

Pro Bono Practices and Opportunities in Turkey

Excerpt from: A Survey of Pro Bono Practices and Opportunities in Selected Jurisdictions

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Pursuant to Article 2 of the Turkish Constitution, the Republic of Turkey is a democratic, secular and social state governed by the rule of law. Article 10(1) of the Constitution provides that all individuals are equal before the law without any discrimination, irrespective of language, race, color, sex, political opinion, philosophical belief, religion and sect, or any other considerations. Article 36 of the Constitution and Article 6(1) of the European Convention On Human Rights (the “ECHR”)¹ together guarantee the right of every individual to fair trial and the right to legal remedy either as a plaintiff or defendant.

In light of the above, it can be concluded that the Turkish State has a constitutional duty to establish effective mechanisms to ensure access to justice, which includes the provision of free legal assistance. Further, as part of its efforts to harmonize the Turkish legislation with the *acquis communautaire*, in August 2009, Turkey has adopted a “judicial reform strategy” which, among other things, covers issues related to efficiency and effectiveness of the judiciary, and facilitation of access to justice.² In order to facilitate access to justice, the reform strategy focuses on, among other things, (i) reviewing the legal aid system to enable effective access to justice, (ii) setting up standardized websites for courts, and (iii) standardizing interpretation services for people speaking local languages.

I. Legal Services and the Legal Profession in Turkey

In Turkey, the exercise of the legal profession in general and the provision of free legal assistance (called “legal aid”) in particular are organized and controlled by local bar associations (each, “Bar,” together, the “Bars”). Bars provide free legal representation both in criminal and in civil matters, but the scope of representation, as well as the application and implementation procedures in respect to each type of legal aid, are governed by different set of rules.

A. Criminal Legal Aid

Criminal legal aid was introduced to Turkey in 1992 through amendments to the Code of Criminal Procedure then in effect.³ In 2004, Turkey adopted a new Code of Criminal Procedure (as amended from time to time, the “Criminal Procedure Code”⁴). Pursuant to Article 150 and onwards of the Criminal Procedure Code, any suspect or defendant who wishes to benefit from criminal legal aid qualifies for criminal legal aid, regardless of his or her financial status or seriousness of the crime in question. Having Turkish nationality is not a requirement to receive criminal legal aid.⁵ Furthermore, mandatory criminal legal aid is in place for those suspects, defendants and victims of crimes who are mentally disabled, deaf mute, minor or, in the case of a

¹ Turkey ratified the ECHR on May 18, 1954. Pursuant to Article 90 of the Turkish Constitution, international agreements duly ratified by Turkey bear the force of law. In case of conflict between domestic laws and international agreements concerning fundamental rights and freedoms such as the ECHR, the terms of the relevant international agreement shall prevail.

² *Judicial Reform Strategy* by the Ministry of Justice of the Republic of Turkey, available at: <http://www.sgb.adalet.gov.tr/yrs/Judicial%20Reform%20Strategy.pdf> (last verified, September 28, 2010). See also the *Commission Staff Working Document, Turkey 2009 Progress Report* accompanying the Communication from the Commission to the European Parliament and the Council dated October 14, 2009, SEC (2009) 1334.

³ I. Elveris, G. Jahic and S. Kalem, *Alone in Court-Room, Accessibility and Impact of the Criminal Legal Aid Before Istanbul Courts*, Istanbul Bilgi University, Human Rights Law Research Center, June 2007 (unpublished), page 1.

⁴ Published in the Official Gazette dated December 17, 2004 and Numbered 25673.

