tr/UYAP-Odulleri.

[3] For further information see https://uyap.gov.tr/Hizmetler

- **Citizen Portal (Vatandaş Portal):** This Portal enable citizens to access all judicial and administrative cases, enforcement proceedings filed by or against them, and to file civil lawsuits. Citizens can access the Citizen Portal through mobile signature, e-signature, E-Government password, or the E-Government platform.
- **Lawyer Portal (Avukat Portal):** This Portal eases lawyers' lives in Turkey, meaning lawyers are no longer required to physically visit the courthouse in order to:

  » review court and prosecution files;

  » submit petitions and make copies of documents submitted;

  » deposit expenses and litigation costs with the court; and

  » conduct asset research of debtors in insolvency cases.

In addition to the above, virtual hearings are gradually becoming accessible to lawyers.
The Lawyer Portal is accessible through e-signatures and mobile signatures which are assigned to lawyers.

- **UYAP Legislation and Jurisprudence Database (Uyap Mevzuat ve İçtihat Programı):** This database allows free access to the legislation and the court precedents via a program that can be downloaded online. A mobile application called "Uyap Mobil Mevzuat" is also available to provide mobile access to the database.
- **Expert Portal (Bilirkişi Portal):** This Portal is designed for Court appointed experts, and enables them to access files of the cases that they are appointed to. The Portal is also accessible through a mobile application.
- **Mediator Portal (Arabulucu Portal):** This Portal allows registered mediators to access mandatory or voluntary mediation files assigned to them, to file and save documents in those files, and check general mediation statistics. The Portal is also accessible through a mobile application.
- **Conciliator Portal (Uzlaştırmacı Portal):** This Portal allows the conciliators appointed in criminal cases subject to mandatory conciliation to access files assigned to them, and to file and save documents in those files. The Portal is also accessible through a mobile application.

- **Institution Portal (Kurum Portal):** This Portal is designed for public and private institutions. Through the Portal, institutions can follow up closed or pending cases filed by or against them before judicial and administrative courts, and enforcement proceedings filed by or against them before enforcement offices.
- **E-Sales Portal (E-Satış Portalı):** The Portal enables execution and bankruptcy offices to publish information about auctions made under the Code of Enforcement and Bankruptcy, and bidders to bid electronically by depositing collateral.
- **SMS Information System (SMS Bilgi Sistemi):** Through a cooperation established between the Ministry of Justice and the major GSM operators in Turkey, subscribed lawyers and citizens receives SMS notifications about cases, executive proceedings, and hearing dates.

- **Audio-Visual Information System (SEGBİS):** This system has been introduced for the audio-visual recording of testimonies, interrogations and trials, as well as the distant interrogation or hearing of persons outside the precinct of the court, who cannot be present during the process, by means of videoconference. SEGBİS equipment allowing access to SEGBİS is available in courthouses and penitentiaries.
- **E-Justice Portal (E-Adalet Vatandaş):** E-Justice is an additional mobile application that was launched in 2019, in order to assist UYAP Citizen Portal. Through the E-Justice application, individuals may monitor all legal and commercial cases concerning themselves, open and closed, and follow the procedural timeline easily.
- **Celse:** "Celse" is a mobile application launched in 2018, and functions in connection with UYAP for online conduct of procedural transactions by attorneys. Through this application, attorneys can view their execution files and cases as well as monitor their hearing dates.
- **Police Portal (Kolluk Portal):** The Portal is still under construction. Once activated, the Portal will enable direct assignment of criminal cases from Police departments to prosecutors. It will significantly accelerate prosecution by reducing bureaucracy between police departments and prosecution offices. In addition, through a system called MABS (Mobile Wanted Person Information System), law enforcement officers working mobile have access to arrest and warrant decisions available on UYAP.

2. E-Service

The gradual transfer of the all services to electronic service began in 2016, with the requirement of e-service for certain taxpayers. Over the years, the implementation of e-service became prevalent and as of 1 January 2019, it became mandatory in Turkey to make notifications to certain parties including lawyers registered to the bar, registered mediators, and experts via the National Electronic Services System ("UETS") established by the Turkish Post ("PTT"). The Electronic Services Regulation was published in Official Gazette number 30617 on 6 December 2018. The procedure for electronic service under the regulation can be summarized below:

- The authority making the electronic service prepares the electronic service message on UYAP and delivers it to UETS.
- The time stamped and encrypted electronic service message is sent to the addressee, while PTT ensures security for the system.
- Electronic service is deemed to be served upon the end of the fifth day following the delivery of the message and the relevant statutory time period commences as of this date.
- An addressee who wishes to get delivery messages regarding electronic servicemust notify the PTT of an e-mail address or a cell phone number which can receive SMS messages. PTT sends e-mail delivery messages to the addressee free of charge, but a fee will apply for SMS messages. Messages which are delayed or fail to be delivered do not impact the validity of the electronic service.
- PTT keeps records for 30 years, which are deemed to be definitive evidence, unless proven otherwise. The records state:

  » The serving authority delivered an electronic service message to UETS.

  » The message was received by the addressee.

  » The message is deemed to be delivered.
- PTT allocates storage space to all electronic service users for a fee. If the storage space is full, the data will be kept open for the user's access for at least six months after it is deemed to be delivered. The data will then be deleted, starting from the oldest.
- If electronic service cannot be made due to a force majeure, services will be made as per other procedures set forth in the Services Law.

