

Access to Legal Aid in Criminal Matters: Istanbul Sample

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Abstract- Academicians focused on “Access to justice” topic in Turkey during the 2000’s, as a result of European Union accession process, the judicial, legislative and administrative systems in Turkey underwent a series of reforms in the last decade. On the other hand, many citizens in Turkey today are still unable to claim their basic rights and access available services because of financial inadequacy and lack of knowledge. This review is aimed to manifest the current situation in access to criminal legal aid specifically in Istanbul that reflects Turkey as the most populated and developed city of the country. To achieve this, legal framework of legal aid in Turkey and the procedure of legal aid provided by the bar association have been summarized and additionally researches regarding the general overview of access to legal aid in criminal matters in Istanbul and the Istanbul Bar Association’s Annual Report have been discussed. Due to the lack of regional and annual data of legal aid statistics, conducting a specific questionnaire severally for each district is recommended for further researches.

Index Terms- Access to justice, penal procedure code, civil and criminal legal aid, social inequality.

I. INTRODUCTION

Access to justice is a principal human right. It is also necessary for the protection of all other economic, social, cultural, civil and political rights, and essential for fighting with poverty and economic inequalities. Legal aid has been introduced as a requirement of the right to fair trial and it is a principle brought not to be deprived of the right to file a case for those who cannot afford it. In the early 20th century, many European countries had no formal approach to legal aid, and the poor relied on the charity of lawyers. Most countries went on to establish laws that provided for the payment of a moderate fee to duty solicitors. To curb demand, legal aid was restricted to lawyer costs in judicial proceedings requiring a lawyer [1,2,3].

“Access to justice” became a popular research topic in Turkey during the 2000’s, as a result of European Union accession process, the judicial, legislative and administrative systems in Turkey underwent a series of reforms in the last decade. Many citizens in Turkey today are still not able to claim their basic rights and access available services because of financial inadequacy and lack of knowledge. This review is aimed to reveal the current situation in access to criminal legal aid specifically in Istanbul, that reflects Turkey as the most populated and developed city of the country. Through the manuscript, legal framework of legal aid in Turkey and the procedure of legal aid provided by the bar association have been summarized and additionally researches regarding the general overview of access to legal aid in criminal matters in Istanbul and the Istanbul Bar Association’s Annual Report have been discussed.

Legal Framework of Legal Aid in Turkey

Right to a fair trial

Right to legal remedies is regulated in article 36 on the Turkish Constitution, accordingly “Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures.” This right is also matter to article 6 (right to fair trial) and article 13 (right to an effective remedy) of the European Convention of Human Rights (ECHR), that it’s closely related.

It’s possible to say that Turkey has a mission to build an effective system to realize access to justice to it’s citizens by considering Turkish Constitution’s below articles [4].

Since judicial activities are costly, this right is guaranteed by the constitution, state has some positive responsibilities to ensure the enjoyment of this right effectively, especially for the people who are lack of financial possibilities. In this context, some arrangements has been made on the legislation in order not to obstruct the right to a fair trial because of attorney’s fee, case fee and the other litigation expenses.

Legislations concerning legal aid basically divided in two forms as legal aid in civil matters and mandatory legal aid in criminal matters, however before this distinction there are some other arrangements that contains both matters. Attorney’s Act No 1136 regulates the content and the process of how to demand and get legal aid service referred to in articles 176-181, the details of these matters has also mentioned in Turkey Bar Association Legal Aid Directive.

In addition to mentioned legislations, while the principles of legal aid in civil matters has regulated by Code of Civil Procedure (HukukMuhakemeleriKanunu HMK) No 6100 between the articles 334 -340, the principles of mandatory legal aid in criminal matters has regulated by Code of Criminal Procedure (CezaMuhakemesiKanunu CMK) as part of mandatory defense counseling and mandatory attorneyship.

Legal Aid in Civil Matters

The grounds of legal aid that apply to civil matters and bankruptcy/dept pursuance has regulated by (HMK) such as the content, the demand and service procedure of legal aid and who could make use of it. In this direction; If persons who are incapable of paying the case costs partially or fully without leading himself and his family in a bad condition can prove accuracy of their allegations and defenses or in application to enforcement and

provisional injunction, they can benefit from legal aid (HMK 334/1). If public associations and foundations which are incapable of paying the case costs partially or fully without leading themselves they can benefit from legal aid (HMK 334/2).

