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# EXPERIMENT ON THE FREE LEGAL AID



Author: Arrita Reznici

Editors: Ehat Miftaraj, Betim Musliu and Gzim Shala

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

KLI

Str. Ilaz Agushi, Pristina

E: [info@kli-ks.org](mailto:info@kli-ks.org)

[www.kli-ks.org](http://www.kli-ks.org)

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## List of Abbreviations

CoE	Council of Europe
CPC	Criminal Procedure Code
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FLAA	Free Legal Aid Agency
FRRoLS	Functional Review of the Rule of Law Sector
KBA	Kosovo Bar Association
KJC	Kosovo Judicial Council
KLI	Kosovo Law Institute
KPC	Kosovo Prosecutorial Council
MoJ	Ministry of Justice
SRoL	Strategy on the Rule of Law

## 1. Executive summary

Free legal aid plays a critical role in promoting justice, equality and the rule of law. This ensures that all individuals, regardless of their financial means, have the opportunity to access legal representation and advice. This is particularly important in protecting the rights of vulnerable and marginalized groups in society, including low-income individuals, minorities and victims of domestic violence. Being accessible to everyone and not just a privilege for a certain group, free legal aid provides everyone with adequate means to protect their rights.

On June 26, 2024 the Ministry of Justice published the Draft Concept Document for Free Legal Aid, in the platform for public consultation. In what is presented in this Draft Concept Document, the reform will not be implemented but will begin to be tested. This means that this is nothing other than an experiment. Unfortunately, such an approach risks violating both the system of free legal aid in Kosovo and the rights of citizens.

Furthermore the Draft Concept Document does not follow an unbiased approach in relation to the presented options. Considering that reasoning leads to a conclusion, the text of the Draft Concept Document makes one believe that in this case the opposite has happened – an attempt has been made to reason a predetermined model. The entire Draft Concept Document is built in such a way that a priori presents as failed any other option, except the option that it proposes to follow further.

First of all, the Draft Concept Document misinterprets the Strategy on the Rule of Law that provides the need for a reform of free legal aid. The “unification” mentioned in the SRoL does not mean the merger of free counsel and free legal aid legal aid and the interference of ANJF in criminal proceedings. For this reason, this concept should not be extracted from its original meaning and the legal infrastructure in Kosovo.

Furthermore, there is an essential difference between the concept of free counsel as provided by the criminal procedural provisions, with the concept of free legal aid as defined in the material provisions of the law on free legal aid. The Draft Concept Document does not make such difference of concepts. Whereas the Constitution of the Republic of Kosovo differentiates one concept from the other. Thus, free counsel is conceptually a different concept from free legal aid. Unfortunately, the draft concept document does not take into account all these differences.

The Draft Concept Document provides for the responsibility for payment and quality control for all forms of legal aid financed by the state to be transferred to FLAA. If this idea is implemented in practice, this would constitute an infringement of the functional independence of the justice system. Such independence has been already elaborated by the Constitutional Court on another equivalent case.

The fact that FLAA now functions as an agency within the Ministry of Justice presents an additional problem in terms of the politicization of free legal aid. Unfortunately, this problem is not addressed at all, even though this open constitutional violation not addressed until now, should have been included in this Draft Concept Document.

Planning and implementation of free legal aid can be managed very simply through effective and genuine cooperation and coordination for the proper implementation of the current positive

legal framework. All this without the need to complicate solutions and interfere in other areas. Effective coordination between state institutions, KJC, KPC, KBA, FLAA, and NGOs is essential for a comprehensive system of legal aid. Strengthening this structure includes increasing cooperation between these parties, refining pro bono-based policies and establishing clear guidelines and standards for the provision of legal services.

Strengthening the current mechanisms is the easiest and most adequate way to achieve a goal of improved efficiency and quality in the provision of free legal aid. Therefore, before moving to other models, KLI recommends that the Draft Concept Document addresses the problems through inter-institutional cooperation as a solution and not automatically move to a new system, until all problems can be addressed in the current system.



## 2. Access to justice and the free legal aid reform

Access to justice is one of the vital grounds of democracy and the rule of law, guaranteeing the standards for the protection of human rights, by providing opportunities for citizens to protect their rights. This includes the right to a fair, independent and impartial trial, the right to a transparent and public trial, the right to a trial within a reasonable time, the right to efficient and effective justice, as well as the right to receive legal advice, as well as to have professional protection and representation. Consequently, access to justice must be guaranteed to all citizens, regardless of their financial situation. In this regard, legal aid is fundamental to the enjoyment of all these and other rights.

Free legal aid plays a critical role in promoting justice, equality and the rule of law. This ensures that all individuals, regardless of their financial means, have the opportunity to access legal representation and advice. This is particularly important in protecting the rights of vulnerable and marginalized groups in society, including low-income individuals, refugees and victims of domestic violence. Being accessible to everyone and not just a privilege for a certain group, free legal aid provides everyone with adequate means to protect their rights.

