

The State of Legal Aid in Turkey towards EU Negotiations¹

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1. Introduction

In the hope of EU membership, massive legal reforms have been taking place in Turkey. The reforms not only include regulation in new areas of law and establishment of new structures, but also wholesale re-drafting of codes of commercial, civil and criminal law as well as codes of civil and criminal procedure. Thus far, legal aid was not among the reformed areas and it is difficult to say that it will be in the short future. This paper will therefore attempt to demonstrate the current legal aid structure in Turkey and present reform ideas.

2. Turkey: An Overview

In December 2004, Turkey has been declared to have satisfied the Copenhagen political criteria for EU membership. Consequently, Turkey has officially become a candidate for EU accession. Membership negotiations for entry are due to start in October 2005. As the adoption of the current thirty four titles of the EU Acquis is expected to be the subject of lengthy discussions, negotiations are likely to last 7-10 years.

According to the general census of 2000³, Turkey's population is 67.803.927, of which 65 % lives in urban and 35 % in rural areas. Meanwhile, in 2004, the GDP per head reached the highest figure in Turkey's history with USD 172. This amount equals approximately to USD 7000 when adjusted to purchasing power parity. No doubt that if it were a member today,

Turkey would be the poorest country in the EU, but not by a mile. Although the GDP per person is less than a third of the average for the 15 members before the 2004 enlargement, it is not far off that of current EU member Latvia or much the same as those of Romania and Bulgaria, due to become members in 2007⁴.

In terms of legal tradition, Turkey is under the influence of continental Europe ever since the Republic was established in 1923. It has courts of first instance in 845 districts that handle criminal and civil matters while the appeal instance is before the Supreme Court in Ankara⁵. After years of procrastination, an intermediary appeal instance is finally being set up that will reduce the heavy work load of the Supreme Court.

Graduates of law schools can become attorneys licensed to practice law after one year of apprenticeship. This relative ease, coupled with the fact that law schools have mushroomed over the country in the last ten years, has been criticized as diminishing the quality of the profession. Thus, a bar examination has been introduced, content and form of which is yet to be determined, that is due to take place in 2006⁶. Attorneys are obliged to register with the bar association in the jurisdictional area of their practice. As of 31 December 2004, there are 52.195

¹ Paper prepared for the International Legal Aid Group Conference taking place in Killarney, Ireland in June 2005.

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³ Source: www.die.gov.tr. (The government statistical agency)

⁴ A promising start, A survey of Turkey, Economist March 19th-25th 2005, p. 14.

⁵ It should be noted that the draft new code of civil procedure contains provisions establishing courts of cassation as an intermediary appellate body.

⁶ If the purpose of an exam is to enhance quality, then a candidate should not be allowed to take it six times as envisioned.

attorneys in Turkey⁷. This means that for every 100,000 person, there are approximately 75 attorneys. This is quite a low number if one considers that the same ratio is 312 in the US and 190 in Germany⁸.

3. International and domestic obligations concerning legal aid

Whether or not Turkey becomes an EU member, it is still a party to the European Convention on Human Rights ("the Convention"). In view of this, it is probably more correct to review Turkey's obligations in reference to this Convention under which as opposed to criminal cases, there is no right to a counsel in civil cases.

The Turkish Constitution can also be cited as a point of reference for legal aid, as it sets out that Turkey is a democratic, secular and social state governed by the rule of law. Further, it provides that all individuals are equal without any discrimination before the law and that everyone has the right to a legal remedy either as plaintiff or defendant and the right to a fair trial before the courts⁹. In view of the above provisions, it may be said that the Turkish state has a duty to establish an effective mechanism for the realization of access to justice including free legal assistance which it did carry out to a certain extent.

4. Criminal legal aid: A comparison

In Turkey, free legal assistance funded by the government was introduced first for *criminal defendants* in 1992, partly in response to the then numerous cases of unaccounted missing persons and bad treatment

cases while in custody¹⁰. Accordingly, the Code of Criminal Procedure was amended to limit the powers of law enforcement officers and prevent the abuse of power. Another important goal was to ensure the equality of arms by improving legal representation at all levels of investigation and prosecution for the defendants¹¹.

The government did not do this by establishing a public defenders system or by setting up standards for providers of service or otherwise. It simply delegated the provision of service to bar associations who had to establish Code of Criminal Procedure Practice Units (briefly "CCPP Units") *within their bars* to provide legal aid to criminal defendants. Thus, the said units has been in operation ever since but no evaluation took place to determine their performance or efficiency¹².

