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**THE STATE OF LEGAL AID IN TURKEY  
TOWARDS EU NEGOTIATIONS**

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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 of new areas of law and establishment of new structures, but also package re-drafting of basic laws such as of commerce, civil and criminal law as well as civil and criminal procedure. Thus far, legal aid was not among these and it is difficult to say that it will be in a 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

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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 2000<sup>2</sup>, Turkey's population is 67.803.927, of which 65 % lives in urban and 35 % in rural areas with the latter figure expected to decline further as EU membership gets closer. Meanwhile, in 2004, the GDP per head reached the highest figure in Turkey's history with USD 4172. 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 2007<sup>3</sup>.

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 only appeal instance is before the Supreme Court in Ankara<sup>4</sup>.

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

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<sup>2</sup> Source: [www.die.gov.tr](http://www.die.gov.tr) (The government statistical agency)

<sup>3</sup> A promising start, a survey of Turkey, Economist March 19th-25th 2005, p. 14.

<sup>4</sup> It should be noted that the draft new code of civil procedure contains provisions establishing courts of cassation as an intermediary appellate body.

mushroomed over the country in the last ten years, has been heavily criticized as diminishing the quality of the profession. Thus, a bar examination has been introduced that will take place for the first time in 2006<sup>5</sup>.

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 attorneys in Turkey<sup>6</sup>. 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 Germany<sup>7</sup>.

### **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”) whereby as opposed to criminal cases, there is no right to a counsel in civil cases. In view of this, it is probably more correct to review Turkey’s obligations in reference to this Convention.

There is talk of four new titles being added to the current EU negotiation list as a result of EU’s experience with Eastern European countries’ accession process. One of these new titles apparently will be the judiciary and justice. As such, we can expect access to justice (thereby legal aid), currently one of the priorities mentioned in Turkey’s

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<sup>5</sup> The act applies to those who were not a student of any law school as of 10 May 2001. At the same time, if the purpose of an exam is to enhance quality, then a candidate should not be allowed to sit for the exam six times.

<sup>6</sup> [www.barobirlik.org.tr](http://www.barobirlik.org.tr). (The Union of Bar Associations)

<sup>7</sup> The figures are taken from S. Dönmezer-F. Yenisey, *Ceza Adalet Sisteminin Etkinligi* 1998, Istanbul: TESEV 2000.

National Program under Home and Justice Affairs, to become a separate title, requiring closer attention by the government.

While this is welcome, on the domestic front, 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 courts<sup>8</sup>. 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 custody<sup>9</sup>. 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 defendants<sup>10</sup>.

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<sup>8</sup> The latter was added to the constitution on 3 October 2001.

<sup>9</sup> 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.

<sup>10</sup> *id.* p. 188.

However, the government did not do this by establishing a public defenders system or by setting up standards for providers of service or otherwise. Instead, it 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. This system has been in operation ever since but no evaluation took place to determine its performance or efficiency<sup>11</sup>.

Initially, attorneys working for the CCPP Units were complaining of unwelcoming attitudes by law enforcement officers and of hindrances<sup>12</sup>. Today, the system has come a long way, although indications of low access rates<sup>13</sup> call this optimistic comment into question. Nevertheless, it 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 remuneration<sup>14</sup> 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

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<sup>11</sup> 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.

<sup>12</sup> Elveris, I., Kutucu, S., and Yasar, I., p. 206.

<sup>13</sup> There are indications that in parts of Turkey as few as 20% of indigent criminal defendants have access to free legal representation, Introduction, in *Legal aid in Turkey*, p.174.

<sup>14</sup> 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.

order to be able to better protect the criminal defendants<sup>15</sup>. Nevertheless, it can be said that 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 court<sup>16</sup>. Nevertheless, in 2001 the government allocated funding for legal aid in civil and administrative matters<sup>17</sup> through the Ministry of Finance<sup>18</sup>. Thus, the legal aid provisions in the Law on Attorneys finally found application. While allocation of funds was a welcome development, this was not as a result of a public debate on legal aid. Accordingly, the “hands off” approach that was described concerning 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.

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. 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.

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<sup>15</sup> The Istanbul Legal Aid Bureau requires a similar training for attorneys that will work for women and juveniles.

<sup>16</sup> This is set to change in the new civil procedure code that is currently being drafted.

<sup>17</sup> Includes criminal victims as well.

<sup>18</sup> It must be noted that in Turkey it is the Ministry of Finance that determines the budget of ministries and not the ministries themselves.

Under the system, 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 as the representative for the bureau<sup>19</sup>. Nevertheless, the figures provided by the Union indicate that so far, all Bars were sent funds by the Union and made use of the system. However, due to lack of a central authority setting rules for the operation of legal aid bureaus, many of the below explanations had to be obtained from the Istanbul Legal Aid Bureau and are therefore of limited application. 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, every legal aid bureau interprets them according to the economic indicators in their respective city<sup>20</sup>. This might be 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.