The Draft Concept Document for Free Legal Aid of the Ministry of Justice (hereinafter: the Draft Concept Document) defines the need for reforming free legal aid, based on the legal and institutional framework, with special emphasis on the volume, quality and cost of legal aid provided, the efficiency, but also the provision of access to justice for marginalized groups. It is further stated that *the challenges and limitations in access to justice are a consequence of inadequate legal infrastructure and limited financial resources allocated to raising awareness about this issue and providing free legal aid. Therefore, it is necessary to overcome these challenges and create a comprehensive, functional and efficient system of free legal aid, which would ensure equality in access to justice.*<sup>1</sup>

Regarding this situation, KLI does not dispute the need to improve the system of free legal aid, but considers that a structural reform as proposed in the Draft Concept Document, besides being unnecessary, would be extremely harmful and could damage sustainability of this very important mechanism. The option that emerges as a proposal from the Draft Concept Document, or the so-called “Hybrid Model” has great implications in the structural reform, but above all in the legal one, as well as in the time aspect of the implementation of the reform.

Taking into consideration some circumstantial elements to justify the transition to this option, and ignoring what essentially constitutes free legal aid, presents an unrealistic analysis of the situation and options, and as such is an unsafe approach with consequences for citizens.

The improvement of all identified shortcomings can be completed using the current system, without the need to transition to the “Hybrid” model. For this reason, the main focus of the Draft Concept Document should be the improvement of the current situation in order to facilitate access to justice and the provision of quality services for vulnerable groups. This would be achieved if the reflection of the situation and the analysis of the options was

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<sup>1</sup> Draft Concept Document on Free Legal Aid, Ministry of Justice, pg. 8-9. Published in the Public Consultation Platform on 26.06.2024.

conducted adequately. While, with the proposed model, it is not possible to justify the achievement of this goal in any form.

Therefore KLI has recommended an intermediate option as a solution, which means strengthening the current mechanisms. Such an option, in addition to being easier to implement, less expensive, could be achieved within an optimal time and would not create consequences for the beneficiaries of free legal aid - with special emphasis on vulnerable groups in the country.

### 3. Non-compliance with the Strategy on Rule of Law

The concept document stipulates that *the Free Legal Aid Reform will be implemented during the years 2024-2026*,<sup>2</sup> while later adding that *taking into account the other measures that must follow after this reorganization, it is estimated that at least 5 years must pass, that is, around 2030, to assess the real effect of this reorganization*.<sup>3</sup> This period of transition is an extremely long time to be allowed to affect the interests and rights of the citizens of the Republic of Kosovo, with special emphasis on vulnerable groups, who are supported through free legal aid.

The same is also non-compliant to the commitments in the Program of the Government of Kosovo 2021-2025, as well as the Strategy on Rule of Law 2021-2026.

The Strategy on the Rule of Law, empowered since July 2021, is a document that derives from the Functional Review of the Rule of Law Sector in Kosovo. Within this process the document related to the access to justice was also drafted.

SRoL provides that in order to improve access to courts and prosecution offices *the improvement of official legal guarantees for a fair trial, including free legal aid is foreseen. In this regard, the adoption of a single law for free legal aid is foreseen in order to create a unique, transparent and accountable system, and at the same time capable of providing services in all areas, for all in need. Clearer criteria for the appointment of defense counsel for legal aid will also be provided here*.<sup>4</sup> In this regard, previously the policy document on Access to Justice has addressed this issue, while providing the possible options. While the measure which foresees the improvement of the legal aid system in Kosovo in accordance with the requirements of the EU and the Council of Europe, as an activity, it determines *the need for FLAA and KBA to harmonize their respective regulations in order to provide clear criteria for the appointment of defense counsels for legal aid*.<sup>5</sup>

Thus the policy document determines this issue needs to be addressed while in coordination and harmonization between the relevant bodies and not undergo a complete and structural reorganization, with long-term consequences. Furthermore, the SRoL emphasizes the need for *“clearer criteria for the appointment of defense counsels”*, not defining as an option the direct

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<sup>2</sup> Draft Concept Document on Free Legal Aid, Ministry of Justice, pg. 99. Published in the Public Consultation Platform on 26.06.2024.

<sup>3</sup> Ibid.

<sup>4</sup> Strategy on Rule of Law in Kosovo 2021 – 2026, pg. 34.

<sup>5</sup> Policy Document on Access to Justice, Functional Review of the Rule of Law Sector in Kosovo, pg. 72.



representation by FLAA officials, but strengthening the quality of protection by defense counsels.

“Unification” mentioned in the SRoL does not mean the merging of free counsel and free legal aid and the interference of ANJF in criminal proceedings. Hence, this concept should not be extracted from its original meaning and the legal infrastructure in Kosovo. For these reasons, the option chosen by the Draft Concept Document is not compliant with the SRoL, both in terms of duration and content.

#### 4. The bias of the content of the Draft Concept Document

Presenting different options in a Concept Document usually happens in order to compare several decided options. A fair reflection of the actual state and options in a Concept Document logically leads to the recommended option as well. In this case, the Draft Concept Document does not do this. The same does not follow an unbiased approach in relation to the presented options. Considering that reasoning leads to a conclusion, the text of the Draft Concept Document makes one believe that in this case the opposite has happened – an attempt has been made to reason a predetermined model.

The entire Draft Concept Document is built in such a way that a priori presents as failed any other option, except the option 2 (Hybrid Model) that it proposes to follow further. So, if you read the presented options, in the second option there are recommendations for solving the challenges, while in the other options it only identifies problems/challenges.