⁵ U. Karan, *Impact of Financial Obligations on Access To Justice In Turkey, Legal Aid and Pro Bono*, January 2005 (unpublished), page 7.

suspect or a defendant, charged with a crime that may be punished with five years of imprisonment or more.⁶ Bars have been entrusted with the task of providing criminal legal aid, and many Bars in Turkey have established Code of Criminal Procedure Practice Units (the “CCPP Units”) which are funded by the Turkish government. In addition, pursuant to Articles 234 and 239 of the Criminal Procedure Code, victims of crimes are also entitled to apply to the CCPP Units and request that the relevant Bar appoint a lawyer to represent them as intervening party if the crime is a sexual offense or is punishable with five years of imprisonment or more. In addition, within the framework of the National Judiciary Network Project (“UYAP”), there is a public and free-of-charge specific information system entitled “Citizen Portal” set up in Turkey to inform and help victims of crimes, and efforts are underway to ensure that citizens may examine their files in a comprehensive manner and be informed via mobile text messages (SMS) of any updates.⁷

Despite the increase in funds allocated to CCPP Units’ services, preliminary research suggests that, in certain parts of Turkey, approximately nine out of ten defendants are not represented by a lawyer at any stage of the criminal justice process, and overall the CCPP representation rate is a mere 2.8%, meaning that only one in every 35 offenders benefited from CCPP services at any stage of the criminal justice process.⁸ However, given that routine data on the provision and cost of legal aid is not kept, any finding based on this preliminary data would also call into question the accuracy of these figures. The key finding of this research is the strikingly low accessibility rate of Turkish people to the CCPP Units’ services. Ironically, however, the results of the study also suggested worse final outcomes (in terms of conviction rates or duration of trial, for example) for defendants represented by a CCPP Unit lawyer compared to defendants who were represented by private lawyers, or even those who had no legal representation during trial.

Under the existing regime, neither the defendant himself nor his family can approach the Bar with a request for a lawyer. Only the police, the prosecutor or the court can ask the Bar to send a lawyer to assist the defendant. The majority of the Bars have a list of attorneys who have volunteered to assist defendants, but, in more rural areas of Turkey where there are only a few attorneys registered with the Bar, Turkish regulations require such attorneys to assume the task of participating in criminal legal aid schemes.

Pursuant to the Regulation Concerning the Principles and Procedure Regarding the Funds Payable to Attorneys under the Criminal Procedure Code,⁹ the government funding process functions as follows: (i) the Ministry of Finance provides the funds to the Bars; (ii) the Bars process the required paperwork and submit the same to the relevant prosecutor’s office for review; (iii) upon approval of the latter, the Bars process the payments on the basis of a tariff jointly issued by the Ministry of Finance and Ministry of Justice, which sets forth the amount of fees payable per case and per task. The Tariff is revised on a yearly basis to be effective as of January 1st of each year.

⁶ Articles 150, 234 and 239 of the Criminal Procedure Code.

⁷ Scheme for Evaluating Judicial Systems 2007, European Commission For the Efficiency of Justice (CEPEJ), Turkey’s Responses, *available at*: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2008/turkey_en.pdf (last verified on September 28, 2010).

⁸ *Supra* 969, page 7.

⁹ Published in the Official Gazette dated March 2, 2007, numbered 26450.

The CCPP system adopted by the Istanbul Bar Association is said to be the most advanced in Turkey. Where a CCPP Unit is not established, Bars have instead set up commissions to provide legal aid services. These commissions differ from the CCPP Units in that the commissions often do not have their own independent budget or do not employ representatives on a full-time basis; instead, they have an on-call attorney appointed.¹⁰

B. Civil Legal Aid

In Turkey, legal aid to plaintiffs and defendants in disputes of a civil or administrative nature is governed jointly by the Code of Civil Procedure (the “Civil Procedure Code”¹¹), the Code of Lawyers¹² and the Legal Aid Regulation¹³ issued by the Union of Turkish Bar Associations.

The scope of civil legal aid covers all civil, administrative and commercial disputes, as well as execution proceedings and interim measures. Unlike criminal legal aid, provision of civil legal aid is subject to two qualifications: (i) the applicant should have limited financial means; and (ii) the applicant should appear likely to succeed on the merits of the dispute, *i.e.*, his or her case or claim is not frivolous. Under Turkish laws and regulations, foreigners can only benefit from civil legal aid services on the basis of reciprocity. In this respect, Turkey is party to the Hague Convention Regarding Civil Procedure dated March 1, 2004, under which Turkey is bound to provide legal aid to citizens of the countries which have ratified this convention on the basis of reciprocity.