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<sup>19</sup> Elveris, I., Kutucu, S., and Yasar, I., p. 189.

<sup>20</sup> *id.* p. 190.

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, a remedy that could also be considered ineffective.

### **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 consideration<sup>21</sup>. 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 attorney must advise the location of her/his office and the area of practice. Cases are then

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<sup>21</sup> *id.* p. 191.

allocated according to lists prepared by the legal aid bureau, on a rotation basis<sup>22</sup>. In fact, the Regulation provides that attorneys must be given 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 the proof that they have filed a case before a court or have taken action concerning the case<sup>23</sup>. Proof of filing a case to obtain payment in a way promotes 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. The system should have left some initiative for the attorney to thoroughly follow the case by making half of the payment at the conclusion of the case.

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<sup>22</sup> *id.*

<sup>23</sup> *id.* p. 201.

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:

For written legal advice: YTL<sup>24</sup> 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 time<sup>25</sup>. 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

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<sup>24</sup> As of the end of April 2005, €1 equals to YTL 1,78.

<sup>25</sup> Elveris, I., Kutucu, S., and Yasar, I., p. 195.

the hearings and what took place in these hearings. The attorney must also enclose all the relevant hearing protocols<sup>26</sup>.

Meanwhile, every three months legal aid bureaus prepare 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 months<sup>27</sup>.

This being said, however, the Union is not in a hierarchical position towards the bar associations. As such, it does not monitor the bars. Nor does it carry out financial audits of the bars. Further, neither the Units nor the legal aid bureau have an authority to judge another attorney's professional opinion and practice in any particular case. They also lack any authority to apply any disciplinary measures on the attorneys. If an attorney fails to fulfill professional requirements, (s)he shall be responsible under the Act on Attorneys and the Union's codes of conduct. As such, it appears that for the Union the only way to exercise any control over legal aid performance is through withholding quarterly funds<sup>28</sup>.

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 provide enough guarantees for

<sup>26</sup> *id.*

<sup>27</sup> *id.* p. 196.

<sup>28</sup> *id.*

clients<sup>29</sup>. Attorneys' and Bars' view of independence amounts to unaccountability even the service attorneys provide is funded with public money. In view of this, any attempt to monitor or control by an independent institution, would probably be met with resistance from attorneys and the Bars. This could especially be so if they were under scrutiny for their professional judgment by a peer (or otherwise through consumer associations). 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.

#### **10. Financing of the system:**

Each year, the Ministry of Finance<sup>30</sup> 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 Bar<sup>31</sup>.

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<sup>29</sup> 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.

<sup>30</sup> 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.

<sup>31</sup> Elveris, I., Kutucu, S., and Yasar, I., p. 197.

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 year<sup>32</sup>. 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 <sup>33</sup>
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 questionnaire<sup>34</sup>, the legal aid budget per inhabitant in Turkey is €0,13 one of the lowest among Council of Europe members. 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.

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<sup>32</sup> *id.* p. 198.

<sup>33</sup> 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.

<sup>34</sup> [http://www.coe.int/T/E/Legal\\_Affairs/Legal\\_co-operation/Operation\\_of\\_justice/Efficiency\\_of\\_justice/](http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Efficiency_of_justice/).

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 Turkey<sup>35</sup>. The re-allocation of the amounts to the respective bars is made according to a complicated scoring system<sup>36</sup> indicating the following total amounts:

	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 conducted. Little is therefore known to develop ways to assist them. In any case, no

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<sup>35</sup> Source: [www.die.gov.tr](http://www.die.gov.tr)

<sup>36</sup> 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.

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 illusory<sup>37</sup> 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 lawyering 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 did not challenge the view of their members as they also saw provision of legal aid as a responsibility dumped on them by the state. The Bars now see 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. However, 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.

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<sup>37</sup> Tarhanli T., Introduction, in Legal aid in Turkey, p. 156.

This shows that self regulation of the profession needs a thorough debate in Turkey, as it leads to conflict of interest<sup>38</sup>. Powered by the law does not allow for reduced price and alternative products, the Union and the Bars exclude large segments of low income people from the legal market. At the same time, even reduced alternative legal services were allowed, the current advertising ban vigorously enforced by the Bars, would prove an obstacle for their proper functioning.

In addition to providing low priced legal assistance models for 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. Alternatively, if the monopoly of lawyers cannot be relaxed in the short run, the Bars could at least be pushed to counter balance their privilege 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.

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<sup>38</sup> Clementi's radical reforms, the European Lawyer, February 2005, p. 8.

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 other reasons, especially for the disadvantaged segments of the society while regulators of the profession are yet to respond to the challenges brought about by globalization and liberalization. Accordingly, legal aid is *only one way* to address access to justice issues prevalent in Turkey and requires a holistic approach from the 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 interested parties should be established.

3. The current structure, resulting in an applicant making requests according to different laws and regulations from different institutions, should be replaced by a user friendly, “one stop shop” structure.
4. A clear selection criteria and quality procedures 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.