Challenges that a particular system faces, can be addressed and overcome. Thus, strengthening the current mechanisms is the solution in these cases. Except for cases where the problems arise from the system that is in force. But, if this is not the situation, then the need to strengthen the adequate mechanisms should not necessarily be translated into the need for a new system. Unfortunately, this is exactly what the Draft Concept Document does, it does not provide with the option of “empowering current mechanisms” at all. With such an option, all the identified challenges would be addressed, without the need to switch to a new and, as the Draft Concept Document itself argues – unsafe system.

This lack of safety is evident in the Draft Concept Document itself. Despite the proposal to continue with option 2, the Ministry of Justice, however, seems to be neither convinced of its functioning, nor of the positive effect it can have in terms of cost.

In the Draft Concept Document it is stated that *“it would be recommended that the beginning of the implementation of such a model for criminal proceedings representation should be implemented in Pristina with at least three officials, for example, which has the majority of cases in the country. [...] It is recommended to start the implementation of this model in Pristina and then use the other as a “control” group to measure the impact of working or not of this model.”*<sup>6</sup> So this model is simply proposed and does not provide even minimal assurance that it will work and have an impact on the improvement of free legal aid.

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<sup>6</sup> Ibid, pg. 62.

So, in what is presented in the Draft Concept Document for Free Legal Aid, the reform will not be implemented but will begin to be tested. This means that this is nothing other than an experiment. Unfortunately, such an approach risks violating both the system of free legal aid in Kosovo and the rights of citizens.

In addition, even the reasoning for the positive cost impact should seem to not be feasible with the proposed model. The Draft Concept document provides that *“there is a real risk that the intermediate model, in trying to balance between innovation and practical implementation, could result in a more expensive system than the current model.”*<sup>7</sup> However, despite everything, the Draft Concept Document is defined to go further with this model.

## 5. The positive legislation in providing free legal aid

The content of the Draft Concept Document, among other things, seems to aim to standardize the eligibility criteria for all types of free legal aid (criminal, civil, administrative, misdemeanor). Even though at first sight, this goal gives the impression of a proper prospect, however, in reality it contains special problems, that cannot be addressed by legal changes as presented in the Draft Concept Document.

The Draft Concept Document addressed in this report is all about the free legal aid. This means that with this Draft Concept Document there is no possibility in amending the Criminal Procedure Code, in order to address the needs defined according to the intention to reform the system of free legal aid. Also, it is worth mentioning that the Criminal Procedure Code has just been amended recently.

Following several years of work, on February 17, 2023, the Criminal Procedure Code 08/L-032 entered into force. Provisions have also been changed regarding the mandatory defense. All legal changes in this Code derive as a result of discussions and analyzes that have been carried out in the context of increasing the efficiency of the criminal procedure. Thus, it is irrational to change this system through acts that do not have criminal procedure as their subject, but the subject is the free legal aid.

Above all, it should be clear that there are essential substantive, procedural and legal differences in what is defined to be the provision of free legal aid in certain fields, in particular in the criminal one, with others such as civil or administrative. Therefore, the entire handling of this issue in the Draft Concept Document is wrong.

### 5.1. The difference between the concept of free counsel and free legal aid

There is an essential difference between the concept of free counsel as provided by the criminal procedural provisions, with the concept of free legal aid as defined in the material provisions

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<sup>7</sup> Ibid, pg. 67.

of the law on free legal aid. The Draft Concept Document does not make such difference of concepts. The origins of both of these concepts derived from the country's highest legal act, the Constitution of the Republic of Kosovo.

Article 30 of the Constitution has clearly stipulated the rights of the accused, where it is defined explicitly that *everyone charged with a criminal offense shall enjoy the following minimum rights: [...] (5) to have assistance of legal counsel of his/her choosing, to freely communicate with counsel and if she/he does not have sufficient means, to be provided free counsel.*<sup>8</sup> This constitutional provision reflects the same standards as defined in the European Convention on Human Rights, namely where Article 6 of this Convention has defined the right to a fair trial and explicitly provides that “*everyone charged with a criminal offence has the following minimum rights: [...] to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require*”.<sup>9</sup>

In criminal proceedings, Kosovo follows the system of ex officio appointment of the counsel during the criminal proceedings. This system consists in the appointment of defense counsels ex officio through KBA, but they are financed by either KJC or KPC, depending on the procedural stage of the need for the appointment of the defense counsels.

Regarding this system, the CPC in accordance with international standards, has clearly defined all situations when ex officio representation in criminal proceedings is provided to defendants. The CPC defines the Defendant's Right to Defense Counsel<sup>10</sup>, the Qualification as Defense Counsel<sup>11</sup>, the Mandatory Defense<sup>12</sup>, and also the Defense Counsel at Public Expense When There is Not Mandatory Defense<sup>13</sup>. As such, these provisions seek to guarantee professional and adequate representation for defendants, guaranteeing procedural certainty in the first place.

This entire criminal system is built within the framework of the criminal procedure, which is regulated by a law codified as the Criminal Procedure Code. Thus, even the provisions related to the appointment of the defense counsel are within the scope of this analysis.

