

RESEARCH STUDY ON FREE LEGAL AID

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About Free Legal Aid in general

Free Legal Aid is one of the ways in which certain persons are provided with legal aid in order to exercise their rights and defend their interests at the court or other competent state bodies. Free Legal Aid is also one of the ways in which the right of access to the court and other state bodies is realized and implemented in practice, on the basis of the principle of equality, in which proceedings, the party itself does not pay any procedural costs and fees, nor costs of professional representation. These costs are already covered from the state budget or from the budget of the organization providing Free Legal Aid².

Provision of Free Legal Aid (hereinafter: FLA) is a modern *acquis communautaire*, which gained its legal basis, respectively its source, relatively late. The most important document that refers to it and in some way, although indirectly, establishes the provision of Free Legal Aid is the European Convention on Human Rights and Fundamental Freedoms, adopted in 1950, which stipulates that all persons accused in criminal proceedings must be provided with legal aid and the right to adequate defense³. This Convention does not directly mention the right of access to court, however, analyzing the practices of the European Court of Human Rights, one gets the impression that this Court in some way "derived" or created this right by interpreting an article⁴ of the European Convention on Human Rights. The legal logic of such interpretation, we believe, is reflected in the fact that the exercise of the right of access to justice is the basis for the exercise of all other rights guaranteed by the above mentioned convention, but also by other Conventions.

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² *In principle, the Free Legal Aid Agency is financed from the state budget, but there are other organizations, mostly non-governmental, which can be financed from other sources, i.e. from donations or charitable actions.*

³ *This legal logic can be related to the principle called "equality of arms", with which it is considered that in criminal proceedings we have on the one hand a professional lawyer who practices justice (prosecutor), and on the other hand in the biggest number of cases, there is no person who is a lawyer by profession or who has a professional field of representation and defense at the court, so the chances should be equalized, respectively through professional representation, one will be offered the opportunity and given the right to reject the claims and express self-defense adequately.*

⁴ *Article 6, item 3 point c of the Convention.*

Although the aforementioned article of the Convention does not directly address the provision of FLA in other legal areas and procedures such as civil proceedings or administrative disputes, but refers only to a criminal matter, a practice has been established by the work of the European Court of Human Rights that also refers to the provision of FLA in other legal areas. For example, in the case of *Airey v. Ireland* it is stated that the signatory states of the abovementioned Convention are obliged to ensure FLA when it is necessary for the effective protection of civil rights and obligations in court proceedings⁵.

There is also a very long list of other FLA cases where the Court has found that there are human rights violations where, for example, the party's ignorance, costs of proceedings or the party's material and social status are such as to impede the effective exercise of rights. By doing so, the Court has ensured that a practice is built that will later grow into a regulated system (in most European countries) providing FLA to all those in need in an orderly and institutionalized manner.

Free Legal Aid in Kosovo

FLA in Kosovo is regulated by the Law on Free Legal Aid 04 / L-017. From a comparative point of view, we consider that this Law is one of the most advanced in the region, especially given the fact that some countries in the region still do not have the law that regulates this area.

The law is regulated in such a way as to establish a functional system providing FLA to all persons who meet certain conditions and criteria set by law, in all court proceedings, i.e. litigation, criminal, administrative, and misdemeanor proceedings⁶. It also defines the scope of the law, the organization of the agency and the conditions that a person must meet to become a beneficiary.

However, analyzing this law from the perspective of FLA beneficiaries, i.e. those who need it and those who want to use the services of the Free Legal Aid Agency (hereinafter: the Agency) or its regional and mobile offices, several elements of importance can be singled out. These are the *services* provided by the Agency and the *criteria* that a person must meet in order to become a beneficiary of free legal aid.

As for the services provided by the Agency, the legislator has divided them into those provided primarily and secondarily and they are decisively defined in the law, as information

⁵ *Airey v. Ireland, Application no. 6289/73 dt. 09.10.1979.*

⁶ *Article 1. of the Law*

and legal advice regarding legal proceedings; support in writing and all other technical support, related to the completion of the case; representation in civil, administrative, misdemeanor and criminal proceedings; defense and representation at all stages of criminal proceedings; information and legal advice regarding misdemeanor proceedings; information, legal advice and assistance in the mediation procedure, arbitration. It is worth mentioning that all these services are provided as a form of primary FLA, while only certain points (drafting of written documents and acts and presentation in court proceedings) are provided as a form of secondary legal aid.

Analyzing all the previously mentioned forms through which citizens are provided with FLA, we believe that this law covers all the most important actions that can be taken in a legal or judicial process. This is because we believe that some of the most important legal actions for the parties are provision of legal advice, drafting certain acts such as lawsuits, responses to lawsuits, complaints, objections, contracts and other written means of regulating legal relations in society, as well as representation of parties at the court, i.e. in proceedings before a competent state body by a lawyer hired by a member of the Kosovo Bar Association, in cases when this is necessary due to the nature of the case and when it is considered that the party would suffer irreversible consequences and would not be able to exercise the rights adequately without proper representation and support.