The requirement of electronic service of documents has achieved a great deal since it simplified the service of any public document including judicial documents.

3. Virtual Hearing

Civil Courts:

Virtual hearing at the civil courts through UYAP has been on the agenda of the Ministry of Justice for a while. This opportunity has been available at the criminal courts since 2012, and became an urgency for civil matters as well, due to effects of COVID-19. Accordingly, the Ministry of Justice has accelerated the process.

The first trial was conducted in June 2020, by the Minister of Justice. Then, a pilot scheme was implemented in Ankara West Cadastral Court, 1st and 2nd Consumer Courts, along with 1st and 2nd Civil Enforcement Courts. Finally, the Ministry of Justice decided to enlarge the scope of application, and, as of 19 October 2020, e-hearings became accessible before 42 consumer courts at Ankara, Istanbul (Çağlayan), Istanbul Anatolian, and Bakırköy Court houses. E-hearing became available in all Enforcement Courts at the Ankara Court house and all civil courts at the Ankara West Court house as of 30 November 2020, and in all Consumer Courts, Enforcement Courts and Cadastral Courts at the İzmir, Bursa, Aydın, Adana, Antalya, Balıkesir, Denizli, Diyarbakır, Erzurum, Eskişehir, Gaziantep, Hatay, Kahramanmaraş, Kayseri, Kocaeli, Konya, Malatya, Manisa, Mardin, Mersin, Muğla, Ordu, Sakarya, Samsun, Şanlıurfa, Tekirdağ, Trabzon, and Van Court houses as of 7 December 2020. The Ministry of Justice aimed to increase the number of courts offering e-hearing services to 200 by the end of 2020, and the target has already been achieved. As of the date of this Article, e-hearings are available at 260 courts in 30 cities. The long-term target of the Ministry is implementing e-hearings in all courts in Turkey during 2021.

The legislative ground of virtual hearings in civil courts is Article 149 of the CPC titled “Conducting Hearing Via Audio and Video Transfer.” The Law numbered 7251 on the Amendments to the Code of Civil Procedure and Certain Laws which was published in the Official Gazette dated 28 July 2020 and numbered 31199 and entered into effect on the same day, have introduced significant reforms to the CPC including Article 149.

Prior to the amendment, conducting hearings through transmission of audio or video was allowed in cases whereall parties’ consent to conduct the hearing through those means were obtained. The amendment made to Article 149 of the CPC removes the requirement of the parties’ approval for conducting hearings via video and audio transfer. Accordingly, the court decides upon one of the party’s requests, or ex officio, to hold hearings through those means.

After the above-mentioned amendment, Article 149 of the CCP reads as follows:

1. Upon the request of one of the parties, the court may decide for the requesting party or its attorney to attend the hearing from their whereabouts and to carry out procedural proceedings, through simultaneous transmission of their audio and video.
2. The court may, ex officio or upon one of the parties' request, decide for a witness, an expert or a specialist to be heard from their whereabouts, through simultaneous transmission of their audio and video.
3. The court may ex officio decide for those concerned to be heard from their whereabouts for the lawsuits and affairs which are at the parties' free disposition.
4. The court may decide to hold hearings elsewhere within the provincial boundaries in case of a factual obstacle or for a security reason, upon the opinion of appropriateness of the Justice Commission of the Regional Court of Appeals within its jurisdiction.
5. The procedures and principles regarding the implementation of this article shall be determined by a by-law."

To explain the practical details, the General Directorate of Information Systems of the Ministry of Justice published a guideline[4] and video[5]. According to this guideline, the below procedure will be followed in e-hearings:

- Requests will be filed via attorney portal ("Avukat Portal") or CELSE applications available on UYAP.
- Attorneys can file their requests for conducting a hearing online 24 hours in advance at the latest. Filing requests within last 24 hours will not allowed by the system.
- On Avukat Portal, when clicking on the relevant hearing in the list of the hearings, a "Send A Request" button will appear. If clicked, a window allowing the attorney to state the grounds for her/his request for e-hearing will pop-up. Once the grounds are filled out, it can be submitted to the court.
- Requests will be directly assigned to the president and an authorized officer in courts of a board and to the judge where the court is consists of single judge.
- President/Judge will be authorized to approve the requests 24 hours in advance of the hearing at the latest. Until the last 24 hours, if not approved or dismissed yet, the request will be marked as "Under Review." In the last 24 hours before the hearing, pending requests will be automatically dismissed by the system.
- Once the court initiates the e-hearing, a"Join the hearing" button on Avukat Portal/Celse will be activated and attorneys will be able to join the hearing by clicking this button.
- Cybersecurity will be ensured through e-signature or mobile signature allowing attorneys to enter into Avukat Portal/CELSE. Further, before initiating the hearing, the judge will verify attorneys' information and photo through UYAP. Due to cybersecurity concerns, attorneys are not allowed to attend e-hearings via another attorney's e-signature on the basis of an authorization certificate from the other attorney which does not allow the judge to verify the attorney's identity. In such case, attendance of the attorney acting on the basis of the authorization certificate will not be accepted by the judge,and the attorney whose e-signature was used will also be deemed as absent.
- Once verifications are fulfilled, the e-hearing will be conducted as a traditional hearing regulated by Article 183 of the CCP and Article 49 of the Attorneys' Act. Accordingly, use of any devices allowing audio or video transmission are prohibited during e-hearings. Judges and attorneys will be vesting their traditional robes and the order of the hearing will be ensured by the judge(s).
- Different courtroom screens will display attorney and hearing minutes. At the end of the hearing, minutes will be uploaded to Avukat Portal.
- Quality of connection and data transfer will be the user's responsibility. To avoid any interruption during the hearing, an 8Mbit internet connection will be required. The connection shall not be made through a common network. No other application shall be used during e-hearings. It is also advised that fixed networks such as office networks should be used for connection rather than mobile networks.