In each criminal case, the judge has in front of him/her an indictment, the review of which needs for the criminal procedure to be conducted. The case is presided over by a single trial judge or a trial panel, who decides on all procedural actions, including the need to appoint (or not) a defense counsel at public expense. As long as the single trial judge or the trial panel is handling a criminal case, legally and conceptually, not one person has the right to interfere in the exercise of powers regarding the administration of cases. Not even the President of the Court or the KJC. Thus, based on the circumstances, during the administration of a criminal case, the single trial judge or the trial panel, as a procedural action for the administration of a criminal case, also decides on (not) appointing a defense counsel at public expense. Any

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<sup>8</sup> Article 30, par. 5 of the Constitution of the Republic of Kosovo.

<sup>9</sup> Article 6, par. 3c of the European Convention on Human Rights.

<sup>10</sup> Criminal Procedure Code no. 08/L-032, article 52.

<sup>11</sup> Ibid, article 53.

<sup>12</sup> Ibid, article 56.

<sup>13</sup> Ibid, article 57.

external evaluation, including the evaluation by the FLAA, represents an interference in the work of the single trial judge or the trial panel in the administration of the case.

Reasonable doubt of committing a criminal offense defined by the Criminal Code is proven only through a criminal procedure, that is regulated in detail by the Criminal Procedure Code. Thus, the criminal laws themselves have always made this division, adopting separate and unified codes such as the Criminal Code and the Code of Criminal Procedure. As long as neither of these two codes interferes with the other one, there is no possibility of another material law to infringe the procedural legislation regarding criminal procedure.

Another reason is legal certainty. The clarity of legislation is one of the crucial aspects of legal certainty.<sup>14</sup> Based on the need for high legal certainty in criminal proceedings, the legislation has been codified, in a single Code, that deals with all criminal proceedings. Interfering into this legislation with other laws that do not aim to regulate the criminal procedure fundamentally violates the legal certainty of all participants in a criminal procedure.

According to the Draft Concept Document, the officials of the FLAA will have the opportunity to represent defendants in criminal cases. However, in order to increase the quality of representation, in a procedure where the freedom of the citizen is endangered, such as the criminal procedure, the CPC has stipulated that “*only a member of the Kosovo Bar Association may be engaged as defense counsel*”.<sup>15</sup> Thus, the interference in the Criminal Procedure Code, through acts that regulate free legal aid, affects one of the most important aspects within a criminal procedure, which is the defense of the defendant.

On the other hand, in order to ensure effective access to justice, it is expected to have an effective, sustainable and reliable free legal aid system that is not limited to criminal cases. In this regard, despite the fact that the ECHR does not explicitly guarantee the right to free legal aid in civil, administrative or other cases, the jurisprudence of the ECtHR has determined the situations and obligations of states to provide legal aid to everyone, based on in particular some criteria.

In the practice of the ECtHR one can find that to determine whether the provision of legal aid is necessary for a fair hearing must be decided based on particular facts and circumstances of each case and will depend, among other things, on the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant’s ability to represent himself effectively.<sup>16</sup> Furthermore, in the decisions rendered by the ECtHR, the complexity of the case is considered, assessing whether a person can address his/her request effectively, without a representative.<sup>17</sup> Another key criterion that is considered to assess whether the state is obliged to provide legal aid even when such a thing is not provided

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<sup>14</sup> Follow the link:

[https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule\\_of\\_Law\\_Check\\_List.pdf](https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf) - f.25-26.

<sup>15</sup> Criminal Procedure Code no. 08/L-032, article 53.

<sup>16</sup> Refer to the case *Steel and Morris v. United Kingdom* §61.

<sup>17</sup> Refer to the case *Airey v. Ireland* § 24.

as mandatory, is the applicant's capacity to represent him or herself effectively.<sup>18</sup> Likewise, it is important to consider the existence of a legislative requirement to be legally represented.<sup>19</sup>

On the other hand, our country has embraced a fairly high standard in this aspect, taking into account the fact that Article 31 of the Constitution of the Republic of Kosovo defines Right to Fair and Impartial Trial, where in paragraph 6 stipulates that *Free legal aid shall be provided to those without sufficient financial means if such assistance is necessary to ensure effective access to justice.*<sup>20</sup> This means that the right to free legal aid is clearly defined and stipulated in the highest legal act in the country, even when it comes to other proceedings. Further specifics and the manner of regulating free legal aid are clarified and defined in the Law on Free Legal Aid.

So in relation to the parallel provision of access to justice for all types of cases, even the Constitution of the Republic of Kosovo differentiates one concept from the other. So the Constitution provides as specific concept the free counsel, and another specific one – the free legal aid.

Thus, free counsel is conceptually a different concept from free legal aid. Furthermore even the criteria differ. The interest of justice is required in the case of free counsel, but not in the case of free legal aid. The interest of justice should be evaluated by the judge of the case and not by the FLAA. Unfortunately, the Draft Concept Document does not take into account all these differences.

On the other hand, the Criminal Procedure Code 08/L-032 has regulated in detail the situations of mandatory defense.<sup>21</sup> Thus, in the situations defined by this Code, it is automatically considered to have met the criteria for free counsel. Therefore, this assessment cannot be overruled by another assessment from an institution outside the judiciary, namely from an institution subordinate to the Ministry of Justice. For this reason, the system defined in the Criminal Procedure Code, essentially affects the regularity of the development of a criminal process and the provisions built in the context of increasing legal certainty, efficiency and effectiveness of criminal procedures.

