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FREE LEGAL AID AS AN INSTRUMENT OF THE RIGHT TO ACCESS TO JUSTICE: THE BASIC NOTIONS OF THE LEGAL CONCEPT, THE HISTORY OF ITS DEVELOPMENT AND ITS IMPLEMENTATION IN SERBIA

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Abstract: Right to access to justice is the most important human right indispenable for effective enjoyment of other human rights. Because of its span and content, the right to access to justice is nearly impossible to define precisely. There are various guarantees included in the right to a fair trial and right to effective remedy which embody the ideas and interests that the right to access to justice in essence encompasses, as well as legal instruments which enable the effectivness of this human right. One of those instruments is the free legal aid, which was introduced to Serbian legislation only in 2019, even though many non-governmental organizations had been providing it as one of their main activities long before it would become subject of the national legislation. However, our analysis shows that effective access to justice through the means of access to the free legal aid is not yet achieved in Serbia for the failure of domestic authorities to implement the constitutional guarantees and ensuing legislation properly.

Keywords: Right to Access to Justice; Right to a Fair Trial; Free Legal Aid; Procedural Human Rights.

Resumo: O direito de acesso à justiça é o mais importante direito humano, indispensável para o exercício eficaz de outros direitos humanos. Devido ao seu carácter abrangente e ao seu conteúdo, o direito de acesso à justiça é quase impossível de definir com precisão. Existem diversas garantias incluídas no direito a um processo justo e no direito a uma tutela efetiva que incorporam as ideias e os interesses que o direito de acesso à justiça engloba na sua essência, bem como instrumentos jurídicos que permitem a eficácia deste direito humano. Um desses instrumentos é o apoio judiciário gratuito, apenas introduzido na legislação sérvia em 2019, apesar de muitas organizações não governamentais terem vindo a prestar como uma das suas principais atividades muito antes de se tornar objeto da legislação nacional. No entanto, a nossa análise revela que o acesso efetivo à justiça por meio do apoio judiciário gratuito ainda não foi assegurado na Sérvia pela incapacidade das autoridades nacionais de implementar adequadamente as garantias constitucionais e a legislação subsequente.

Palavras-chave: Direito de Acesso à Justiça; Direito a um Julgamento Justo; Apoio Jurídico Gratuito; Direitos Humanos Processuais.

The time of natural law is divine time: eternity.
The creation of the State as an impartial third party marks the start of legal history.
The time of access to justice is the time of the sovereign and the State.

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As long as the civil state exists, access to justice will exist.
Daniel Bonilla Maldonado (2020: 20)

1 . Introduction

In his short historical reflection on access to justice, in order to explain its framework and content, Lawrence M. Friedman (2010: 3) asked who is supposed to have access, to what and for what purpose, as well as what justice is in "access to justice." When a modern man, with solid finances, answers the above questions, he readily expresses his expectation to have an easy access to independent and impartial courts and administrative bodies, accompanied with reasonable costs, or even free of charge where possible, an independent and objective investigation, expedite and fair outcome of the proceedings, as well as applicable non-discriminatory norms along the way. It appears that a modern man has, more or less, a high expectation from the state to have his any legal dispute resolved. Evidently, what is expected or implied is that there exists a normative and institutional system, built on firm democratic principles and norms, which is capable of providing access to justice both procedurally (institutionally) and substantively. That is the perspective of a modern private individual, who has been living in the second half of the 20th and in the 21st century, who is secured and empowered by the civil and social rights provided in international legal instruments and constitutions, which enable certain personal autonomy against the state as well as from other individuals, and who believes in equality. This is also a consequence of the positivist approach, typical for most of the modern states which are built on several pillars – legality, liberty and principle of separation of powers, which are all together intertwined with the last one – access to justice (Friedman, 2010: 3).