It is fair to say that user experience as of the date of this publication is quite positive towards the e-hearing. The first impressions include that judges do not refuse requests for e-hearings which are submitted on time, the waiting period which would reach up to 2-3 hours in a physical hearing has been shortened through e-hearings, e-hearings are conducted in an atmosphere similar to that of a physicalhearing room, it is easy to follow both the hearing minutes and the judge's actions, no major connection problems have been experienced, and audio and video quality is high.

[4] Available at https://rayp.adalet.gov.tr/resimler/468/dosya/e-durusma-avukat-kullanim-klavuzu05-11-202014-11.pdf

[5] Available at https://rayp.adalet.gov.tr/Resimler/468/video/edurusmavideo06-11-202011-00.mp4

Criminal Courts:

Virtual hearing opportunity has been available at the criminal courts since 2012, through SEGBİS which has been introduced for the audio-visual recording of testimonies, interrogations and hearings, as well as the distant interrogation or hearing of persons outside the precinct of the court who cannot be present during the process by means of videoconference**.**

Art. 3 of the Regulation on the Utilization of Audio-Visual Information Technology Systems in Criminal Procedure published in Official Gazette dated 20 September 2011 ("the SEGBİS Regulation") defines SEGBİS as: "The Audio-Visual Information System that electronically transfers, records and stores sounds and images simultaneously." Under the SEGBİS Regulation, SEGBİS is designed as a feature of UYAP by the Ministry of Justice (Article 5 of the SEGBİS Regulation).

In the CCP, use of audio-visual transmission is by through several articles (Articles 52, 58, 147/1-h, 180/5 of the CCP). Accordingly, SEGBİS may be used to hear, interrogate, or ensure attendance at hearings witnesses whose identities are kept anonymous, individuals heard within the scope of International Judicial Assistance, experts, and witnesses that cannot be present during the hearing due to any valid excuse, or who are located outside the precinct of the court,defendants, detainees, suspects and arrested individuals,individuals who are in a therapeutic institution, or outside the precinct of the court.

Further, through a controversial amendment to Article 196/4 of the CCP, introduced through the "Decree Having the Force of Law numbered 694 on Making Several Regulations As Part of the State of Emergency" published in the Official Gazette dated 25.08.2017 and numbered 30165, it is regulated that "the defendant's statement could be taken via SEGBİS in situations where the judge or the court deems it necessary". This amendment, whichgivs a large amount of discretion to the court, is heavily criticized by legal practitioners in Turkey for its potential to violate a defendant's right to be physically present at a hearing and principle of face-to-face confrontation.

Law enforcement officers are required to ensure the presence of the relevant person at the location where the distant interrogation through SEGBİS shall take place. To this end, the requesting authority shall declare the identity of the person, the time and place of the hearing, and any preparations to be made beforehand to the relevant law enforcement agency. An appropriate number of law enforcement officers shall be present during the process (Articles 13 and 15of the SEGBİS Regulation). In addition, for people held in detention, the requesting authority gives necessary information to the penitentiary institution (Article 14 of the SEGBİS Regulation) to ensure the presence of the detainee in the SEGBİS room.

Interrogations and hearings made through SEGBİS are, in principle, recorded in SEGBİS (Article 9 of the SEGBİS Regulation). Recording of testimonies of child victims of crime, and witnesses who cannot be produced before the court personally and whose testimonies are indispensable for uncovering the truth, are specifically regulated as mandatory (Article 52/3 of the CCP and Article 9 of the SEGBİS Regulation).

Records obtained through the SEGBİS are transcribed into digital minutes under UYAP and signed electronically. Copies of the transcriptions may be delivered to the parties, but audio-visual recordings are not handed over to them. In case of demand or objection, audio-visual recordings may be made available for examination by the relevant person accompanied bythe prosecuting authority (Article 8 of the SEGBİS Regulation).

B. Current and Anticipated Issues

Digitalization of justice is an intricate subject involving issues regarding principles of procedural law, and fundamental rights like access to justice, a fair and transparent trial, due process, and privacy. Therefore, an ideal digitalization would certainly be one ensuring protection of fundamental rights rather than sacrificing them on the way.

1. Access to Justice

Remote dispute resolution methods are considered to be supportive for access to justice. Indeed, it is undeniable that online access to court documents, and the opportunity to file and manage court cases through online platforms are great steps towards more accessible justice. However, for a fully accessible, stand-alone, paperless online system, there is still a long way to go. In Turkey, despite electronic filings, hard copy files of each case are still kept at the court, and the system is not suitable for excluding traditional procedures completely.