In the context of all this, it is consequently impossible to implement the proposal according to the option proposed in the Draft Concept Document, where the main goal and focus is related to the unification of free ex officio representation from the KJC or KPC, with the FLAA, in a single mechanism – at FLAA.

## 5.2. Effective coordination to implement the legal framework

The Draft Concept Document proclaims the importance of unifying free counsel in criminal cases with free legal aid, in a single mechanism - within the FLAA, as a solution towards better planning and implementation of free legal aid. However, other tools are not elaborated which

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<sup>18</sup> Refer to the case *McVicar v. the United Kingdom* §48-64.

<sup>19</sup> Refer to the case *Gnahoré v. France* §41.

<sup>20</sup> Article 31, par. 6 of the Constitution of the Republic of Kosovo.

<sup>21</sup> Criminal Procedure Code no. 08/L-032, article 56.

could increase the efficiency in this area without the need to change the system – such as the need for inter-institutional cooperation.

Planning and implementation of free legal aid can be managed very simply through effective and genuine cooperation and coordination for the proper implementation of the current positive legal framework. All this without the need to complicate solutions and interfere in other areas, as elaborated above. Effective coordination between state institutions, KJC, KPC, KBA, FLAA, and NGOs is essential for a comprehensive system of legal aid. Strengthening this structure includes increasing cooperation between these parties, refining pro bono-based policies and establishing clear guidelines and standards for the provision of legal services.

The coordination between the FLAA and NGOs has already been reached through partnership, where the NGOs are obliged to fulfill certain criteria to provide free legal aid within the adequate quality of providing these services.

Coordination would also positively affect the strengthening of supervisory mechanisms in the practice of free legal aid, which would also be reflected in increasing and controlling the quality of the provision of free legal aid. KLI elaborates on this issue in the following parts of this report.

On the other hand, inconsistencies in implementation can create gaps in the provision of services, that yet again cannot be addressed by any type of modification or other model. Therefore, institutional coordination turns out to be very important. All this, KLI considers, can be achieved without radical modifications in the current legislation with long-term implications, but only by strengthening the current mechanisms, through the promotion of continuous cooperation and genuine implementation of the legislation.

Therefore, before moving to other models, KLI recommends that the Draft Concept Document addresses the problems through inter-institutional cooperation as a solution and not automatically move to a new system, until all problems can be addressed in the current system.

## 6. Unconstitutional interference in the justice system through financing

The Draft Concept Document provides that the responsibility for payment and quality control for all forms of legal aid financed by the state will be transferred to FLAA. In this regard, the proposed model provides the following *the unification of the Free Legal Aid fragment of the KJC for free criminal legal aid (ex-officio), that of the KPC and the Free Legal Aid Agency, in a single mechanism and that at the Free Legal Aid Agency. Such a unification will be in function of planning, better implementation of free legal aid, and consequently will have a reflection on the fairness of the budget in the face of cases that will be provided with free legal aid.*<sup>22</sup>

Furthermore it also anticipates *the transfer of the budget from KJC, KPC to FLAA of that part that has been largely divided between these two institutional mechanisms. This would enable the budget allocated by the state for free legal aid to be concentrated only in FLAA and from*

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<sup>22</sup> Draft Concept Document on Free Legal Aid, Ministry of Justice, pg. 62. Published in the Public Consultation Platform on 26.06.2024.



*the latter to be planned, allocated, spent and reported. This form will have a better reflection in budget planning, spending and reporting, besides these it will be possible to have a larger number of those who will be provided with free legal aid.*<sup>23</sup>

All of the above, if implemented in practice, would constitute an infringement of the functional independence of the justice system. By which it is implied that with these potential actions there will be a flagrant constitutional violation.

*The Kosovo Judicial Council is a fully independent institution in the performance of its functions.*<sup>24</sup> This constitutional principle has been embodied by the Constitutional Court of the Republic of Kosovo in its decisions.

The latter, in the judgment no. KO219/19, regarding the constitutional review of the challenged Law no. 06/L-111 on Salaries in Public Sector, decided to declare that the following provision is not in compliance with the Constitution. The provision stipulated that *“in the case of the creation of new functions, positions or job titles, the institution in which the position is created shall request the ministry responsible for public administration and the ministry responsible for finance to determine the salary class applicable to that function, position, or job title, on the basis of equivalence”*.<sup>25</sup> Even, despite the fact that paragraph 4 of this law had stipulated that *“The establishing of new functions, positions, or designations of officials in the Presidency of the Republic of Kosovo, the Constitutional Court of the Republic of Kosovo, the Justice System, the Assembly of the Republic of Kosovo, and independent constitutional institutions is regulated by this law and by act of specially approved by the competent bodies of the institutions.”*

The Constitutional Court had considered this approach as unconstitutional, assessing that *“if this provision were to be declared constitutional, it would mean that whenever the Judiciary, the Constitutional Court, the Ombudsperson and other Independent Institutions need to create a new position within their organization chart or change the internal organizational structure, depending on the need that may arise in the future - they should turn to the Government to seek permission and approval for the creation of a new position and to seek permission and approval to change the internal organizational structure. The challenged Law in this regard states that it is the MPA which “will evaluate the function, position or title” and will make the “proposal for approval in the Government for the salary class that will be applied for that function, position or title”*.<sup>26</sup>

In such a parallel, also in cases where the court will decide on procedural actions – namely on the (un)necessity to appoint a counsel at public expense, in case the responsibility for the payment and control of all forms of legal aid financed by the state will be transferred to the FLAA, it means that in the decisive and final chain, the decision-maker is the Government, which will “approve” every proposal of the Judiciary.