Initially, attorneys working for the CCPP Units were complaining of unwelcoming attitudes by law enforcement officers and of hindrances¹³. Today, the system has come a long way, although indications of low access rates¹⁴ call this optimistic comment into question. Nevertheless, it

¹⁰ Elveris, I., Kutucu, S., and Yasar, I. Basic assessment of the legal aid in Turkey, in Elveris Idil (ed.) Legal aid in Turkey: policy issues and a comparative perspective, 2005, p. 187-8, Istanbul, Bilgi Publications.

¹¹ *id.* p. 188.

¹² Regrettably, Turkey does not have a tradition of research based policy making. Further, the resources allocated for research and development are very limited. The author is the coordinator of a study sponsored by the Open Society Justice Initiative and the Danish Embassy that will examine access and quality issues of the criminal legal aid that will be concluded by November 2005 which will be a first in Turkey.

¹³ Elveris, I., Kutucu, S., and Yasar, I., p. 206.

¹⁴ There are indications that in parts of Turkey as few as 20% of indigent criminal defendants have access to free legal representation, Introduction, in Elveris Idil (ed.) Legal aid in Turkey, p.174.

⁷ www.barobirlik.org.tr. (The Union of Bar Associations)

⁸ S. Dönmezer-F. Yenisey, Ceza Adalet Sisteminin Etkinliği 1998, İstanbul: TESEV 2000.

⁹ The latter was added to the constitution on 3 October 2001.

can be said that there are less problems in the defense of those who by law are obliged to have an attorney (juveniles, mutes, deaf and other disabled persons who in the absence of a counsel are presumed not to be able to effectively defend themselves) than other criminal defendants.

While lack of quality standards, lack of accountability, low remuneration¹⁵ and other problems continue to plague the CCPP system, some Bars have introduced, on their own initiative, training requirements for attorneys that will render criminal legal aid in order to be able to better protect the criminal defendants¹⁶. Nevertheless, lack of government policy in the uniform provision of service remains a problem.

5. Legal aid in civil matters

In Turkey a party does not need to have legal representation to pursue her/his case in court¹⁷. Nevertheless, in 2001 the government allocated funding for legal aid in civil and administrative matters¹⁸ through the Ministry of Finance¹⁹. Thus, the legal aid provisions in the Law on Attorneys finally found application. Before that, it remained an unfunded mandate. While allocation of funds was a welcome development, this was not as a result of public debate on legal aid. Accordingly, the “hands off” approach adopted in criminal legal aid provision also prevailed in civil legal aid provision. Therefore, similar problems such as lack of policy, standards,

responsible authority for the overall running of the service and monitoring also exist for civil legal aid. In other words, the government provides funds, but sets no goals, targets or priorities for the service, nor does it control how the taxpayers’ money is spent.

Currently, the system is governed by the Legal Aid Regulation (“Regulation”) adopted by the Union of Bar Associations (“the Union”) who is the recipient of funds allocated for this purpose by the Ministry of Finance. The Union allocates the said funds to every Bar in the country according to a formula. Accordingly, each Bar’s board of directors is responsible for the establishment of a legal aid bureau. Where there is no legal aid bureau, then the board may commission an attorney to be the representative for the bureau²⁰. Nevertheless, so far all Bars were sent funds by the Union and made use of the system.

As there is no central authority setting rules for the operation of legal aid bureaus, many of the below explanations were obtained from the Istanbul Legal Aid Bureau and may therefore be of limited application elsewhere. Nevertheless, the author is told that by virtue of its leading role, other legal aid bureaus often get information from the Istanbul Legal Aid Bureau as to how things are organized there, leading implicitly to some standardization over the country.

6. Eligibility Criteria

The eligibility criteria to obtain legal aid are “financially not being able to pay” and being likely to prevail on the merits. As there are no uniformly applicable guidelines for the interpretation of what these mean, it is said that every legal aid bureau interprets same according to their understanding or sometimes according to the economic indicators in their respective city²¹. This might be

¹⁵ It must be noted that the attorneys who work for the CCPP system are paid on the basis of a different tariff that is sometimes two to three times lower than the regular attorney fees tariff under which legal aid lawyers are paid.

¹⁶ The Istanbul Legal Aid Bureau requires a similar training for attorneys that will work for women and juveniles.

¹⁷ This is set to change in the new civil procedure code that is currently being drafted.

¹⁸ Includes criminal victims as well.

¹⁹ It must be noted that in Turkey it is the Ministry of Finance that determines the budget of ministries and not the ministries themselves.

²⁰ Elveris, I., Kutucu, S., and Yasar, I., p. 189.

