

Conclusions of the Research into the Free Legal Aid System in Montenegro 2012-2019

Montenegro has established its free legal aid system by adopting of the Law on Free Legal Aid, which applies as of 1 January 2012. Adopting of the Law was followed also by adopting of a number of secondary legislation acts which complemented the legal framework for provision of free legal aid in Montenegro.

Institutional conditions for providing free legal aid have been created as well, and **free legal aid services have been established in all basic courts**. Judicial institutions strived to inform citizens by implementing public campaigns about opportunities offered by the free legal aid system. Also, communication has been established with civil society organizations through cooperation projects and programmes aimed at more efficient promotion of the institute of free legal aid. The greatest contribution to implementation of these activities was provided by courts themselves, but also by the Ministry of Justice of the Government of Montenegro, Judicial Council and the Supreme Court of Montenegro, Centre for Training in Judiciary and State Prosecution, Association of Judges of Montenegro, international organisations (UNDP and OEBS), as well as by non-governmental organisations who strived from the very beginning of the establishing of the free legal aid system to provide their active contribution.

Since the beginning of enforcement of the Law on Free Legal Aid, **the total of 3.935 applications for FLA have been filed, and this right has been exercised by the total of 2.935 persons**. In the period 2012 – 2018, **354 applications were rejected, 71 denied, while the procedure was suspended in 51 cases**. The largest number of persons who have been granted FLA come from within **beneficiaries of family cash benefits and persons of poor financial standing**, and more than **90% are citizens of Montenegro**.

According to available data, in relation to the total number of approved applications for FLA, **only 4% (120) relate to victims of domestic and family violence, or victims of trafficking in human beings. Only one child without parental care has exercised the right to FLA until now** (there were 2 in total in six years who filed the application for FLA with competent services). According to available data, **EUR 1216.446,84** was allocated for FLA costs for the period 2012 – 2018, **and EUR 54482.930,98 was disbursed** (there are no data on disbursed funds for 2015). With respect to the total number of applications filed and decisions made on FLA, **administrative dispute was initiated only in 9 cases** (of which 5 cases in 2015 – a complaint in one of them was adopted, and rejected in the remaining 4), while there were no cases before the Administrative Court against decisions on granting FLA in 2012; 2013; 2014 and 2016.

Regardless of the progress made after 2013 in the normative area and with respect to organization of the legal aid system, there are still obvious challenges relating to the coverage of beneficiaries, types of procedures in which free legal aid can be granted, as well as the control and evaluation of the quality of legal aid that has been provided.

Changes and amendments to the 2015 Law **provide explicitly that the right to free legal aid is recognized to victims of domestic and family violence**, as well as to victims of trafficking in human beings, regardless of the financial standing. By incorporating victims of trafficking in human beings and victims of domestic violence into priority categories who are guaranteed the right to free legal aid, Montenegro has implemented obligations assumed by ratification of the Convention on Action against Trafficking in Human Beings, and of the Istanbul Convention as well.

However, the **Law still does not recognize victims of torture or abuse and victims of discrimination as a priority category** of beneficiaries of the right to free legal aid. This matter is important from the

viewpoint of equality of arms, particularly when the State or authorities and their representatives are the other party in a proceeding. Regardless of the reverse burden of proof for discrimination, a person who is a victim of discrimination may face numerous problems as regards conducting a procedure for the protection of his/her rights. The same applies to persons who are victims of torture.

The abovementioned changes and amendments to the 2015 Law have also ensured more favourable conditions for exercising the right to free legal aid, and conditions that need to be met by a person applying for free legal aid with respect to the value of assets, i.e. the amount of income have also been specified. Duty of the authority conducting a procedure in which the right to FLA may be exercised is defined with regards to informing parties in the proceedings about such right.

There have been no changes with respect to expanding the circle of authorized providers of FLA. Namely, although the Law on Free Legal Aid specifies that it does not limit provision of legal aid by services, non-governmental organisations and other organisations, in practice these organisation are not entitled to remuneration or to necessary costs. The Law does not envisage that, **in addition to lawyers**, free legal aid is provided, **at the Government expense, by non-governmental organisations** engaged in human rights, trade unions, political parties, university legal clinics and other entities having the required expertise and already providing legal aid. Also, no evidence is neither kept on FLA services provided by these organisations, nor such data are a part of analyses concerning functioning of the FLA system, which are prepared and published annually, although they would contribute considerably to assessing the overall situation in this field.

Free legal aid was mostly used in civil proceedings, for preparation of pleadings and representation before court. However, free legal aid was not used sufficiently in proceedings based on domestic or family violence, which may indicate insufficient promotion of the Law among these target groups. In addition, free legal aid is still not accessible in all proceedings in which decisions are made on the rights and legally based interests of citizens, such as administrative and misdemeanour proceedings which most of cases of violation of rights is related to in the Montenegrin context.

Although the opportunity to use free legal aid was extended in 2015 to include proceedings before the public enforcement officer, the **Law still does not envisage the opportunity to obtain free legal aid in administrative proceedings**, whereby persons of poor financial standing are deprived of free legal aid in proceedings in which their rights are established with respect to exercising various types of social protection, pension and disability insurance rights, labour-based rights, until the phase of administrative dispute is reached, when it may be too late for efficient protection. These legal solutions are not in line with established standards and practice of the European Court of Human Rights.

Such approach primarily starts from the type of proceedings, and not from the rights that are protected by such proceeding, which is **contrary to interpretation of the European Convention on Human Rights**. In this way, a person of poor financial standing is deprived of free legal aid in proceedings in which important rights and legally-based interests are established – such as the right to exercise social assistance; pension and disability insurance rights; labour-based rights, when the person is forced to seek protection in an administrative dispute.