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<sup>23</sup> Ibid.

<sup>24</sup> Article 108 of the Constitution of the Republic of Kosovo.

<sup>25</sup> The Judgment of the Constitutional Court of Kosovo on case no. KO219/19, par. 286.

<sup>26</sup> Ibid, par. 287.

Regarding this situation in the case elaborated above, the Constitutional Court has already decided that this is contrary to the definition of “institutional, functional and organizational” independence of the Judiciary. As such, it is unacceptable and contrary to the Constitution and the key principle of separation of powers as a constitutional model of governance in the Republic of Kosovo.

## 7. Politization of the FLAA

The fact that the FLAA now functions as an agency within the Ministry of Justice presents an additional problem in terms of the politicization of free legal aid, not only in terms of its financing, but also in a wider sense. Unfortunately, this issue is not addressed in the Draft Concept Document.

United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems are drawn from international standards and recognized good practices, aiming to provide guidance to States on the fundamental principles on which a legal aid system in criminal justice should be based and to outline the specific elements required for an effective and sustainable national legal aid system, in order to strengthen access to legal aid pursuant to Economic and Social Council resolution 2007/24. Paragraph 25 that defines the guideline no. 11 regarding the nationwide legal aid schemes provides that *to ensure the effective implementation of nationwide legal aid schemes, States should consider establishing a legal aid body or authority to provide, administer, coordinate and monitor legal aid services. Such a body should: (a) Be free from undue political or judicial interference, be independent of the Government in decision-making related to legal aid and not be subject to the direction, control or financial intimidation of any person or authority in the performance of its functions, regardless of its administrative structure.*<sup>27</sup>

In Kosovo, with the entry into force of 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, the system of free legal aid has been politicized.

Law No. 08/L-063 while aiming the rationalization of institutions and by systematizing the FLAA 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.<sup>28</sup> Thus, under this new legal regulation, citizens now do not have sufficient legal certainty to seek legal aid from the FLAA for their cases. Thus, this legal regulation has violated the right of citizens to free legal aid, according to the standards set by the ECtHR, these

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<sup>27</sup> United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Guideline 11, par. 59.

<sup>28</sup> KLI, Unconstitutional politicization of FLAA, October 2022, pg.4.

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.<sup>29</sup>

In addition to the politicization of the FLAA, the litigants, namely the defendant and the plaintiff, have been practically merged in the Ministry of Justice. Thus, paradoxically, for the same cases, the Ministry of Justice will have to take care of both 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 defendant's interest.<sup>30</sup>

This issue is also provided for in the Document on Access to Justice, drawn up in the framework of the Functional Review of the Rule of Law Sector in Kosovo, from which the Strategy on the Rule of Law 2021-2026 is derived. This document *about the plans for the integration of the FLAA in the MoJ, among other things, states that these changes may not ensure the necessary integrity and independence of decision-making, the operation and status of legal aid. Given that the dominant number of cases for which free legal aid is provided by the FLAA are administrative in nature and related to complaints against the Government, the placement of the FLAA under the MoJ may have serious consequences for its independence when handling such requests and deciding whether or not free legal aid will be provided. This would also mean a confrontation between the State Attorney's Office and the Department of Legal Aid, where the latter would be placed within the MoJ. Moreover, the placement of FLAA under the MoJ will also have implications for its personnel as they will be treated as civil servants according to the Civil Service Law, and their salaries will be reduced in accordance with the coefficients provided by the Law. Unless a special status and better ratio is provided for the FLAA staff, such placement of the Agency under MoJ would demotivate already trained FLAA personnel to continue working. Policy making in this regard will take into account the recommendations of TAIEX experts that if integration goes ahead, then substantial safeguards should be added to the legislation to properly protect the administration of legal aid (and the reputation of the Minister). This should include an effective governing board or Council and legal safeguards on status, independence of functions, decision-making and funding.*<sup>31</sup>

Considering everything stated above, this open constitutional violation, yet to be addressed, should have been handled by the Draft Concept Document. Therefore, this issue needs to be involved in the Draft Concept Document and it is recommended to repeal the Chapter III of Law No. 08/L-063 on amending and supplementing the laws related to the rationalization and establishment of accountability lines of the independent agencies, so that FLAA functions as prior to the adoption of this Law.

## 8. Pro-bono representation

Overcoming the obstacles of limited resources and improving capacities in the framework of free legal aid can benefit from the integration of pro bono services into the system. Pro bono

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Policy Document on Access to Justice, Functional Review of the Rule of Law Sector in Kosovo, pg. 20-21.

work, provided voluntarily by legal professionals (lawyers) without compensation, can augment available legal aid resources and improve the quality of service. Fostering a pro bono culture can be achieved through the creation of pro bono partnerships. A concrete situation was the initiative of the Kosovo Bar Association, for the provision of free services. Such an arrangement was achieved through the Regulation on the Appointment of Lawyers Ex Officio and the Provision of Free Legal Aid. Moreover, according to this Regulation, lawyers who represent ex officio and free legal aid have been obliged within a calendar year in at least one (1) case to provide their services pro-bono, in the legal cases presented by FLAA, the Police, the Prosecutor's Office or the Court.

