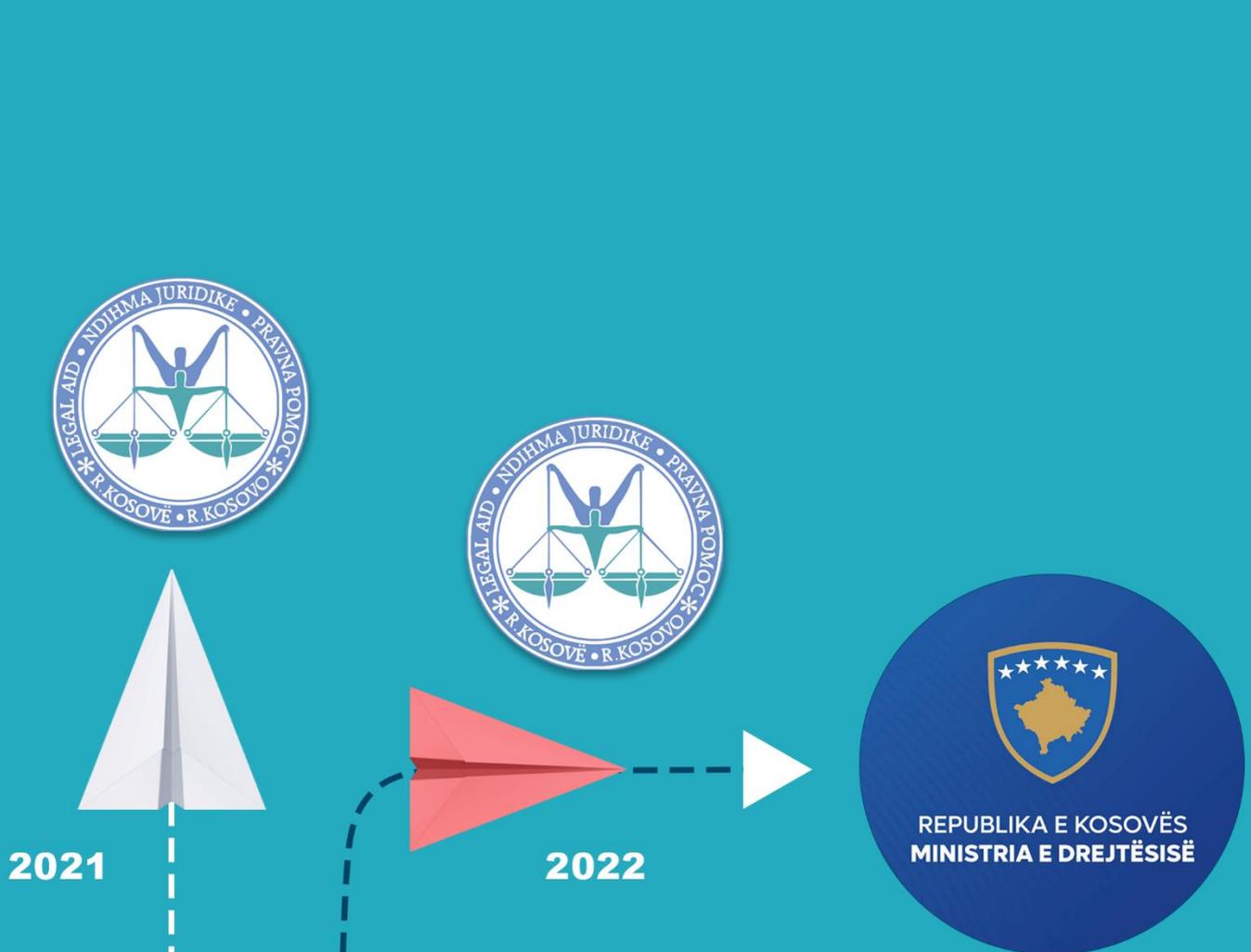




Politicization against the constitution of FLA



*From an Independent Institution
to the Ministry of Justice*

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ABOUT KLI

KLI, Kosovo Law Institute, is a non-governmental and non-profit organization of public policy, a think tank specialized in the justice sector.

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1. Executive summary

With the aim of, as is stated in the Law, to rationalize and establish lines of accountability for independent agencies, the Assembly of the Republic of Kosovo adopted Law No. 08/L-063 on amending and supplementing the laws related to the rationalization and establishment of accountability lines of the independent agencies (hereinafter: Law No. 08/L-063), that entered into force on September 21, 2022. Through this law, the Free Legal Aid Council is terminated as an oversight body of the Free Legal Aid Agency (hereinafter: FLA). With this law, FLA is incorporated to the Ministry of Justice.