The movant has to present his claim and reference evidences briefly and prove that he is incapable of paying the case cost by presenting documents regarding his financial status to the relevant authority.

The litigations cost will be postponed if the movant is appropriate for legal aid. Because all case cost and state outlays has to paid by the losing party at the end of the trial. On the other hand if the legal aid beneficiary could be partially or fully exempted of the payment after the consideration that he would be victimize because of the collection in case he adjudged as unfair by the court.

Mandatory legal aid in criminal matters for the victim

Mandatory defense counsel is issued pursuant the article 239 of CMK among the rights of the intervening party. According to this, in cases where the victim or the individual who suffered damages from the crime has intervened the prosecution, a lawyer shall be appointed by the Bar Association in cases of sexual assault and in crimes that carry imprisonment of five years at the lower level and less, if he puts forward a request to the court.

In addition to this, if the victim or the individual who suffered damages from the crime is a child, deaf or mute, or an individual who is mentally ill to the extent that he cannot make his own defense, then request is not needed in order to appoint a lawyer (Art. 239/2 CMK). This kind of appointment is defined as the “mandatory” defense counseling.

It’s necessary to emphasize that, pursuant to article 334/3 of HMK, reciprocity principle is required for foreign citizens to benefit from legal aid, however for mandatory legal aid in criminal matters there is no citizenship agreement and the regulation is applied to anyone who is intervened the prosecution as victim, witness or suspect.

Mandatory legal aid in criminal matters for the suspect

Mandatory defense counseling and mandatory attorneyship are the principal components of the legal aid in criminal matters. There are some fees to be paid for the lawyers however who serve during the criminal investigation and prosecution procedures.

Because of the significant importance of the values that are subject to criminal procedure, both victim and the party who suffered from the crime need to be represented during the trial in order to protect their rights. However, for the people who are not financially covered adequately, access to justice poses a big problem exactly at this time.

To avoid this, CMK allocated two separate institutions that are “mandatory defense counsel” and “mandatory attorneyship”. The suspect or the accused shall be asked to choose a defense counsel on his behalf. In cases where the suspect or accused declares that he is not able to choose a defense counsel, a defense counsel shall be appointed on his behalf, if he requests such (Art. 150/1 CMK). According to the second part of the same article; if the suspect or the accused who does not have a defense counsel is a child, or an individual, who is disabled to that extend that he cannot make his own defense, or deaf or mute, then a defense counsel shall be appointed without his request (Art. 150/2 CMK). The third case of mandatory defense counsel is provided for suspects accused of crimes carrying imprisonment terms more than five years.

Another obligatory case that requires mandatory counsel is the decision of arrest. According to the article 101/3 CMK that regulates the decision of arrest; in cases where a motion for an arrest has been submitted, the suspect or accused must have the legal help of a defense counsel chosen by him, or appointed by the bar association.

If mandatory counsel appointed to the one who is suspect or accused of a crime, he has to pay the cost of court and counseling fee in case of the court finds him guilty at the end of prosecution. But pursuant to article 6/3-c ECHR and also as agreed on Court of Cassation Decisions, this cost can’t be demand from the person in subject to prove his financial impossibilities [5].

The Structure of Legal Aid Provided by the Bar Association

In Turkey Bar Associations are authorized to provide criminal legal aid and in this context they established Code of Criminal Procedure Practice Units (CMK Units) to serve citizens. The first CMK unit was established in Istanbul by Istanbul Bar Association and served as a model for the other Bar Associations of Turkey. According to the Istanbul Bar’s annual report for the year 2012, in CMK unit 7555 attorneys are recorded and 4782 of them working actively. Considering the population of the city, the CMK Unit has divided into 26 subunits. The appointments with lawyers used to be made according to an on duty list, at which day the lawyers are available [4].

The request for legal criminal aid can be made by filling an application form which could also be filled by the legal aid bureau employees in case of applicant’s illiteracy. According to the Code of Criminal Procedure, requests may also be made by close relatives or the spouses of the defendants too. Law enforcement officers could advise about defendants’ rights but cannot make a criminal legal application. However since 2010, CCP units began to use OCAS (Code of Criminal Procedure Practice Lawyer Online Tasking System) website to deputize lawyer. By using this web site, courts, judges, prosecutors and law enforcement could request lawyer from bar association, online twenty four hours a day, seven days a week. Then the system is tasking the lawyer automatically, who is up coming next on the system. As to acceptance of duty by lawyer the process is beginning [4].