The mandatory involvement of such a large number of lawyers for the provision of free legal aid, also positively affects a wider geographical coverage, thus allowing lawyers to provide legal aid services to wider masses of the population. This affects the exclusion of the fixed costs of individual lawyers, which according to the Draft Concept Document was assessed as a shortcoming, in terms of cost increase.

So, with the serial strengthening of such a regulation, which clearly defines the rules, procedures, criteria, rights and obligations of certain lawyers in cases of representation ex officio and free legal aid, the solution of a number of high number of pro bono court cases is solved, taking into consideration the high number of lawyers in the Republic of Kosovo.

Alternatively, pro bono initiatives not only augment existing legal aid resources, but also enrich the legal profession by fostering a sense of community responsibility and professional development among legal practitioners.

The provision of pro bono legal services is also known internationally. The American Bar Association recommends 50 hours of pro bono legal work per year.<sup>32</sup> The UK Law Society also promotes pro bono work, due to changes in legislation that have led to cuts to legal aid funding, including access to legal advice.<sup>33</sup> This is because the provision of pro bono legal services has become an essential tool in closing the justice gap, and a mandatory statewide pro bono requirement would represent a permanent infusion of millions worth of legal aid into the legal system.<sup>34</sup>

To strengthen the system of pro-bono representation, currently, there is enough legal basis. Whereas, the Draft Concept Document uses pro-bono representation within the argumentation of the Hybrid model. Therefore, KLI recommends to the MoJ that the Draft Concept Document adequately extends the analysis related to pro-bono representation, emphasizing that changing the system of free legal aid is not necessary to strengthen this system. On the contrary, it is fundamental that the system is not changed.

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<sup>32</sup> American Bar Association, Pro Bono, (e qasshme në: [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_6\\_1\\_voluntary\\_pro\\_bono\\_publico\\_service/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_6_1_voluntary_pro_bono_publico_service/)).

<sup>33</sup> The Law Society, Introduction to Pro Bono, (e qasshme në: <https://www.lawsociety.org.uk/topics/pro-bono/introduction-to-pro-bono>).

<sup>34</sup> Scott L. Cummings & Rebeça L. Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 Harv. L. & Pol'y Rev. 83, 83–111 (2013).

## 9. Quality assurance system of the free legal aid

The Draft Concept Document stipulates that the responsibility for payment and quality control for all forms of legal aid financed by the state will be transferred to FLAA. Whereas, the report of the European Commission for Kosovo, states that *“the lack of a system of quality assurance of free legal aid remains an issue.”*<sup>35</sup> Further in the Draft Concept Document it is stated that *there is no real system of “quality assurance” on the lawyers who provide legal aid ex officio, especially in relation to legal representation in cases before the courts. The KBA has a disciplinary function, but according to the KBA itself, as well as other actors of the system, the KBA rarely takes action against lawyers for breach of duty or ineffective representation of clients.*<sup>36</sup>

The fact that the Draft Concept Document mentions that the KBA rarely takes action against lawyers for breach of duty or ineffective representation of clients, does not mean that there is a lack of disciplinary mechanism within the KBA. Also, this cannot be a ground to amend the entire system of free legal aid. The existence of a mechanism should be a sufficient ground to work on making the citizens aware of their appeal possibilities and further strengthen this mechanism so that it performs its functions in an efficient and effective manner.

Furthermore, the existence and functioning of the coordinating office within the KBA in relation to the FLAA and the appointment of lawyers ex officio, would be an efficient form of quality assurance, where the lawyers would be held responsible in the KBA, in the event of a complaint against them or during systematic reporting to the coordinating office of the KBA. Taking into account their reputation, the responsibility of the lawyers will be higher in case of non-fulfillment of their duties according to the legal provisions, than in the situation when the representation is carried out by the legal officers of FLAA. This is because even the most severe disciplinary measure imposed on the officials in question, that of “termination of contract”, would not hold them sufficiently responsible for the damages caused to the beneficiaries of the free legal aid. Eventually, they would have the opportunity to continue working privately. This means that the amendments proposed in the Draft Concept Document under the justification of proper quality assurance, do not apply in any way.

Therefore, KLI considers that an intermediate option, where current mechanisms are strengthened, as more easily feasible and adequate to achieve a goal of higher efficiency and quality in the provision of free legal aid. This comes after considering the aforementioned reasons on the possibility of overcoming the obstacles of limited resources, raising awareness and improving capacities, including institutional coordination, without radical changes to the current legislation, through strengthening the provision of pro bono legal aid.