Pursuant to Article 176 of the Code of Lawyers, legal aid covers (1) exemption from court fees and (2) free legal representation by an attorney appointed by the Bar.

- (1) Under Articles 465-472 of the Civil Procedure Code, request for exemption from court fees is filed with the competent court verbally or in writing, and can be done at any stage of the proceedings by the applicant in person or by his attorney. Such request is limited, however, to individuals and organizations of public interest only. It is not compulsory for the court to respond to the applicant in writing. Accordingly, any applicant who requested such an exemption needs to follow up on the outcome of her request. If the request is rejected by the court, the Bar providing free legal representation services can still pay the court fees on behalf of the applicant through the funds allocated to it, if it so decides, by virtue of a board resolution.
- (2) Requests for free legal representation, on the other hand, are made directly to the relevant legal aid bureaus which are established within the organization of the Bars (the “Legal Aid Bureaus”). The applicant must submit the documents proving her identity, cause and lack of financial means. If the request is rejected, the applicant can appeal verbally or in writing to the president of the relevant Bar, whose

¹⁰ *Supra* note 969, page 13-15.

¹¹ Published in the Official Gazettes dated July 2, 1927, July 3, 1927, and July 4, 1927, numbered 622, 623 and 234 respectively.

¹² Published in the Official Gazette dated April 7, 1969, numbered 13168.

¹³ Published in the Official Gazette dated March 30, 2004, numbered 25418.

decision shall be final. The attorneys appointed by the Legal Aid Bureaus are paid on the basis of the fees set forth in the Lawyers' Minimum Tariffs.¹⁴

C. Criticisms on the Legal Aid System

The existing criminal and civil legal aid structure has been criticized for a number of important reasons.

First, with respect to civil legal aid, attorneys appointed by the Legal Aid Bureaus to provide civil legal aid services are not subject to an exam, interview process or prior training on providing legal aid services. Attorneys working for the CCPP Units are subject to a very short training only. The distribution of work among attorneys appointed by the Legal Aid Bureaus and CCPP Units is made irrespective of the attorney's performance.¹⁵ Other than quarterly reporting requirements to the Union of Turkish Bars concerning the cases, there are no auditing or disciplinary procedures to control case development.¹⁶

Second, although the CCPP Units and the Legal Aid Bureaus function side by side under the umbrella of the Bars, they do not have a coordinated approach, nor do they coordinate their work with the social services, the police or the NGOs.¹⁷

Third, Legal Aid Bureaus established with different Bars apply different criteria for providing civil legal aid, as there is no coordinating and supervisory body that standardizes the implementation process for all of the bureaus.¹⁸ Furthermore, as will be discussed under "Barriers To *Pro Bono* Practice," the scope of civil legal aid is vaguely defined in Turkey, and calls into question whether the lawmakers' intention was to limit the Bars' authority in this area to legal representation before the courts and other authorities or to entrust them with the task of providing free legal advice in Turkey.¹⁹ This is problematic because, under Turkish law, Bars have exclusive jurisdiction over provision of legal services which by law are entrusted in them. This exclusivity, if considered broadly, would effectively prevent persons other than licensed attorneys, such as legal clinic programmes or NGOs, from giving legal advice, even *pro bono* (see below "Barriers To *Pro Bono* Practice").

D. Recent Developments

The Ministry of Justice has, in collaboration with the United Nations Development Programme, jointly initiated a project entitled "*Development of Preventive Justice Programs for*

¹⁴ The Lawyers' Minimum Tariffs for the year 2010 is published in the Official Gazette dated December 24, 2009, numbered 27442.