Law No.08/L-063 aiming at the rationalization of institutions and by systematizing the FLA within the Ministry of Justice, has politicized the system of free legal aid in Kosovo. Starting from general policies to specific decisions, the Ministry of Justice will decide, as an institution led by a political appointee. Finally, it can now be said that a political institution will decide on citizens' requests for the provision of free legal aid. Moreover, according to the new law, the criteria for the provision of legal aid by NGOs will be determined by the Ministry of Justice.

In addition to the politicization of FLA, the litigants, namely the respondent and the plaintiff, have practically merged in the Ministry of Justice. Thus, paradoxically, for the same cases, the Ministry of Justice will have to take care of the protection of the interests of citizens and the protection of the interests of public institutions. So, both for the plaintiff's interest and the respondent's interest.

In line with the standards set by the European Court of Human Rights (hereinafter: ECtHR), KLI finds that Law No. 08/L-063 has not established a balance between access to justice and the independence of legal professionals who provide free legal assistance. The politicization of FLA, its incorporation into the Ministry of Justice and the creation of a situation where FLA, through the provision of legal aid, will protect the rights of citizens against the institutions represented by the State Advocacy Office, both of these institutions under the umbrella of the Ministry of Justice, deprives the beneficiaries of free legal aid for effective access to justice

Thus, under this new legal regulation, citizens now do not have sufficient legal certainty to request legal aid from the FLA for their cases that need free legal aid. Therefore, this legal regulation has violated the right of citizens to free legal aid, according to the standards set by the ECtHR, these mandatory standards in the Kosovar constitutional order. For this reason, this draft law is contrary to Article 31.6 of the Constitution of the Republic of Kosovo.

In order to protect the constitutionality and fundamental rights and freedoms of citizens, the reaction of the Ombudsman in this situation is necessary. In this case, after this analysis, the Ombudsman, according to his competence defined by the Constitution, should proceed with Law No. 08/L-063 in the Constitutional Court for the evaluation of the constitutionality.

2. Free Legal Aid

The provision of free legal aid is part of human rights. In the Constitution of Kosovo, free legal aid is part of the rights of the accused¹ and the right to a fair and impartial trial.² As part of the right to a regular judicial process, the European Convention on Human Rights has guaranteed legal aid for criminal cases³ until, based on the fact that the Convention aims to protect, in particular, access to justice, the European Court of Human Rights has determined that article 6.1. of the Convention, under certain circumstances, may oblige the state to provide free legal aid in other cases that do not fall into the criminal domain⁴.

The basic law that regulates the way of providing free legal aid in Kosovo is Law No. 04/L-017 on Free Legal Aid, amended by laws No. 08/L-035 and Law No. 08/L-063. Free legal protection is offered to all entities that meet the criteria defined by law. According to this law, legal protection, among other things, means representation in civil, criminal, administrative and misdemeanor proceedings⁵. According to this law, the Free Legal Aid Agency is responsible for organizing and providing free legal aid. This Agency, during 2021, provided free legal assistance in 2560 administrative cases, 1734 civil cases, 211 criminal cases and 94 misdemeanor cases.

3. Incorporation of FLA to the MoJ

According to Law No. 04/L-017 for Free Legal Aid [Article 19.2.] FLA is an independent public institution that exercises its functions and responsibilities in accordance with this law. According to this law [Article 11] the supervisor/oversight of the work of the Agency was the Free Legal Aid Council, as an independent institution.

On September, 21, 2022, the Law No. 08/L-063 on amending and supplementing the laws related to the rationalization and establishment of accountability lines of the independent agencies entered into force. This law terminated the Free Legal Aid Council, where upon its competencies are passed to the Ministry of Justice.

Thus, according to Law No. 08/L-063 [Article 19.3) ANJF is an integral part of the Ministry of Justice. With this law [Article 12], the provision that guarantees FLA independent management of the budget and independent recruitment of personnel is abolished. Therefore, FLA is now part of the Ministry of Justice and must answer to the same for all actions it undertakes.

¹ Constitution of the Republic of Kosovo, article 30.5.

² *ibid*, article 31.6.

³ European Convention on Human Rights, article 6.3.c.

⁴ *AIREY vs. Ireland*, European Court of Human Rights, 9 October 1979, par.26; *McVICAR vs. United Kingdom*, European Court of human Rights, 7 August 2002, par.48.

⁵ Law No. 04/L-017 on Free Legal Aid, Chapter II.

4. Politicization of legal aid

The Ministry of Justice is headed by the Minister of Justice, who is a political appointee. In this way, FLA from an agency that reported to the independent body established especially in holding FLA accountable has now entered under the umbrella of a political institution.