Likewise, the categorization of lawyers in the provision of legal aid through a regulation is an adequate method for ensuring a high quality in the provision of legal services. This is because lawyers with more than three years of professional experience could represent the defendants

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<sup>35</sup> European Commission, Kosovo 2023 Report, pg. 39. ([https://neighbourhood-enlargement.ec.europa.eu/document/download/760aaça-4e88-4667-8792-3ed08cdd65c3\\_en?filename=SWD\\_2023\\_692%20Kosovo%20report\\_0.pdf](https://neighbourhood-enlargement.ec.europa.eu/document/download/760aaça-4e88-4667-8792-3ed08cdd65c3_en?filename=SWD_2023_692%20Kosovo%20report_0.pdf))

<sup>36</sup> Draft Concept Document on Free Legal Aid, Ministry of Justice, pg. 28. Published in the Public Consultation Platform on 26.06.2024.

in all phases of the criminal procedure at every level of the prosecutor's office and courts, in the Juvenile Department and the Department of Serious Crimes. Whereas, those with less than three years of experience can represent the defendants at any level of the general departments of the prosecutions and courts, as well as in providing free legal aid at the FLAA.

On the other hand, with the hybrid system, FLAA officials will be overwhelmed with cases that exceed the recommended limits, making it difficult for them to devote the appropriate time and attention to each case. This burden will cost the beneficiaries of free legal aid - the most vulnerable groups in the country, with a decrease in the quality of free legal aid, due to challenges with human capacities and other resources. Based on the literature review, public defender services, even under the best of circumstances, face a range of obstacles when providing legal aid. From funding disparities to issues of public perception, public defenders face tremendous pressure to do more with less.<sup>37</sup> Therefore, the inclusion of such a system, even a hybrid one, severely damages the system of free legal aid. Above all, this form affects the access to justice for the citizens of the Republic of Kosovo, who will not have the opportunity to enter the offices of the FLAA at any time, as they can do in the current situation. In the regional offices of FLAA where there is a more limited number of officials - and will never be able to multiply the extent necessary for coverage - citizens will travel from deep areas, only to find that the offices are closed because the officials will be busy representing in court. This deeply undermines access to justice for vulnerable groups in the country.

All these situations must be taken into account in the analysis, problem and recommendations in the Draft Concept Document, so as to reach a fair solution regarding the reform of the free legal aid system.

## 10. Public awareness

It is very clear that access to free legal aid is essential to providing fair, equal and meaningful access. If an someone fails to address their legal requirements, then this directly affects him/her, but also the family, the justice system, the economy and society in general. Therefore, the sooner the citizens manage to address their problems through advice or other legal actions, it affects the prevention of the emergence or escalation of a certain legal problem. This proves that simple and immediate access to free legal aid is a key to mitigating problems and addressing them in the right way. But often citizens fail to address their problems, due to the lack of knowledge about their rights and about the opportunities they have to seek the realization of their rights, regardless of the economic situation.

This is stated also in the European Commission Kosovo 2023 Report, where is said that *the level of legal aid (for both victims and suspects/accused), although improved, remains inadequate due to conflicting legislation, lack of public awareness and different systems for*

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<sup>37</sup> Katie Meyer, *Despite Outlier Status, Pa. Lawmakers Don't Make Public Defense A Priority*, (Oct. 2, 2018), <https://perma.cc/7HM9-6ZU>.



*providing free legal aid.*<sup>38</sup> Thus highlighting one of the main problems is the lack of awareness about free legal aid.

Raising awareness and access to free legal aid enables that all citizens, especially the most vulnerable and marginalized groups, be informed about their legal rights and the availability of free legal services. This helps overcome barriers related to information, cultural differences, language and other geographical challenges.

In terms of achieving this goal, KLI undertakes continuous awareness-raising actions for certain groups of citizens regarding the relevant assistance provided. Therefore, in this direction, with the aim of inclusion and a wider geographical coverage, continuous awareness of the public by FLAA, is necessary. Therefore, there is no need to reform the system, let alone essential reformation, but in the first place a budget must be allocated for this issue, and there must also exist cooperation with public television, and also with other actors so that awareness campaigns can be created and the appropriate level of awareness for citizens can be achieved. In this regard, not only the need for public awareness and how this awareness is achieved, should be part of the Draft Concept Document.

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<sup>38</sup> European Commission, Kosovo 2023 Report, pg. 39. ([https://neighbourhood-enlargement.ec.europa.eu/document/download/760aa9a-4e88-4667-8792-3ed08cdd65c3\\_en?filename=SWD\\_2023\\_692%20Kosovo%20report\\_0.pdf](https://neighbourhood-enlargement.ec.europa.eu/document/download/760aa9a-4e88-4667-8792-3ed08cdd65c3_en?filename=SWD_2023_692%20Kosovo%20report_0.pdf))

## 11. Specific recommendations

- The reform of free legal aid should be conducted based on a concrete, impartial and balanced analysis.
- To not provide structural reform of free legal aid, but consider the option of strengthening the existing mechanisms.
- To address the issue of unconstitutional politicization of free legal aid, by repealing Chapter III of Law No. 08/L-063 on amending and supplementing the laws related to the rationalization and establishment of accountability lines of the independent agencies, so that FLAA functions as prior to the adoption of this Law.
- The Draft Concept Document should reflect the difference between the concept of free legal aid and the concept of free counsel, in order to not allow the FLAA to interfere in the criminal proceedings.
- The Strategy on Rule of Law should be considered for the implementation of the reform, both in terms of duration and content.
- To maintain the institutional, functional and organizational independence of the judiciary.