Although fully online access to justice is the ideal, the existing technological infrastructure of the country does not allow for such a transition. In fact, technology does not follow a balanced trend of development in each region of Turkey,and there are still small towns which do not have internet access, or are deprived of technical infrastructure to allow uninterrupted access to online services. In particular, Turkey was ranked 45 out of 79 countries in the Global Connectivity Index[6] in 2019, and it is noted that "Turkey still lacks more advanced technical enablers, and the few that exist have not yet developed into a scalable ecosystem. This places Turkey below the global average. Turkey should continue improving broadband penetration and maintain affordability for its people. This is the key factor that will help Turkey to catch up with other countries in terms of cloud services and data analytics."

As a result of considerations for equal access to justice, despite all encouraging efforts and developments, our virtual justice system remains a supplementary service which does not replace existing traditional court services.

[6] https://www.huawei.com/minisite/gci/en/country-profile-tr.html

2. Fair Trial and Due Process

There are several procedural principles in Turkish law, some of which ensure an individual'sconstitutional right to a fair trial (Article 36 of the Turkish Constitution). These fundamental principles constitute the basis of our judicial procedure and provide the uninterrupted application of human rights. Although virtual justice practices are very much needed in today's world, transformation from the traditional to the technological should be carried out with diligence in order to preserve these fundamental principles.

Respecting basic procedural principles such as direct examination by the court, face-to-face trial, direct access to evidence, uninterrupted hearings, equal treatment of parties,fair trial, and due process are rather hard to tackle in virtual justice. It is expected in Turkish law that the Judge shall be present in all stages of the trial, including supervising the collection of evidence and establishing a judgement. Evaluating the parties and witnesses in person and observing the evidence first hand is a vital part of a Judge's duty, and is deeply rooted in the traditional way that a hearing is conducted. In order to transition in a way that would not hurt the sense of justice for the individuals, and protect due process in civil and criminal justice, exclusive techniques might be needed to enable e-hearings to be as authentic as possible.

As satisfying measures are not taken to ensure respect to the above principles yet, SEGBİS system is heavily criticized by criminal and human rights law doctrine for breaching fundamental rights of defendants who cannot directly lead questions to the witnesses, examine evidence newly added to the file, nor receive direct legal advice from counsel during SEGBİS sessions. The practice of not bringing suspects in detention to the courtroom limits the right to self-defence, contradicts the principle of face-to-face confrontation, and the principle of orality in criminal procedures. Similar issues are expected to arise in virtual hearings before the civil courts; and the Ministry of Justice shifts the liability for technical problems to the user as indicated in the guideline published by the General Directorate of Information Systems of the Ministry of Justice, and in the announcements made on UYAP that quality of connection and data transfer are the user's responsibility, and that to avoid any interruption during the hearing an,8Mbit internet connection is required.

SEGBİS has also been the subject of a thorough examination by the Court of Cassation and the Constitutional Court from the day it was launched since the system mainly deals with issues pertaining to procedural principles, hence, fundamental human rights.

There are various precedents of the Court of Cassation and the Constitutional Court that criticized and shaped the execution of SEGBİS in relation to the principles of criminal procedures such as immediateness, face-to-face confrontation, and equality of arms. The experimental development of the SEGBİS paved the way for the realization of the importance of creating such system completely compatible with existing procedural principle, thus, setting a roadmap for future digitization processes.

Although it is stated in Article 196/4 of CCP, that if the Court or the Judge is satisfied that it is necessary, the defendant shall be heard through SEGBİS. The Constitutional Court[7] emphasizes in its decisions that in implementing this provision the Court should evaluate the situation in terms of lawfulness, legitimacy grounds, and proportionality. In order for implementation of this provision to be proportional and in compliance with the Constitution, the individuals right to intervene and be present before the Court shall be convenient to achieve the aimed purpose, it should be necessary in terms of the purpose, and it should be applied in moderation by considering the balance between the restriction and purpose. It is also remarked that the reasons for restriction of the right to be present before the court shall be duly explained in the decision, as a matter of fact. This has been cited as a cause for reversal.

[7] Constitutional Court Decision, Application No: 2016/25089, Date 10/06/2020.

In addition, gaps in the legislation concerning the SEGBİS are filled by precedents of the Court of Cassation[8]. Through several decisions, the Court of Cassation established that regarding the prosecution phase, (i) a general principle is to have the defendant present at the hearing, and this right can be restricted merely based on rightful grounds (ii) the defendant shall openly consent to attend the hearing through SEGBİS for the initial and final sessions and collection of the substantial evidence, and (iii) in the event that the Court hears a defense statement through the system, it shall be provided that the defendant is accompanied by her counsel, upon request.

SEGBİS's development process has proven to be a valuable example for further digitization processes. While it is likely that similar issues will arise with e-hearings before civil courts, through legislation and case law a system that will strikea balance among proper use of technology,fundamental principles of procedural law, and fundamental human rights should be created.

[8] Court of Cassation, General Assembly of Criminal Chambers, File No: 2017/33 E., Decision No: 2018/74 K., Date: 27/02/2018.

3. Principle of Transparency

As per Article 141 of the Constitution of the Republic of Turkey, hearings in courts are open to the public, and closed hearings can only be decided upon as and when it is absolutely compulsory for public morality and public security.