Indeed, access to justice as we know it is a modern idea, idea of the second half of the 20th century. It is a demand of the contemporary society from the modern legal systems, and serves to focus on two basic purposes of the projected legal systems by which people may vindicate their rights and/or resolve the disputes under the auspices of the state: "first, the system must be equally accessible to all; second, it must lead to results that are individually and socially just." (Cappelletti, Garth, 1978: 182) As a human right, the right to access to justice represents the most basic requirement from an egalitarian legal system that seeks to guarantee legal rights, rather than just proclaiming them (Cappelletti, Garth, 1978: 185). Hence, access to justice is expected to provide much beyond fulfilled formality. In order to be fully realized, it should satisfy social expectations and bring out justice in substantive terms, which requires an entire system.

As a consequence of the above approach towards and understanding of the access to justice, most modern legal systems should be concerned with how, at what price and for whose benefit they really work (Cappelletti, Garth, 1978: 181). Unconditioned and equal access to justice of all, as the final goal of the modern societies, is an answer to the last concern. Therefore, inability to access justice creates "double violation of values central to modern legal and political imagination…the basic equality of all human beings…[and] individual autonomy" (Maldonado, 2020: 27-28). However, that is a utopian goal, because many inequalities cannot be remedied by formal means, while

the first and second concern, as we will see later in our reflection, depend on the states and the limitations dictated by their sovereign powers.

Still, we must acknowledge that proponents of the right to access to justice have initiated changes, leading to normative, institutional, procedural and substantive improvements. These changes were facilitated by instruments that improved the quality of legislation, judicial and administrative proceedings, and institutions in terms of quality of staff, service, and the fairness of procedures and outcomes. At least in Europe, instruments of the Council of Europe ("the CoE") have notably reformed the entire legal and judicial systems to provide more effective access to justice.

Given the scope and effects of the right to access to justice, three approaches to its study have emerged. The first, known as the *constitutional right approach*, examines the content of this right as a fundamental constitutional right (Maldonado, 2020: 16-17). Second, the literature also recognizes the *sociological perspective* on the right to access to justice. This approach examines how ethnic, racial and class inequalities hinder access to justice; how monopolies in the legal market affect the quality of legal representation; how "institutional designs" enable or disable access to justice; and how legal norms, are exercised in practice (Maldonado, 2020: 17). The final approach is the *normative perspective* on the right to access to justice, which focuses on how this right should be interpreted and on the ideal "institutional designs" for its realization (Maldonado, 2020: 17).

Returning to the subject of our reflection, the free legal aid ("the FLA") system in the Republic of Serbia, we would like to situate this instrument of effective access to justice in its historical development and determine its basic normative and institutional characteristics. Namely, the point in time and historical context in which the FLA has been introduced in Serbia is different from that in the Western countries, where this instrument was introduced much earlier under different political and economic circumstances. Second, the Serbian approach to the providers of the FLA is quite restrictive, while the list of beneficiaries is not limited to the poor, but includes many other social categories. This approach, at least in principle, promotes positive discrimination and recognizes some other social groups who could, regardless of their financial capacities, benefit from the FLA. Third, the Serbian approach to the FLA may be an example of how the effective enjoyment of the right to the FLA is not solely a procedural matter in a concrete case, but an issue that requires an entire system. Therefore, to assess the effectiveness of the FLA, it is necessary to examine the entirety of the FLA system established by the state. We hypothesize that effective access to justice requires first of all an effective access to the FLA in cases where the FLA is indispensable for the individual to protect their rights. We will approach the FLA legislation and its implementation from the constitutional, sociological and normative perspective, as suggested by the literature, as well as from the quantitative perspective where the statistics allow us, in order to examine our hypothesis.

In the first part of this reflection, we will focus on the notion, historical development, and European perspective of the right to access to justice. This part will discuss in detail how this right has evolved into its modern form, emphasizing the European understanding, standards, and approach to FLA matters. In the second part we will turn to the FLA system in Serbia as

an instrument of access to justice. We will focus on the issues concerning the FLA providers, beneficiaries, and the administration of requests for the FLA, to assess the system. This is important, because some systemic deficiencies may deprive numerous individuals of FLA, which may negatively affect their participation and success in relevant proceedings and cause them irreparable damage.