Among its 81 provinces, Istanbul is Turkey’s most populated city with 13 854 740 inhabitants based on the official census data for 2012. It’s also European’s third and world’s twenty first biggest city. Population growth rate of the city is 1.68 % yearly and projective researches demonstrated that, if these trends continue, Istanbul will be the most crowded city of Europe by 2020. 99% of

the city habitants settled in the urban. The density of population is 2666 person per square km which is 27 times of Turkey's population density. Since 1950 more than 11 million of people have migrated to city from almost all provinces but mostly eastern part of Turkey. Demographic indicators shows that 84.2 % are born outside of Istanbul. 35% of this population are living on Asian side and the rest, 65% are living on European side of the city where employment, economic, cultural and educational activities are intense and easy to reach [6].

Istanbul has 39 districts and most crowded one is Bağcılar with 794 024 people. Almost 5, 5 percent of the city population is living in Bağcılar. The following districts are; Küçükçekmece, Ümraniye, Pendik, Bahçelievler, Esenyurt, Üsküdar and Kadıköy. Literacy rate over 6 years of age and over is 97.3 which is over the country's average. Further 30% of total universities in Turkey are settled in Istanbul. Unemployment rate for the city is declared as 11.3%. In Istanbul approximately half million people still lives under the poverty threshold which only includes food and non- food items. In other words % 5 of Istanbul population considered as poor [6,7]. Crime rates in Istanbul have been decreased during the past five years. This decline could be explained with the effective usage of CCTV's. According to EU Crime and Security Consortium research results 18% of people become victim of a crime in Istanbul as compared to other metropolis the rate vary as 32 % in London, 27 % Amsterdam, 24 % in Copenhagen, 23 % New York, 20 % Brussels and 19 % Rome [8].

II. RESEARCHES ABOUT THE LEGAL AID IN İSTANBUL

Undoubtly the most essential question of the subject is to find out how to enter these legislations into force. Because the success of these regulations depends on adopting them to the practice in an effective way. To determine this there are some important researches have been carried out in İstanbul Courthouses in different years.

The first of these was "The Effectiveness of Criminal Justice System" carried out as Project by Prof. SulhiDönmezer and Prof. Dr. FeridunYenisey in 1998. The results of this research demonstrates that the accused were represented by the counselors that they've chosen by themselves instead of the ones that bar appointed. The reason of this issue determined that the research was limited with İstanbul and included only bad check lawsuits. In the same research it's seen that the ratio of the lawyers who served legal aid and get paid by the bar association was only % 6, 5. Based on this situation it's recommended to establish an effective payment system to lawyers in order to motivate them and for achieving the legal aid's objective [9]. But unfortunately it's known that this issue is still going on after all these years.

The second research project concerning this subject was implemented in 2011 by the cooperation of Bahçeşehir University (BAU), Max Planck Institute (MPI) and HKI under the name of "The Effectiveness of Criminal Justice during the Investigation Process". The data of this project was 1000 court files that were investigated in court houses and according to the analysis of these files it's found that while the number of the law suits that a lawyer involved was 20, the number of the law suits without a lawyer was 36 and no information gained regarding lawyer attendance from the other files. This research mostly contains the criminal court of first instance and criminal court of peace law suits. Since the investigation and prosecution procedures of these law suits are not included such crimes that require to have a mandatory counselor, it's seen that the numbers of the law suits that have mandatory lawyers was inconsiderable as it's estimated.

In the year 2013 BAU, MPI and HKS have carried out collectively another project themed " Enforcement of Detention and The Role of Defense" [10], that has searched the files that include the verdict of conviction only by the heavy criminal courts in Istanbul Courthouses. According to the survey on application of the pre-trial detention and the role of the defense which carried out by BAU in 2013, the suspect didn't represented by an attorney at the detention hearing in 124 files (see Table 1).

TABLE 1 -Was the suspect represented by an attorney at the detention hearing?					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	583	77.0	82.5	82.5
	No	124	16.4	17.5	100.0
	Total	707	93.4	100.0	
Missing	Cannot be understood from this file	47	6.2		
	99	3	.4		
	Total	50	6.6		
Total		757	100.0		

According to the law a defense lawyer must take place at the detention hearing but a few years ago there was a conflict of payment for appointed lawyers between the Ministry of Justice and Bar Association. Therefore, these lawyers protested the situation and weren't involved in the cases (see Table 2). According to the BAU's survey, %52 of the defense lawyers were appointed by the Bar Association, only in 106 cases the suspect had enough financial resources to retain his own private lawyer (see Table 3).