The principle of transparency is an example of an individual's right to a fair trial under Article 36 of the Constitution, allowing for public inspection of the courts[9]. According to the Constitutional Court , the principle of transparency is one of the most important to securing a fair trial. Its main purpose is to protect individuals from a secret trial conducted behind closed doors and away from public scrutiny, as well as the result of such a trial. Therefore, the principle of transparency is important in terms of ensuring trust in the courts and fair treatment under law..

However, the principle of publicity is not absolute. As explicitly stated in Article 141 of the Constitution, in certain casesthe confidentiality of the hearings can be decided upon for reasons such as the protection of a minor, or public security. The amendment made to Article 28 of the CPC, adds “situations which are indisputably necessitated by a superior interest worth preserving, of the persons related to the proceedings” are among the exceptions to the principle of publicity, enabling hearings to be held, in whole or part, privately..

The principle of transparency should also be balanced with the right to privacy, another right of an individual. Otherwise, transparency may do harm an individual.. This balance is relatively easy to establish in traditional hearings. The fact that the physical capacities of the courtrooms are limited, and prohibitions on recording audio and video in the courtroom, allow hearings to be open only to a limited number of people. Therefore, while transparency exercised, the privacy of an individual is, in most cases, not violated. On the other hand, by holding hearings electronically the physical barriers of courtrooms are removed, and more people can be present for them.. This makes it more difficult to establish a balance between the privacy of the individual and the principle of transparency.

At this point, the existence of two different approaches can be mentioned. The first approach is the one that is being practiced in countries such as the US. In US practice, there are courts that broadcast hearings live on their own websites, giving priority to the principle of transparency. However, countries such as Turkey adopt another approach and broadcast e-hearings in the relevant courtroom open to the public. As such, transparency can be provided just as in traditional hearings. However, even in this case, the fact that the parties are not present in the courtroom, and the hearing records can be made accessible to the parties, both bring along security concerns as will be explained below.

[9] Constitutional Court Decision, Application No: 2013/4186, Date 15/10/2014.

4. Protection of Personal Data:

a) Privacy Concerns on UYAP

UYAP, as explained above, is the main application for all judicial actions and all actors of the judiciary can reach the system via specifically designated portals. The security of UYAP system is essential for data protection in the judicial system as it contains a vast amount of personal data as described under the Law on Protection of Personal Data No. 6698 ("DP Law"), including all types of special category personal data. At this point, it should be noted that as per Article 28/1-(d) of the DP Law, the DP Law does not apply to the processing of personal data by judicial authorities or execution offices in relation to the investigation, prosecution, trial, or execution proceedings. One may argue that although judicial authorities and execution offices are exempted from the DP Law for their data processing with respect to judicial acts, the Ministry of Justice ("Ministry") as an administrative body is not exempted from the DP Law. The fact that the Ministry only maintains the system facilitating data processing activities of judicial authorities,and that only the judicial authorities are those who are processing data over UYAP, the Ministry only fulfills the requirements that would be expected from the provision of the platform to the judicial authorities.

As per Article 46/B of Presidential Decree No.1, the Information Processing Office of the Ministry is responsible to ensure the effective and efficient utilization of the information system (UYAP in particular) by cooperating with judicial and execution authorities.. Based on this provision, UYAP is designed and the system is provided by the Ministry. However, all the data in UYAP are under the control of courts,and the Ministry, as a rule, has neither control over data nor access to it . Therefore, there is -except for providing the platform and storing the data on it - no further processing by the Ministry of the data processed by judicial and/or execution authorities. Even if the data processed by judicial and/or execution were under the scope of the DP Law, the Ministry would not be considered anything more than the data processor for judicial and execution authorities.

A data processor is defined under the DP Law as a natural or legal person processing data basing on the authority vested by the data controller. As processing activities by judicial authorities with respect to judicial acts are outside the scope of the DP Law, judicial and exectution authorities cannot be regarded as data controllers. Consequently, the Ministry cannot be classified as a data processor since it does not process data based on the authority vested by a data controller who processes the data under the DP Law.

Anyway, as per Article 20 of the Constitution, the state has an obligation to protect individual privacy. Thus, the state must take all necessary technical and administrative measures to protect individual privacy, and provide an adequate protection mechanism against intrusion into an individual' privacy by other private institutions and individuals. In this respect, on 6 July 2019, the Presidency of the Republic of Turkey published the Circular No. 2019/12 ("Circular") concerning certain measures to be taken by public authorities for data security.

Based on the Circular, the Digital Transformation Office of the Presidency of the Republic of Turkey published the Guideline on the Security of Information and Communication ("Guideline"), and explained certain technical and administrative measures to be taken by public authorities.

When UYAP is examined, it appears that it is poevulnerable to certain data breaches. The first vulnerability of the UYAP system is a data breach caused by the misconduct of judiciary agents[10]. As judiciary agents usually have the authority to display case and enforcement data, and there is no prevention system to detect unusual data displays, the system is open to misconduct of judiciary agents; and this has been the subject of several lawsuits in the past. Another issue arising from judiciary agents is authorizing a third person who is not a party to a case to display case information negligently. Again, there is no detection system for this. The Guideline includes logs and control records as technical measures that should be taken. Also, as explained in the Guideline, instead of giving authority to judicial agents to access all judicial data, an authorization matrix may be established where data access is limited to the appointed.