¹⁵ *Roundtable Discussion On Legal Aid In Turkey: Policy Issues and Comparative Perspective*, Report and Selected Papers and Report Delivered at a Roundtable Held in Istanbul, Turkey, on April 16, 2004, including The Agenda and List of Participants, Istanbul Bilgi University in Cooperation with Open Society Justice Institute, page 2. See also Corey Stoughton, *A Comparative Analysis of the Turkish and American Criminal Legal Aid Systems*, Ankara L. Rev. Vol. 6, No. 1, pages 1-16.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ I. Elveris, *IR 708, Social Policy Final Paper: Access to Justice For the Poor In Turkey: Can legal clinics empower?* (unpublished), page 7.

¹⁹ *Id.*

Legally Empowered Citizens and Increased Access to Justice for All in Turkey” in May 2010.²⁰ The project aims at increasing the administrative capacity and developing the infrastructure for preventive legal mechanisms in Turkey and, to that effect, specifically focuses on increasing awareness of rights, knowledge of specific legal rights and issues and public confidence through, for example, operating a preventive justice website, launching a nationwide legal awareness campaign, and investing in process through introducing preventive justice to primary school curricula.

II. *Pro Bono Opportunities in Turkey*

A. Legal Clinics and Pro Bono Networking In Turkey

Istanbul Bilgi University Human Rights Law Center (“Bilgi”) is the first university in Turkey to set up legal clinics based on the models used in law schools in the United States. Currently, Bilgi has three legal clinics (street law, refugee law and private law). In the private law clinic, they provide legal information rather than legal representation before courts because, legal complications aside, as a practical matter, litigation takes too long in Turkey.²¹

Bilgi is the only institution to set up a *pro bono* network in Turkey. The *pro bono* network teams up NGOs with law firms in Istanbul. The network functions by making a needs assessment of the NGOs to determine if the NGOs (or their constituents) need legal drafting, representation or pure legal advice. The compiled filings are then sent to the law firms in Istanbul. The law firms, in turn, choose the NGO they want to work with, as well as the type of legal assistance they wish to provide. The law firms are then introduced to the NGOs.

III. *Barriers to Pro Bono Practice*

A. Bilgi’s Experience

Bilgi’s experience with legal clinics and its *pro bono* initiative highlights some of the practical and legal barriers to providing *pro bono* services in Turkey. For example, Idil Elveris, coordinator and lecturer at Bilgi, states that the NGOs have at first been skeptical, almost suspicious, of their initiative to try to assist them. The initial skepticism of the NGOs vis-à-vis the intentions of Bilgi, as well as the law firms, pinpoints the lack of a strong cultural background and tradition of community work, voluntarism and social trust among Turkish citizens.²² This conceptual barrier constitutes one of the practical impediments to *pro bono* initiatives in Turkey. The barrier to their legal clinics’ initiative, on the other hand, has been legal in nature.

B. Legal Barriers – Monopoly of Bars

Generally speaking, the legal profession is subject to rigid regulation in Turkey. To begin with, the scope of legal services, the provision of which requires an attorney’s license, is defined rather broadly.

²⁰ A summary of the project (in Turkish), *available at*: <http://www.sgb.adalet.gov.tr/projeler/koruyucuhukukprojesi.pdf> (last verified on September 28, 2010).

²¹ I. Elveris, *Educating and Supporting A Commitment To Public Service Lawyering*, Fourth International GAJE Conference, Cordoba-Argentina, November 2006, Promotion of *Pro Bono* Initiatives, Presentation Notes (unpublished).

²² I. Elveris, *Brief Statement of Pro Bono Work In Turkey* (unpublished), page 2.

Under Article 35 of the Code of Lawyers, *only* attorneys registered with a local Bar are entitled to “render legal opinions, appear before courts, arbitrators and other judiciary bodies, pursue matters before courts and to prepare all documents in relation thereto.” If persons other than a registered attorney exercises such licensed rights, the law provides that they shall be fined and condemned to imprisonment for six months to one year.²³ In addition, the Lawyers’ Minimum Tariff provides that any task which is set forth in the Lawyers’ Minimum Tariff can only be undertaken by attorneys and at the fees set forth in the Lawyers’ Minimum Tariff. The tariff includes various tasks which not only relate to representation of clients before courts, arbitrators, execution officers or other judiciary bodies, but also to provision of “verbal or written legal advice,” as well as drafting of certain agreements such as lease agreements, wills or some corporate documents.