TABLE 2 -Is the absence of defense lawyer at the detention hearing related to the conflict between Ministry of Justice and Bar Association?					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	43	5.7	68.3	68.3
	No	20	2.6	31.7	100.0
	Total	63	8.3	100.0	
Missing	99	694	91.7		
Total		757	100.0		

It's instructed above the legal frame and its implementation of legal aid, mandatory defense counselor and mandatory attorney. Thereinafter sociodemographic perspective of legal aid will be mentioned in text.

TABLE 3- Was the attorney of the suspect private or appointed by the Bar Association?					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Private attorney	106	14.0	21.0	21.0
	Appointed by the Bar Association	398	52.6	79.0	100.0
	Total	504	66.6	100.0	
Missing	99	253	33.4		
Total		757	100.0		

III. THE EVALUATION OF THE ISTANBUL BAR ASSOCIATION'S ANNUAL ACTIVITY REPORT

Applications to bar for a lawyer in order to benefit from "Criminal Legal Aid" is a direct indicator of "Access to Justice". Istanbul Bar Association Annual Activity Report for the year 2012, declares the data of the criminal legal aid demands from law enforcement units from all over the 39 districts of Istanbul, both for the children and adults. Istanbul Bar Association Annual Activity Report for the year 2012 has been collected from Code of Criminal Procedure Practice Lawyer Online Tasking System (OCAS) web site [11]. By using this web site, courts, judges, prosecutors and law enforcement could demand lawyer from bar association, online in twenty four hours a day, seven days a week. Then the system is tasking the lawyer automatically, who is up coming next on the system. As to acceptance of duty by lawyer the process is beginning.

Considering this report's figures, it is clear that, some districts of Istanbul such as Fatih, Şişli, Beyoğlu, Bakırköy and Üsküdar are demanding many more lawyer than the others. Those districts are not the most populated ones but industrially developed, thus they offer more job opportunities and residents are less than work places. Fatih and Üsküdar are also the main transport hubs of the city. As a result of this the population in these districts change dramatically in the working hours. Criminological researches show that highest crime rates are reported in the city centers where business centers, factories and offices located. On the contrary crime rate is reducing far away from the city center [12].

On the other hand considering report data it can be said that, Çatalca, Adalar, Şile, Beykoz and Silivri districts have rare applications to CCPP unit for a lawyer. These districts can be considered as countryside and low population zone of Istanbul.

By comparing the number of criminal legal aid applications to the population of districts, it's seen that even they are high populated Çekmeköy, Arnavutköy, Zeytinburnu, Sancaktepe and Güngören districts habitants are applying legal criminal aid lesser than it's expected. Comparing with the most applicant districts with less often applicant districts, it is easy and proper to say suburbs of the city has less awareness of their rights depending economic, social and educational inadequacy.

Criminologists have long suspected that solving problems related to education is key to solving the problem of crime. Education represents the single most important social policy investment in overcoming social disadvantages [13,14]. Household budget research indicates that, only 2, 3 percentage of total expenditures in Turkey done for educational purposes [15]. This figure differs dramatically in high income and poor families. According to this difference, high income group spend their income for education 7 times more than low income group. This gap can be seen in schools too. Because of its population Istanbul has the highest rate in the number of students per classroom and per teacher. The inequality of opportunities in education among Istanbul districts, is stunning. As an example the average of student numbers per classroom rates in Gaziosmanpaşa, Sultangazi, Esenler and Arnavutköy are 34- 38, but 16-18 in Kadıköy, Beşiktaş, Şişli and Bakırköy [16].

Researches also reflect that the poverty and unequal conditions are affecting directly awareness of rights. People in poverty and marginalization directly and indirectly affects their prospects for accessing justice services. Illiteracy and lack of education reduces awareness of their rights and their ability to defend themselves [17].

Istanbul has a young population which is out of labor force. Almost 3, 5 million of the city population is under the age of 15. In another words, one out of every four in Istanbul has not contribute to the household income. At the same time most criminologists suggest that people commit less crime as they getting older. Crime peaks in adolescence and then decline rapidly there after [18]. This fits to the figures of Istanbul Bar Association's Annual Activity Report, every 3 applications in 4 has been made for children defendants or victims of crime. As it's mentioned before criminal legal aid is mandatory for children defendants or victims of crime in any circumstances.