Entry to the system is only possible with e-signature, except for the Citizen Portal which can be accessed via the e-Government system. However, e-signatures can be used by any other person who has somehow acquired the e-signature password, and, therefore, identity verification is not possible in most cases. Also, as the Citizen Portal only requires an e-Government password, these data may be accessed when an e-Government password is acquired maliciously. In the Guideline, multi-factor verification is suggested. In fact, establishing at least a two-factor verification (knowledge-possession) may be useful for identity authentication.

Since all judicial data is kept on UYAP servers, another issue, especially in criminal and family law courts, and since most of these data are special category personal data, physical and cybersecurity of the servers are of utmost importance. In the Guideline, a set of rules for the cyber and physical security servers is provided.

The following are some of the technical measures that can be taken by public authorities as described in the Guideline:

- Training of judicial personnel,
- Bringing data protection obligations in the employment agreements of judicial agents, and executing disciplinary measures to those acting inappropriatly,
- Employing experts in data security issues;
- Activating network and application security systems,
- Keeping logs and tracking/detecting abnormal log records,
- Data masking when necessary,
- Encryption,
- Enabling antivirus and malicious software protection programs,
- Firewall installation and optimization,
- Ensuring the physical security of places where hearing records are kept,
- Making regular backups,
- Using secure environments instead of e-mail for sending records,
- Performing regular inspections.

[10] Selami Hatipoğlu, Kişisel Verilerin Korunması ve İdarenin Sorumluluğu, Trakya Üniversitesi Sosyal Bilimler Enstitüsü Kamu Yönetimi Anabilim Dalı Yüksek Lisans Tezi, Edirne, 2019, s. 161 vd.

b) Privacy Concerns in E-Hearings

b.1. Processing of Personal Data Unlawfully by Third Persons

The fact that hearings are conducted with electronic communication devices may enable or ease the processing of personal data unlawfully by third persons. By considering different situation, the risk can be explained as follows:

In the case of hearings being broadcast live, as isthe US and UK[11] practice, or are made accessible by the public at any time, the use of records by third parties cannot be supervised. In this sense, data can be saved and processed easily by third parties for unlawful purposes. For this reason, opening hearings to the public without any supervision is very likely to cause individual harm.

On the other hand, in the case of e-hearings that are available to the public only in courtrooms by displaying them on screens located in the courtrooms, it is more likely that recording of audio and video will be detected. However, supervision of participants in the case (parties, attorneys, witnesses, experts, etc.) is not completely possible. In such case, hearings which could not be recorded in the courtroom under normal conditions can be recorded unlawfully by participants, at least in theory.

Recording of e-hearings by participants, and processing personal data belonging to parties or third parties cannot be deemed lawful by alleging transparency since Turkish law expressly prohibits image and voice recordings during hearings. In addition, the same risks described hereinabove exist where records are made accessible to the parties and attorneys.

In Turkish practice so far, only parties and their legal representatives are allowed to attend hearings remotely. Courtrooms are still open to the public during the hearing. The records of the hearing are also available in UYAP only to the parties and their legal representatives. In this case, the risk appears to be mitigated to a certain extent. However, in full digitalization, which would not require pyhsical attendance at all in the future, alternative methods such as live streaming platforms should be implemented in order to ensure transparency.

Finally, if it is decided that a hearing will be held in private under the circumstances such as listening to a minor, confidentiality of the hearing can be ensured easily. However, the same thing does not seem possible in terms of hearings held electronically. It is because people present but not in view of the camera cannot be surveilled in court. Therefore, whether the hearings are recorded by the participants or not cannot be known by the court.

[11] Pursuant to s.85A of the Courts Act 2003, as amended by the Coronavirus Act 2020 which received Royal Assent on 25 March 2020, the Court has authority to permit livestreaming.

b.2. Data Security and Retention of Personal Data

Another issue that should be discussed in terms of protecting personal data is recording e-hearings and retention of hearingrecords.

Before delving into the recording of a hearing, the safety of the software used must be discussed briefly. In numerous countries, third party applications such as Zoom, Skype, Teams, are used for holding hearings. For example, in the US and UK, Zoom and Skype are commonly used for e-hearings, and in the UK no limitation is defined for the systems to be used by the courts for remote hearings. However, using those applications also increases the risks associated with the use of these applications in the judicial system. Beyond their already proven and patched security holes, they may still carry some privacy concerns. In some countries, such as Turkey, the use of specific software designed by public authorities is compulsory for these reasons. In such a case, the judicial body may be able to bear only their own risks and focus on the security of only one piece of software. However, the security of this software is also of utmost importance.

In the traditional context, hearings are recorded in hearing minutes. However, not all personal data shared during a hearing is accessible afterward. Only those that are recorded in the minutes are open to access. In hearings held in an electronic environment, the whole hearing can be recorded without exception. In this case, an excessive amount of data may be accessed and processed by third parties not directly related to the case.