According to Law No. 08/L-063 [Article 13], the Ministry is responsible for drafting policies and rules for the provision of free legal aid, supervising the comprehensive work and operation of the free legal aid system and identifying priorities in the provision of free legal aid depending on available resources and financial means. According to the new law [Article 34], the superior body that examines appeals against the decisions of the FLA is the appeals commission. This commission, according to the new law, is established by the minister with a sub-legal act. In addition, Law No. 08/L-063 has given the Ministry of Justice the authority to determine the criteria for the provision of free legal aid by NGOs.

Therefore, Law No. 08/L-063, aiming at the rationalization of institutions and systematizing the NJF within the Ministry of Justice, has politicized the system of free legal aid in Kosovo. Starting from general policies to specific decisions, the Ministry of Justice will decide, as an institution led by a political appointee. Finally, it can now be said that a political institution will decide on citizens' requests for free legal aid.

5. Merger of the respondent and the plaintiff

In administrative, judicial or arbitration procedures, public institutions are generally represented by the State Advocacy Office, according to Law No. 04/L-157 on State Advocacy Office. *“The State Advocacy Office shall represent, give advices and protect the public authorities of the Republic of Kosovo, defined by the Law on public financial management and accountability, in judicial, arbitration an administrative proceedings, in accordance with the Law”*⁶.

The State Advocacy Office is a central administration body within the Ministry of Justice. State Advocacy Office shall be carried out by the State Advocate General who answers to the Minister of Justice⁷.

Therefore, the State Advocacy Office protects public institutions even when they are sued by citizens. Citizens who sue public institutions are, among others, also citizens who meet the conditions to be beneficiaries of free legal aid at the FLA. Thus, citizens seek legal assistance from FLA to sue public institutions, either in civil court proceedings or administrative court proceedings. In practice, this has happened so far in tens of thousands of cases.

According to FLA statistics, during 2021, this Agency provided free legal assistance in 1,961 cases which were directed against the decisions of public institutions, in 2020 in 2,826 cases, while in 2019 it provided free legal assistance in 2,539 cases of this nature. From 2008 until

⁶ Law No. 04/L-157 on the State Advocacy Office, Article 8.

⁷ Ibid, Article 7 and 9.

today, out of a total of 59,787 services provided, 35,411 of them are related to cases of an administrative nature, mainly against decisions issued by public bodies, including government bodies. Accordingly, about 60% of the total legal aid services provided by the Agency are related to decisions issued by public bodies. So, in these cases, FLA has protected the rights of citizens who have claimed that their rights have been violated by public institutions.

Based on the fact that public institution is represented by State Advocacy Office, it means that FLA provided legal assistance for plaintiffs while the State Advocacy Office was a respondent or vice versa.

After the incorporation of FLA to the Ministry of Justice, the FLA and the State Advocacy Office are obligated to report to the same supervisor: Minister of Justice. Therefore, despite that FLA and the State Advocacy Office are interlocutory parties⁸ in many judicial proceedings, where FLA protects the rights of citizens, whereas the State Advocacy Office protects the interests of public institutions, the same institutions report to the Minister in the end, who is the political electee. In a potential appeal against (in) action of FLA in a particular case against public institutions, that are represented by the State Advocacy Office, paradoxically appeals will be reviewed by the Ministry of Justice, in which framework the State Advocacy Office is also in.

In this manner, in addition to the incorporation of FLA in the Ministry of Justice, the litigants, namely the respondent and the plaintiff, have already been merged into this ministry. Thus, paradoxically, for the same cases, the Ministry of Justice will have to take care of the protection of the interests of citizens and the protection of the interests of public institutions. So, both for the plaintiff's interest and the respondent's interest. Accordingly, in each case, the Ministry of Justice will have both a success and a failure at the same time.

This situation seriously undermines the independence and credibility of the State Advocacy office and, especially, FLA. The potential for conducting certain policies by the Minister of Justice as a political appointee to weaken one party in relation to the other party is very high. Under these circumstances, the security of citizens, at least in their perception, to seek legal assistance from an Agency which reports to the Minister of Justice, for a case against the State Advocacy Office which reports to the same person, is seriously compromised.

Therefore, after the incorporation of FLA in the Ministry of Justice, this Agency now lacks objective independence in its work.

⁸ *Note:* FLA according to Law No. 04/L-017 on Free Legal Aid [Article 5] offers primary and secondary legal aid to citizens who meet the conditions to receive free legal aid. The various submissions [lawsuits, complaints, etc.] are compiled by FLA officials while representation is made by lawyers who are engaged and compensated by FLA. Thus, legally, FLA is not a party to the procedure, but based on the fact that it performs these services for citizens who meet the conditions to benefit from free legal aid, it practically follows that FLA can also be considered a type of plaintiff/respondent, since all services are performed for and on account of the plaintiff/respondent.