IV. CURRENT LEGISLATION DURING THE STATE OF EMERGENCY

After the coup attempt on July 15, 2016 and turmoil incidents related to this attempt, a state of emergency was declared across Turkey on July 20, 2016. At the beginning, the state of emergency was declared for 3 months but recently it has been extended for 6 months more. Since it was declared, many statutory decrees (KHK) has been published in Official Gazette and some of these statutory decrees have articles related to criminal procedure. Here we will only refer to provisions that are effective in criminal defense because it is linked to our topic.

According to KHK 668 which has published in Official Gazette on 27 July 2016-29783 (2nd repetition) and approved by Turkish Grand Assembly with the Act No. 6755, as long as the state of emergency continues with regard to the offences enumerated under fourth, fifth, sixth and seventh sections of fourth chapter of second volume of the Turkish Criminal Code, the offences falling under the Anti-Terror Law and the collective offences; searches and seizures can be carried out at lawyer's offices by law enforcement officers without the participation of the public prosecutor upon the order of a judge, or by the written order of a public prosecutor, in cases where there is peril in delay. The bar president or an advocate representing him/her shall be present during the search and seizure process; however, the second and third paragraphs of Article 130 of the Law no. 5271 shall not be applied (Art. 3/1-i). The defense counsel's right to examine the contents of the case-file or take copies of the documents can be restricted by the decision of the public prosecutor, if the purpose of the investigation may be compromised (Art. 3/1-l).

According to KHK 667 which has published in Official Gazette on 23 July 2016-29779 and approved by Turkish Grand Assembly with the Act No. 6749, as long as the state of emergency continues with regard to the offences enumerated under fourth, fifth, sixth and seventh sections of fourth chapter of second volume of the Turkish Criminal Code, the offences falling under the Anti-Terror Law and the collective offences; where there is a risk that public security and the security of the penitentiary institution is endangered, that the terrorist organization or other criminal organizations are directed, that orders and instructions are given to them or secret, clear or crypto messages are transmitted to them through the remarks during the interviews between the detainees and their lawyers; the interviews may be recorded auditory or audio-visually via technical devices, the officers may be made present during the interviews between the detainee and his/her lawyer with a view to monitoring the interview, documents or document templates and files given by the detainee to his/her lawyer or vice versa and the records kept by them concerning the interview between them may be seized, or days and hours of the interviews may be limited upon the public prosecutor's order.

In the event that the interview of the detainee is understood to be made for the aim set out above, the interview shall be immediately ended, and this fact shall be recorded into minutes together with the grounds thereof. The parties shall be warned about this issue prior to the interview.

In the event that such minutes are drawn up in respect of a detainee, the Office of the Magistrates' Judge could ban the detainee from interviewing with his/her lawyers, upon the public prosecutor's request. Decision on banning shall be immediately served on the detainee and the relevant Bar Presidency with a view to assigning a new lawyer. The public prosecutor may ask for replacement of the lawyer commissioned by the Bar. The commissioned lawyer shall be paid in accordance with Article 13 of the Law no. 5320 on the Enforcement and Application Procedure of the Criminal Procedure Code of 23 March 2005 (Art. 6/1-d).

Within the scope of the investigations performed, the defense counsel selected under Article 149 of the Criminal Procedure Code or assigned under Article 150 thereof may be banned from taking on his/her duty if an investigation or a prosecution is being carried out in respect of him/her due to the offences enumerated in this Article. The Office of Magistrates' Judge shall render a decision on the public prosecutor's request for a ban without any delay. Decision on banning shall be immediately served on the suspect and the relevant Bar Presidency with a view to assigning a new counsel (Art. 6/1-g).

Within the scope of the investigations and prosecutions, at the most three lawyers shall be present during statement-taking and questioning periods or hearings (Art. 6/1-ğ).

As seen above, all of these provisions created serious restriction against the right to defense. And all of these practices revealed an important question that the evidence obtained based on these interim measures during the state of emergency can be used after the state of emergency. In order to prevent human rights violations it would be beneficial to reconsider our legal framework [19].

ACKNOWLEDGMENT

The authors would like to express their thanks to TÜBİTAK (Scientific and Technological Research Council of Turkey) for supplying the financial support by 2224-A - International Scientific Meetings Grant Programme with the application number 1919B021416742.

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