E-hearings are recorded and kept electronically in USA and UK practice. In Turkey, so far, hearings are also recorded and made available to the parties after being approved by the court in UYAP. It is clearly described under the law that during an e-hearing certain parts must be recorded, for example, if a minor is heard as a witness her testimony is recorded and stored electronically. However, there is no provision that the whole proceeding be recorded. This being the case, in practicecourts choose to record the entire hearing and make it available to the parties as explained above. In such a case, it is very important to determine where the data will be stored and who will have access it. In Turkey, Hearing records are retained by the Ministry of Justice and accessible by the parties with the approval of the court.

The storage location and conditions of data are also of great importance. Malicious access to records by third parties, including deletion and destruction, are factors that pose a risk todata security. In Turkish practice, records will be kept by the Ministry of Justice in the central recording system servers which are also held by the Ministry in Turkey.

Regardless of whether all hearings are recorded, as in the US and UK systems, or only parts of it,certain security measures must be taken in systems in which records are retained. In this context, it may be preferable to keep these records in secure environments rather than directly with court judges, as in some US courts. As stated above, the technical security measures listed in the Guideline, some of which are explained in section 2(a) hereinabove, are important in this context.

Finally, although it does not seem possible that the recording of hearings by observers will be completely preventable, technical arrangements that disable screen video and screenshot features may be made in the software to be used.

b.3. Protection of Special Category Personal Data

It is necessary to examine separately how special category personal data shared during hearings will be processed electronically. Especially in terms of criminal proceedings, considering their nature as special category personal data, the electronic environment poses a great risk for data to be processed illegally. Moreover, during the hearingit is possible to share other types of special category personal data such as health, sexual life, association membership, religion, and political opinion.

Considering the possibility that during a hearing all kinds of special category personal data can be shared, rendering those public and accessible at any time online eases illegal processing of these data. Therefore, in order to protect special category personal data, displaying the hearing only in the courtroom may be preferable to online broadcasting.

It should also be kept in mind that a special protection regime prescribed in the DP Law limits the processing of health and sexual life data to only certain purposes such as protection of public health. Although the processing of personal data by judicial and/or execution authorities in relation to investigation, prosecution, trial, or execution procedures are exempted from the DP Law, there is an exception for processing by only judicial authorities. For this reason, it should be ensured that data is not processed by persons other than judicial authorities. Again, opening them to online access all but ensures a risk of misuse.

An electronic hearing system brings great advantages as well as great risks. These risks arise due to the nature of the internet and, at some point, they make it very difficult to control personal data. Electronic hearing processes need to be well designed to avoid these risks. The legal policies of countries will be effective at the point of establishing a balance between the principles of publicity and privacy, or when taking inevitable risks.

Looking to the Future of Virtual Justice in Turkey

A. What is on the agenda of the Ministry of Justice?

The Ministry of Justice places special emphasis on digitalization of justice in every reform strategy. Accordingly, Target 4 of the latest Judicial Reform Strategy dated May 2019 of the Ministry of Justice is "to increase performance and efficiency." Activities for reaching this target include the following:

a. *IT systems will be integrated with the foreign missions in order to facilitate judicial affairs of citizens based in foreign countries.*

b. *In districts where a courthouse does not exist, opportunity to testify via SEGBİS will be made available.*

c. *In major airports, opportunity to testify via SEGBİS will be made available.*

In accordance with the above, the Ministry of Justice's short-term agenda covers the below developments:

- **Full Implementation of E-Hearing:** As of the date of this Article, e-hearing is available at 260 courts in 30 cities. The Ministry of Justice aims to increase the number of courts offering e-hearing services, and implement e-hearing in all courts in Turkey in 2021.
- **Virtual Enforcement Offices:** Enforcement offices have a very heavy workload in Turkey, and the number of pending enforcement proceedings exceeds 22 million[12] as of the publication date hereof. Due to this workload, a considerable budget is dedicated to the operation of enforcement offices. Therefore, a reform aiming to reduce this workload and budget, and to facilitate enforcement proceedings by limiting physical appearances of parties and their lawyers at the enforcement offices was inevitable. Accordingly, the Strategy envisages that the"new enforcement office model" based on consolidation of enforcement offices and establishment of specialized sub-departments within will be expanded, and virtual enforcement offices practice will be implemented (Target 8.5).

[12] Statistics are available at https://istatistikler.uyap.gov.tr/

In fact, a step towards virtual enforment offices was initially taken with the Central Execution Proceedings System ("Merkezi Takip Sistemi") ("MTS") under the Law numbered 7155 Concerning the Procedure of the Initiation of Execution Proceedings Regarding the Pecuniary Claims Arising out of Subscription Agreements published in the Official Gazette dated 19 December 2018. Pursuant to the regulation, a tab was created on the UYAP Avukat Portal under the title of MTS Transactions which became available on 1 June 2019. The scope of the MTS is limited to execution proceedings based on subscription agreements. Via MTS, Execution proceedings without judgement can be initiated and conducted online until the attachment phase. In order for creditor's counsel to be able to initiate MTS transactions through Avukat Portal, the creditor should apply for authorization through the Institution Portal on UYAP. After the necessary information is provided, an order of payment is issued automatically and inserted in the file. In the event that the debt is not paid, or a notification cannot be served to the debtor in the MTS phase, ordinary execution proceedings for the attachement are initiated at the Enforcement Office which was specified while applying for the MTS transaction.