The second thing that we think is interesting from the point of view of beneficiaries or those who aspire to use FLA are the criteria that these persons must meet in order to acquire that right, i.e. to obtain a decision that allows them to use FLA services. The criteria are divided as *qualifying, financial and legal criteria*⁷.

According to the *qualification* criteria, all citizens of the Republic of Kosovo have the right to receive FLA, i.e. also foreign citizens, persons designated according to the rules and conventions of international law which oblige the Republic of Kosovo and all other persons based on reciprocity meaning that if the citizens of Kosovo in any other country can use the FLA services, then the citizens of that country can also use the same services in Kosovo⁸.

The financial criteria stipulate that primary FLA can be received by persons living under social assistance or persons who are in a similar situation as persons living under social assistance, although the law does not fully clarify who these persons are. The secondary

⁷ *Article 6 of the Law*

⁸ *Article 7 of the Law*

financial criterion is met by persons whose total family income is lower than the average family income⁹.

Finally, the *legal* criteria are designed so that the provision of FLA is first assessed by judging the basis of the case, therefore, there are three specific criteria: *the actual value of the claim, the strength of the arguments and evidence submitted by the beneficiary and the probability of the success of the claim.*

However, no matter how advanced and regulated this matter may be, we believe that in some cases the legal provisions are unclear, and in other cases we believe that a person who aspires to use FLA is imposed an unnecessary obligation that he is unlikely to fulfill, so we will deal with these details that we have noticed in relation to the legal solutions for the provision of FLA in the next chapter.

Advantages and disadvantages of the Law on providing free legal aid - what should be changed?

By interpreting the legal provisions prescribed in the Law on Provision of the FLA in Kosovo, and for the purposes of this paper, several conclusions can be drawn. Namely, we consider that this area is regulated so that the existing provisions are sufficient for the functioning of the Agency. However, we also think that there is a lot of room for progress and improvement because we think that there are some things that need to be incorporated or better defined and elaborated, as well as to put forth some innovations.

As for the organization of the Agency, for the purposes of this paper, we consider that the most important thing to note is that there is room for progress and better organization and structure, but all this in order to bring citizens, or potential beneficiaries of the Agency as close as possible, to access those services easier, and thus be more efficient in protecting their rights and legitimate interests.

With regards to the circle of FLA beneficiaries, although the Law stipulates that only natural persons can be beneficiaries, i.e. the persons explicitly listed in the Law, we consider that there are several categories that should be envisaged as potential beneficiaries.

The first category that we would mention as potential beneficiaries of FLA are *apatridi* or stateless persons, i.e. persons who do not have any citizenship and are residing in the territory of the Republic of Kosovo. This is because the approach towards such persons is regulated by the 1954 UN Convention on the Legal Status of Stateless Persons, which explicitly stipulates

⁹ *Article 8 of the Law*

that stateless persons must have free access to courts in the territories of all signatory states to the Convention, and should also enjoy both legal assistance and be released from litigation costs.

The second category that we think should be incorporated as potential beneficiaries, are certain legal entities that our Law does not currently provide for as such. Under this, we believe, should be envisaged all non-profit, *non-governmental organizations* that operate and do not engage in commercial or profitable activities. This is because quite often there are cases when a party is a non-profit organization, which as such, due to the nature of its activities, certainly does not have the financial resources necessary for the smooth conduct of various disputes, therefore in some cases the non-profit organization could be unjustly shut down due to the lack of funds to ensure efficient and professional representation in the court or in some other procedures.

Furthermore, in comparison to the legal criteria for the provision of FLA, there is an interesting item relating to the *arguments provided* by the beneficiaries. In this context, we consider that in practice beneficiaries are often unable to provide all the necessary information, documents or evidence which they base their case on, sometimes out of ignorance, sometimes because these elements are currently or permanently inaccessible to them, and all this could lead to an unjustified refusal to provide FLA (for example, in property rights cases related to real estate, a party cannot obtain a possession list or a draft or property plan if he is not the owner). Therefore, we consider that it would be good to establish cooperation between the Agency and other state agencies and services in order to facilitate communication, and also to provide that in certain cases the Agency's officials, in line with the interests of justice, may request information or copies of documents that are necessary to perform his duties successfully and provide legal services as defined by law.

As for the beneficiaries themselves, we consider that it is necessary to specifically regulate their responsibility for the use of FLA if it is unfounded. This is because there is a possibility of abuse of the right to use FLA for inhumane or immoral reasons or even illegal use on the basis of false documents, information or statements, which the party submits to the officials.

Finally, as a last recommendation, in order to inform a wider circle of citizens about the work of the Agency, we consider that it would be in the interest of potential beneficiaries to create the so-called "maps" leading to free legal aid, to inform the widest possible circle of people. These roadmaps should provide, in the clearest and most accessible way, basic information on

what the possibilities are, who provides and who receives free legal aid and in which cases and under which circumstances, and where the nearest office is located. It would be best to develop them with the help of the relevant ministry and in partnership with bodies and organizations dealing with this activity, and they should also be displayed in, for example, courts, prosecutor's offices, municipal buildings, centers for social welfare and similar institutions where the rights and obligations of citizens are decided in a concrete way.