²¹ *id.* p. 190.

considered a good practice since it takes local circumstances into account. It can equally be seen as a bad practice since absence of standards might lead every legal aid bureau to reinvent the wheel.

To determine whether a person is financially able or not, legal aid bureaus request the applicant to bring documents proving her/his eligibility while also investigating it themselves through correspondence with the relevant authorities. If the legal aid request is rejected, then the only right to appeal is to the president of the Bar herself or himself who does not even have to respond, a remedy that could be considered ineffective.

Granting legal aid to an applicant does *not* automatically translate into an exemption from court dues and other costs. In other words, legal aid provided by the legal aid bureau covers only attorney fees leaving other cost matters unaddressed. In this case, the applicant can try to use the mechanism provided by the Code of Civil Procedure. This allows a *court* to grant a temporary waiver from legal dues and other costs, if the applicant is likely to prevail on the merits and is financially unable to cover the expenses of the legal process. Regrettably, courts are known to be not so sympathetic to these requests and their judgment in this respect is final. If a court denies this request, the applicant may request an advance from the Bar that needs to pass a resolution to that effect. This remedy could also be considered ineffective if not burdensome.

7. Service providers and case assignment

Attorneys willing to participate in the provision of legal aid simply apply to the respective legal aid bureau for consideration²². There is no exam or interview process to determine whether the attorney is indeed qualified to do the job. The only requirement for an attorney to participate is that (s)he has a license to practice law. When applying, the

²² *id.* p. 191.

attorney must advise the location of her/his office and the area of practice. Cases are then allocated according to lists prepared by the legal aid bureau, on a rotation basis²³. In fact, the Regulation provides that attorneys must be assigned cases under the principle of equality, reflecting the Union's view that colleagues should not compete with each other. As such, attorneys who do a good job are not able to get more clients as a prize.

8. Payment of legal aid attorneys

Once it is determined that a client is entitled to receive legal aid, the next issue is to decide whether the legal problem can be solved by provision of advice, something the legal aid bureau itself could help the applicant with. If there is need for legal representation, then the applicant is assigned an attorney by the bureau according to the above mentioned lists and procedure.

Attorneys who are assigned cases by the legal aid bureau are paid *in advance* on proof that they have filed a case before a court or have taken action concerning the case²⁴. Proof of filing a case to obtain payment may promote litigation in an already clogged court system. Further, proving that a case was filed does not necessarily mean that such action was appropriate. Thus, *timely* filing of the case, at the court *with jurisdiction* to hear the case, may not be the primary concern for the attorney. Equally, there may not be much initiative for the attorney to thoroughly follow the case after obtaining full payment at the outset of the case.

Payment of legal aid attorneys is done on the basis of the attorney fees' tariff determined by the Union every year. Under the current applicable tariff, some figures are as follows:

²³ *id.*

²⁴ *id.* p. 201.

For written legal advice: YTL ²⁵ 175
For drafting of any petition or notification: YTL 100
For drafting a lease contract: YTL 175
For lawsuits in courts of peace: YTL 175
For lawsuits in courts of first instance: YTL 350
For lawsuits before consumer courts: YTL 150
For lawsuits in appellate courts: YTL 400

If the legal aid applicant prevails in litigation and obtains a monetary award, then the attorney is also entitled to keep the attorney fees that are awarded by the court in the judgment. However, 5% thereof must be passed to the legal aid bureau. In addition, all documented costs of the attorney shall also be reimbursed, such as going to court, land registry or travel to Ankara (by bus) for appellate review.

9. Quality control

To control how the legal aid cases are progressing, the legal aid bureau is entitled to request a report from the attorney working on the case at any time²⁶. Equally, when a case is concluded, the attorney must provide a copy of the judgment obtained in the proceedings and a report. The report must contain information as to the date and time of the hearings and what took place in these hearings. The attorney must also enclose all the relevant hearing protocols²⁷.

Meanwhile, legal aid bureaus prepare every three months a report for the Union that provides the following information: the number of applications to legal aid, the number of those accepted and brought to a conclusion, the number of attorneys worked for legal aid cases, the number of staff of the legal aid bureau, income and payments made by the bureau. This quarterly reporting is for the purposes of getting legal aid funds from the Union as the

Union transfers same every three months²⁸.

This being said, however, the Union is not in a hierarchical position towards the bar associations. As such, it does not monitor bars. Nor does it carry out financial audit of the bars. Further, neither the Units nor the legal aid bureau may judge another attorney's professional opinion and practice in any particular case. They also lack any authority to apply disciplinary sanctions on the attorneys. If an attorney causes a loss of right for a client, (s)he shall be responsible under the Act on Attorneys and the Union's codes of conduct. However, quality issues such as failure to return calls, failure to consult or rudeness are simply not addressed by disciplinary sanctions. It can be said that the current structure of the Act on Attorneys concerning clients vis a vis attorneys and Bars vis a vis attorneys do not protect clients enough against incompetent service²⁹.