- **Online prison visits:** The issue of online prison visits was recently put on the agenda. In accordance with the "Regulation Concerning the Management of Penitentiary Institutions and Execution of Penal and Safety Measures," published in the Official Gazette dated 29 March 2020: a system that would enable online visual phone calls between inmates and their families is being established. Similar systems are established and have been implemented in the United Kingdom and Singapore for some time. Now, upon COVID-19's inevitable effect on in-person prison visits, Turkey is taking a step and testing the online visit system in a few pilot institutions. The Minister of Justice has announced that once use of the system becomes prevalent, inmates will be able to hold visual call with their families for up to 30 minutes a week. For the time being, online visual visits are only stipulated for meetings with families and guardians of the inmates. However, once implementation is widespread, a new regulation shall be considered concerning online attorney visits for inmates.

In the publicity meeting held by the Ministry of Justice on 22.10.2020, it was reported that in addition to online visits, further technologization of penal institutions including electronic censuses of inmates through fingerprint, online access to health care, online payment at commissaries, and an online system which would enable inmates to submit petitions and send e-mails will soon be realized.

- **SEGBİS Rooms at airports and foreign missions and districts where a courthouse does not exist:** Another technological advancement theexpansion of the SEGBİS system. Within this scope, apart from increasing the territorial scope of service, the Ministry of Justice started to establish SEGBİS rooms at major airports and foreign missions to allow citizens who live abroad to attend hearings without leaving the airport or the country they live in. After it was stipulated in the Judicial Reform Strategy in May 2019, this practice was implemented initially at Istanbul Airport in February 2020. The SEGBİS room at the airport also aims to prevent any difficulties arising out of judicial matters for citizens departing the country. In addition, a courtroom is set to be established in Istanbul Airport that will serve as a court on duty, and will examine judicial cases that take place at the airport. While it was reported that over 200 investigation cases were examined at the SEGBİS room at the airport, it was announced that airport court will not be hearing cases that fall into the authority of heavy criminal courts.

Other activities indicated in the Strategy to reach Target 4 are defined as follows:

a. Cyber security standards of IT systems will be developed.

b. Activities for the use of "artificial intelligence and expert system" in judiciary will be carried out.

c. IT systems will be renovated with updated and user-friendly applications.

Within those objectives, the General Directorate of Information Systems of the Ministry of Justice makes significant efforts to ensure expansion and improvement of existing services for the purposes of rendering them user-friendly and safe, and implementing new ones. In addition, mobile applications seem to be the new focus of the Ministry of Justice. In addition to existing ones (e.g. CELSE, E-Adalet, Uyap Mobil Mevzuat), new mobile applications werelaunched in August 2020, to offer mobile access for Mediator Portal, Conciliator Portal, and Expert Portal. The applications are free and compatible with IOS and Android. Further, the Ministry of Justice announced that new features will be developed in the mobile applications for easier and more effective use[13].

[13] https://basin.adalet.gov.tr/adalet-bakanligi-yeni-mobil-uygulamalari-hayata-gecirdi

B. A Quest for the Better

Developments in digitalization of justice in Turkey are encouraging but also challenging. In this period of transformation, legal practitioners' biggest concern is the protection of procedural principles and fundamental rights of individuals. Bearing this concern in mind, we should expect digitalized procedure to be fair, transparent, ethical, accessible, and effective one. Therefore, in each step towards a more digitalized environment, new and appropriate tools for the protection of fundemental rights and procedural principles should be considered.

Undoubtedly, the main step to be taken by Turkey should be enhancing its technical infrastructure to offer equal access to digital justice to each citizen. In parallel, use of digital technologies should be encouraged by the Ministry of Justice in less developed regions of the country.

Further, virtual hearings would be a source of new disputes if well-considered regulations and material support tools are not put into effect immediately. In this regard, particular attention should be given to ensuring the delicate balance between transparency of virtual hearings and privacy. Further, a help desk to provide immediate assistance to users during virtual hearings would be a suggested item for the Ministry's agenda.

Finally, consideration should also be given to determining the limits of court discretion when considering thee-hearing requests of attorneys. Some concrete guidance on the criteria to be applied by the courts while deciding on e-hearing requests that would provide more clarity and confidence on the attorneys' side as to whether their requests would be accepted by the court or not.

Conclusive Remarks

The main purpose of this publication was to provide insight into where Turkey is and what can be expected from the future in terms of virtualization of justice in Turkey. In light of the above explained developments, it is fair to reach to the conclusion that Turkey has achieved great success in virtualization of justice through the continous efforts of the Ministry of Justice.

While appreciating the Ministry's efforts, Turkish legal practitioners' openness to improvement, and their will to embrace new technologies should not be underestimated. This approach of the legal practitioners would be an advantage for Turkey over other countries where practitioners stand for traditional systems. In addition, all reforms and technologies put into force by the Ministry of Justice have been developed in accordance with user experience and advice. Accordingly, we expect that the technical and legislative issues that are discussed above may also be resolved by paying particular attention to the user experience. Indeed, COVID-19 which seems to be here for a while, will increasingly pressure the Ministry of Justice to accelerate implementation of a virtual justice system.

Looking to the future, all indications lead us to the conclusion that Turkey's virtual justice practice has already achieved a promising level, and we should also expect significant developments in the midterm towards full digitalization of the process, while respecting fundemental rights and procedural principles at all stages.

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