Article 35 of the Code of Lawyers together, with the Lawyers’ Minimum Tariff, delineate the scope of licensed services so broadly that many (including Bars) argue that provision of any type of legal advice, whether or not it pertains to representation before judicial bodies, is under the exclusive competence of attorneys registered with the Bars. However, others argue that restricting the provision of legal advice to attorneys, and attorneys only, is not compatible with the freedom of thought and expression guaranteed under the Turkish Constitution.²⁴

C. Legal Barriers – Minimum Tariffs

Pursuant to Article 2 of the Lawyers’ Minimum Tariff, attorneys cannot agree on fees lower than those set forth in the Minimum Tariff. This raises the question of whether even an attorney can provide *pro bono* service in the legal field. Fortunately, under Article 164 of the Code of Lawyers, in the event a lawyer takes on a case *pro bono* (without any consideration), he needs to notify the board of directors of the relevant Bar accordingly. In addition, pursuant to an opinion rendered by the Disciplinary Committee of the Union of Turkish Bars dated September 23, 2000, numbered E. 2000/72, 2000/128, “accepting a case *pro bono* is different than accepting a case in exchange for a fee which is lower than those set forth in the Lawyers’ Minimum Tariff. If the parliament’s intention was to ban *pro bono* work, it would explicitly do so by inserting a provision in the law to that effect.” Accordingly, we believe that there is no legal barrier to attorneys providing *pro bono* work, including taking on a case *pro bono*, to the extent they notify the Bar they are registered with accordingly.

D. Legal Barriers – Ban On Advertising

Pursuant to Article 8 of the Regulation Regarding Ban On Advertising,²⁵ law firms, attorneys and trainees cannot carry out any advertising activities. In connection with their professional activities, they cannot make public statements as spokesmen for their client before the media, or on the Internet, about a case they have pursued or are pursuing unless the circumstances require otherwise. Moreover, they cannot make any statements before the media that can be construed as an advertisement. This ban on advertising effectively disincentivizes law firms to take on *pro bono* work in Turkey.

²³ S. Guner, *Law of Lawyers*, Ankara Bar Publications, 2003, page 125.

²⁴ I. Elveris, *Current Provisions Of Legal Profession and Associated Access To Justice Problems* (unpublished), page 7.

²⁵ Published in the Official Gazette dated November 21, 2003, numbered 25296.

E. Legal Barriers – Foreign Law Firms and NGOs

Whether persons who are not licensed attorneys, including foreign law firms, can provide *pro bono* services in Turkey is questionable. The broad description in the applicable laws and regulations of the scope of work which falls under the exclusive competence of lawyers constitutes a barrier to initiatives in this area. In addition, the standing-to-sue requirements in litigation are extremely narrow, making it difficult for claimants, such as the NGOs, to file a case on behalf of the applicant unless they have a direct tangible interest in the outcome. There is no barrier, however, for foreign firms to represent Turkish clients before international courts and take on cases, for example, before the European Court of Justice, European Court of Human Rights or International Court of Justice.

IV. *Conclusion*

Pro bono opportunities in Turkey are limited. Under the applicable Turkish regulations, if a Turkish qualified attorney or a domestic law firm wishes to take on a case *pro bono*, a notification to the Bar to that effect is required. Otherwise, the relevant attorney or the domestic law firm, as the case may be, is deemed to have breached the requirement to provide licensed services based on the mandatory minimum tariffs. The ban on advertising further disincentivizes attorneys to take on matters *pro bono*. Persons who are not attorneys (such as the NGOs and university legal clinics) are hesitant to give *pro bono* legal advice because Bars in Turkey have a legal monopoly over the provision of a wide range of legal services. Accordingly, *pro bono* work which can be undertaken by foreign law firms and NGOs is limited to taking on cases before international bodies, or otherwise liaising with domestic law firms and university legal clinics to assist them in their efforts to promote *pro bono* efforts in Turkey.