Independence of the profession should not amount to unaccountability for a service funded with public money. However, as long as the government continues to have little understanding of the importance of a more pro active engagement in legal aid, neither the Bars nor the government will have the capacity, or the will, to evaluate the success of the current situation, identify problems or propose solutions.

²⁵ As of August 2005, €1 equals to YTL 1,6.

²⁶ Elveris, I., Kutucu, S., and Yasar, I., p. 195.

²⁷ *id.*

²⁸ *id.* p. 196.

²⁹ According to the CEPEJ report, the number of disciplinary proceedings in Turkey per 1000 lawyers is 26,3 while sanctions per 1000 lawyers is 7,8.

10. Financing of the system

Each year, the Ministry of Finance³⁰ transfers, 3% of the amounts collected under the Law on Dues, as legal aid funds. This amount constitutes 90% of the legal aid funds while the rest is provided by local governments, including municipalities. In addition to the above, other resources may include donations, fees to be given back by attorneys who for no good cause return the case they have been assigned to and money received from applicants under the declaration they sign when applying for legal aid. This declaration provides that if the applicant makes a financial benefit from legal aid, 5% thereof is to be given to the Bar³¹.

10% of the available funds allocated by the Ministry of Finance must be set aside for legal aid expenses of the Union. These amounts can be seen as a reserve for use until additional funds are made available within a budget year³². According to the figure provided by the Union in response to the author's freedom of information request, the amount so set aside equals to YTL 6.583.792,59 which is almost three times more than 2005's legal aid fund allocation. In any case, the total YTL amounts the Union received from the Ministry of Finance in the last 5 years as legal aid fund are as follows:

2001	1.400.000
2002	4.192.573,20 ³³
2003	5.304.149,23
2004	8.153.079,20
2005	10.637.929,10 equaling to €5.976.364,6.

According to the figures provided by the Ministry of Justice for the CEPEJ questionnaire³⁴, the legal aid budget per inhabitant in Turkey is €0,13 one of the lowest among Council of Europe members³⁵.

The three bars that were allocated the most funds in 2003, 2004 and 2005 were Istanbul, Ankara and Izmir, which according to the latest census are also the most populous towns in Turkey³⁶. The re-allocation of the amounts to the respective bars is made according to a complicated scoring system³⁷ indicating the following total amounts:

³³ In the country report prepared for the European Commission for the Efficiency of Justice (CEPEJ), this figure was given by the Ministry of Justice as 3.695.843,06.

³⁴

http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Efficiency_of_justice/.

³⁵ In the CEPEJ report, this figure is dwarfed only by Armenia, Azerbaijan, Malta, Moldova, Romania, Russia, Slovakia and Ukraine. However, one must note that the report quotes figures of 2002.

³⁶ Source: www.die.gov.tr

³⁷ Under the scoring system, every Bar is given five points. For every 25 attorney admitted to the respective Bar, the Bar gets an additional point. For every 50,000 people residing within the boundary of that Bar, the Bar gets another additional point. If the Bar is located in the government's priority development area, the Bar scores 3 additional points. The added points make the score of the Bar. Then, the total funds allocated for legal aid in the country are multiplied by 0,90 and the score of the respective bar. This figure must then be divided by the total of points assigned to that Bar. Under this formula, in 2005 Istanbul scored 963 points while Ankara and Izmir score, 390 and 268 respectively.

³⁰ Here an interesting experience must be mentioned. In order to cross check the figures of the Union and the Ministry of Finance, the author filed a freedom of information request with both of these institutions. The Union was helpful in providing all the figures necessary while the Ministry stated in response that none of the divisions of the Ministry was responsible for the transfer of the funds.

³¹ Elveris, I., Kutucu, S., and Yasar, I., p. 197.

³² *id.* p. 198.

	2003	2004	2005
Istanbul	944.159.000	1.764.220.000	2.340.073,74
Ankara	381.522.000	709.921.000	947.693,42
Izmir	270.066.000	494.443.000	651.235,48

11. Other legal aid options

The Convention does not require states to establish a legal aid service. The states are free to determine ways amounting to effective legal representation what ever that may be. Other than the little known legal aid, there is unfortunately no institutional mode of delivery of free legal advice or representation for low income people in Turkey. Further, even if legal aid was widely advertised, it is unlikely that the current legal aid system with its many flaws would be able to meet an increased demand.