There have not been many changes either with respect to the system of supervision of legal aid providers; responsibility of legal representatives for every individual case still depends mostly on bar associations or courts of honour. In the practice of free legal aid services and during monitoring of trials, cases of complaints of FLA grantees were registered with respect to insufficient engagement of lawyers in their cases. The Law **does not envisage criteria according to which a lawyer may deny**

provision of free legal aid. A lawyer may refuse to provide free legal aid in accordance with the Law governing practicing of law (Article 30(4)). It is a referring norm which is not sufficient in itself, since the Law on Legal Practice does not stipulate the conditions under which a lawyer may refuse to provide FLA, but only cases in which he/she must refuse to provide FLA.

Although, according to the research, there were no substantial objections to the quality of free legal aid that has been provided, it is necessary to improve mechanisms of control of the quality of provided FLA, with respect to the fact that the **system in that sense relies considerably on internal procedures of the Bar Association.** Given experiences of the Civic Alliance in other projects, a question of engagement of lawyers in smaller places, in certain types of cases against civil servants (especially in cases of discrimination or torture), and in cases in which the proceeding would be potentially led against lawyers themselves.

The Law on Free Legal Aid does not recognize explicitly all grounds of discrimination as listed in Article 2(2) of the Law on Prohibition of Discrimination¹, which include race, skin colour, nationality, social or ethnic origin, affiliation to the minority nation or minority national community, language, religion or belief, political or other opinion, gender, sex change, gender identity, sexual orientation and/or intersex traits, health conditions, disability, age, material status, marital or family status, membership in a group or assumed membership in a group, political party or other organisation.

As regards answers received from courts, data show that majority of application were filed with the Basic Court in Podgorica (in the percentage exceeding 50% of the total number of applications), while the smallest number of applications was registered in Cetinje, Kolašin and Danilovgrad. A considerable number of applications was filed with Basic Courts in municipalities in the north of Montenegro: Berane, Rožaje, Pljevlja and Bijelo Polje. Although provision of free legal aid was organized in all basic courts in Montenegro, we registered during the research that **there were also courts to which no application for FLA was filed** (Žabljak – data for 2012; 2013 and 2018). A relatively small number of applications was filed in Nikšić as well, given the size of the municipality (at average 20 – 30 applications).

Employees of FLA services within courts perform other duties as well in accordance with the annual plan and deployment of employees in the court. Records of provided FLA services are managed within PRIS; as well as manually, in the Registry of Cases. A good cooperation is being achieved with lawyers, except it has been noticed that senior lawyers sometimes do not take FLA cases, as reported “due to commitments made earlier and the volume of work”. Legal deadlines for making decisions are complied with, a **relative promptness** has been achieved in **obtaining data** from other authorities, so there are no obvious delays, although acting of the Department of Public Revenues and of the Property Administration could be more efficient. Courts mention the Central Depository Agency (CDA) as a positive example regarding provision of information.

According to assessment of courts, compared to the beginning of enforcement of the Law, citizens are now better informed as to how to exercise their right to FLA. Notices in a form of leaflets are found at the entrance to court buildings, next to courts’ noticeboards, as well as on courts’ websites, but information of citizens could improve through TV programmes, seminars covered by the media, and similar.

Difficulties in assessing certain criteria by officers working on implementation of free legal aid (such as **existence of probable chances of successful** action) are stated as one of practical challenges in deciding on FLA applications. Legal advice provided verbally are not registered, although some

¹ *Official Gazette of Montenegro* 046/10 of 6 August 2010, 040/11 of 8 August 2011, 018/14 of 11 April 2014, 042/17 of 30 June 2017.

services plan to start keeping such records (Basic Court in Nikšić), which certainly represents an example of good practice.

Applications of persons who are victims of torture or discrimination have not been registered in any court, which indicates a need for these potential grantees to be informed in a targeted manner about FLA opportunities and the conditions that need to be met in the FLA granting procedure.

With respect to enforcement of the Law, the practice so far has shown that it is difficult to establish accuracy of the data provided by a person as regards family members, their property or income, given that the practice in actions of courts in this regard depends largely on responses of institutions which hold the information on the basis of which a decision is made on the person's financial standing, i.e. on fulfilment of the conditions for provision of free legal aid. One of the proposal given by the President of the Basic Court in Rožaje is that courts could allow a more detailed access to data of the Real Estate Administration. Namely, although it is possible to access the electronic database of the Real Estate Administration (via their website), data about a person with no property cannot be printed (which may result in prolonging of the decision on FLA application).

A shared, integrated access to free legal aid, which would include all parties: representatives of judiciary, Bar Association, civil society, and those in need of legal aid, has not been built yet. There are no data on the situation with respect to the need for free legal aid, which would serve as a starting point for planning and implementing public policies in the field of FLA. Although cooperation between competent services in the procedure of exercising the right to FLA, other institutions and the civil sector became functional in the last six years, a developed institutionalized models of cooperation between these parties in the justice sector still does not exist, other than those implemented through projects applied by judiciary or executive power and non-governmental organisations.

Available data show also that there had been no substantial progress with respect to informing citizens about the right to free legal aid and the conditions for exercising thereof. According to research data of NGOs from 2016, as many as 78.7% of citizens responded that they had not been informed about the rights provided by the Law on Free Legal Aid (according to the same reference research, this percentage was 73.2% in 2013).