6. Violation of human rights and unconstitutionality of incorporating FLA in the MoJ

As stated above, free legal protection is guaranteed by the Constitution. This right is considered a human right, within the right to a fair and impartial trial. Also, this right is guaranteed through Article 6 of the European Convention on Human Rights, a Convention that is directly applicable in the Kosovan legal system [Article 22 (2) of the Constitution]. According to the Constitution [Article 53] *“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.”*

As for legal protection, the ECtHR has underlined that the state is not responsible for the actions of an officially appointed lawyer. The ECtHR relates this denial of the state's responsibility to the independence of the legal profession or legal professionals from the state, namely from public institutions.⁹ So, the reason why the state is not considered responsible for the actions and non-actions of lawyers has to do with the fact that legal professions are independent from other institutions. So, to remove this responsibility from the state, independence of the legal profession from the state is required.

According to the practice of the ECtHR, it is the state's responsibility to ensure the necessary balance between the effective enjoyment of the right to access to justice on the one hand and the independence of the lawyer's profession on the other. According to the court, these requirements are not met when deficiencies in the legal aid system deprive individuals from the practical and effective access to the court.¹⁰

The independence and impartiality of the bar associations is also one of the elements of independence and impartiality, a basic component of the principle of access to justice. According to the Venice Commission, the bar association plays a fundamental role in the judicial system. For this reason, it is important that the organization of said association ensures independence and proper functioning. To guarantee this independence, criminal and disciplinary proceedings are necessary. According to this Commission, professional ethics entails, among other things, that a lawyer must maintain his independence and be offered protection, in giving impartial advice and representation to clients.¹¹

The practice of the ECtHR or the standards set by the Venice Commission, when talking about the need for the independence of lawyers, the argument is not only related to the title held by a legal professional. The argument in this case is directed towards the services it performs - providing legal aid. For this reason, if the legal aid services offered by the FLA are the same as those of lawyers, the same standards accordingly apply to FLA.

⁹ Staroszczyk vs. Poland, European Court of Human Rights, 22 march 2007, par.133.

¹⁰ Guide on Article 6 of the European Convention on Human Rights, European Court of Human Rights, updated to 31 august 2022, par.167.

¹¹ Rule of Law Checklist, European Commission for Democracy Through Law (Venice Commission), 2016, f.97–98.

Law No. 08/L-063 does not exceed these standards set by the ECtHR and the Venice Commission. As stated above, the responsibility of the state for the representation of clients by legal professionals, does not fall in cases where legal professionals have not had sufficient independence. Thus, taking the functional independence of FLA and its politicization is not in accordance with these standards. Thus, for each failure of the FLA in relation to the beneficiaries of free legal aid, the Ministry of Justice is not exempted from responsibility.

Furthermore, Law No. 08/L-063 has not established a balance between the access to justice and the independence of legal professionals who provide free legal aid. The incorporation of FLA into the Ministry of Justice and the creation of a situation where FLA will protect the rights of citizens against the institutions represented by the State Advocacy Office, both of these institutions under the umbrella of the Ministry of Justice, deprives the beneficiaries of free legal aid of effective access to justice.

As stated, legal professionals play an important role for the judicial system. Situations when the court will decide between two litigants, which are part of the same institution, will necessarily have a negative impact on the fairness of court proceedings.

On the other hand, the competences of the Minister of Justice to decide both for the body that represents the beneficiaries of legal aid and for the body that represents the public institutions, creates great potential for hatching policies and other decisions. Even the perception that this could happen is very harmful.

For these reasons, under this new legal regulation, citizens now do not have sufficient legal certainty to request legal aid from the FLA for their cases that need free legal aid. Thus, this legal regulation has violated the right of citizens to free legal aid, according to the standards set by the ECtHR, these mandatory standards in the Kosovan constitutional order. For this reason, this draft law is in contradiction to Article 31.6 of the Constitution of the Republic of Kosovo

7. Need for Ombudsperson's reaction

According to the Constitution [Neni 132.1] *“The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities”*. In order to exercise this role in practice, the Constitution has given certain powers to the Ombudsman, among which is the right to initiate laws in the Constitutional Court, when it finds that certain laws are not in accordance with the Constitution¹².

¹² Constitution of the Republic of Kosovo, article 113.2 (1).

As argued in this analysis, Law No. 08/L-063 violates human rights guaranteed by the Constitution. Accordingly, Law No. 08/L-063 interfered with the right to a fair and impartial trial, a right that cannot be violated even during the state of emergency¹³.

For this reason, in order to protect the constitutionality and fundamental rights and freedoms of citizens, the reaction of the Ombudsperson in this situation is necessary. In this case, after this analysis, the Ombudsperson, according to their competence defined by the Constitution, should proceed with Law No. 08/L-063 for evaluation in the Constitutional Court.

¹³ Ibid, Article 56.2.