A legal needs study that would determine the needs of the low income persons, especially how these are met and what to do to enhance their access has not been conducted³⁸. Little is therefore known to develop ways to assist them. In any case, no government can meet the diverse needs of the population solely with government funded legal aid, let alone a poor country such as Turkey, with a delivery model that has been found expensive (and thus abandoned) by many countries when they first embarked on their legal aid venture. While the primary responsibility for effective and not illusory³⁹ legal aid delivery should remain with the government, there have to be alternatives promoted by the government allowing for legal aid delivery by civil society.

The author proposes three strategies to enhance legal aid alternatives in Turkey that have been

tried elsewhere. The first concerns the relaxation of the overregulation of the profession. The second is to introduce new initiatives such as legal insurance coverage. The last one is to build on already existing practices such as provision of legal aid by NGOs and legal clinics.

Concerning the first, suffice it to say that initially, legal aid was resented by the legal profession, because it was seen as a source of competition. Regrettably, Bars also saw provision of legal aid as a responsibility dumped on them by the state. They now view legal aid as a source of income for their members but have not adopted a pro consumer approach. This is also evident by the amounts in the attorney fees tariff set by the Union. By law, attorneys are prohibited to reduce their fees below this tariff. Under the current tariff, a person who is paid the minimum wage in the country must work *6.1 days* to obtain *one hour of oral advice*. For a *lease contract*, the amount of time needed is *10.7 days*. Worse, the Istanbul Bar recommends to its members to charge fees that are even much higher than this.

This shows that self regulation of the profession needs a thorough debate in Turkey, as it leads to conflict of interest⁴⁰. The law does not allow for reduced price and alternative services. Thus, large segments of low income people are excluded from the legal market. At the same time, even reduced alternative legal services were allowed, the current advertising ban vigorously enforced by the Bars could be an obstacle for their proper functioning.

In addition to providing low priced legal service delivery models for

³⁸ The author is co-running a small scale research in an urban poor neighborhood of Istanbul to determine the legal needs of the community.

³⁹ Tarhanli T., Introduction, in Elveris Idil (ed.) Legal aid in Turkey, p. 156.

⁴⁰ Clementi's radical reforms, the European Lawyer, February 2005, p. 8.

low income persons, the monopoly afforded to lawyers could be relaxed. Paralegal schemes that were used in other countries in community centers could also be tried in Turkey. Additionally, the Bars could be pushed to counter balance their monopoly with social responsibility towards the community such as rendering pro bono services which remains unknown in Turkey.

There are NGOs that organize attorneys who feel close to that NGO's cause and who assist by providing free legal services for the constituents of the NGO. However, this is not a concerted effort and should be promoted and expanded. Further, there is only one legal clinic in Turkey coordinated by the author. The clinic provides low income persons free legal advice in general practice matters such as lease, family law and social security. At a time when the government seriously considers extending law schools to five years, legal clinics should also be given consideration.

Legal insurance coverage schemes could also be adopted in Turkey as part of the existing social security network despite the fact that large numbers of people remain excluded from the system. However, for those in, this could better their lot.

12. Conclusion and recommendations

Considering that there is still no government funded legal aid schemes in some EU member states (or aid only in criminal cases), in many ways Turkey has come a long way in provision of legal aid in civil matters. However, the justice system remains inaccessible due to costs, user-unfriendliness, delays and cumbersome processes, especially for the disadvantaged segments of the society. As regulators of the profession are yet to respond to challenges brought about by globalization and liberalization, legal aid may be just a way to address access to justice issues prevalent in Turkey. Dealing with the problem and thus satisfy the Convention's

requirements, requires a holistic approach from the Turkish government. In view of the above, the following could be seen as a set of recommendations:

1. The government must develop a legal aid policy with clear priorities, goals and targets.
2. An institution with overall responsibility for implementation of legal aid policy that could at the same time monitor, control and coordinate among institutions should be established.
3. The current structure, resulting in an applicant making requests under different laws and regulations to different institutions, should be replaced by a user friendly, "one stop shop" structure.
4. A clear selection criteria and quality procedure for attorneys that will work for legal aid need to be established while attorneys must be given on job training.
5. A clear appointment criterion for the pre-approved attorneys must be established, together with definitions of poverty and financial eligibility for the applicants.
6. Awareness about the availability of free legal services should be raised through media campaigns as well as billboards and national phone lines.
7. The government and the Bars should encourage the provision of free legal services by civil society to enhance access to justice for the greater parts of the society.