2. What is the (right to) access to justice?

2.1 On the notion and historical development

The concept of access to justice, as access to judicial protection, arose in the 18th and 19th centuries and "meant essentially the aggrieved individual's *formal* right to litigate or defend a claim" (Cappelletti, Garth, 1978: 183; similar Galanter, 2010: 115). This approach was characteristic of the liberal states of the time; access to justice was considered a "natural right", so states were not required to take action for its protection but rather to not allow it to be violated by others (Cappelletti, Garth, 1978: 183). Also, both access to justice and equality were only formal, not effective, and judicial protection could only be afforded by those who could cover its costs (Cappelletti, Garth, 1978: 183). The reality that access to judicial protection was only formal and still unavailable to many persisted in most countries until the middle of the 20th century. Moreover, it was not even noted by the scholarship as problematic until then (Cappelletti, Garth, 1978: 183-184). However, with the growth of the liberal societies and the shift from individual to collective, the human rights movement successfully pushed for the recognition of social rights and corresponding duties of governments (Cappelletti, Garth, 1978: 184) at both the national level, through constitutions, and at international level, through various international instruments. Subsequently, such new rights required a proper mechanism for their effective protection (Shikhelman, 2018: 456-457), and the right to access to justice was recognized as an individual and social right of paramount importance (Cappelletti, Garth, 1978: 184-185). As the "most basic human right" of modern, egalitarian legal systems (Cappelletti, Garth, 1978: 185), the right to access to justice has been concretized in various procedural guarantees, most often gathered under the umbrella of the right to a fair trial and the right to effective legal remedies. Additionally, it has become an issue of both national and international law,[2] with an increasing social impact (Cappelletti, Garth, 1978: 185-186).

2. Following World War II, an entire series of the international human rights instruments was adopted, both universally and regionally, and access to justice has been included explicitly or implicitly in the following provisions: articles 7 and 10 of the Universal Declaration of Human Rights; paragraph 1 of article 14 of the International Covenant on Civil and Political Rights; subparagraph d) of article 37 of the United Nations Convention on the Rights of the Child; article 57 of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence; subparagraph d) of paragraph 3 of article 18 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; subparagraph a) of paragraph 1 of article 7 and article 26 of the African Charter on Human and People's Rights; article 8 of the American Convention on Human Rights; articles 6 and 13 of the Convention for the Protection of Human Rights and

In order to fulfil the legal and social expectations of its legal and political proponents and advocates, but above all of its beneficiaries, access to justice is expected to be effective. According to Cappelletti and Garth (1978: 196 - 222) there have been three waves, at least in the Western countries, for introducing legal instruments aimed at achieving and enhancing the effectivness of access to justice. The first wave, starting roughly between World War I and II, introduced free legal aid (England was the first country to introduce this instrument in the 1920s and its approach to FLA will later be frequently assessed before the European Court of Human Rights), while the second wave, detected after World War II, pushed for normative reforms to provide legal representation in "diffuse claims" in environmental and climate cases, i.e. group or collective claims in public law litigations (which was most common in the United States of America ("the USA")). It appears that in the first two waves, advocates of the effective access to court had two primary goals: to make the access to justice more effective and meaningful for those who were socially and financially impaired from seeking legal protection of their rights, and to protect certain public interests of the weak claimants who were facing "big players" in the courtrooms. Hence, "the access to justice" was still considered and perceived quite formally, and the focus was on individuals and public interests.

However, it was the third wave, which began in the 1970s, that broadened the understanding and scope of effectiveness of access to justice, and that is largely how we perceive the notion of access to justice today. Given that the third wave is the broadest in its scope, it warrants more attention at this point, as it turned the focus from the who to the how and to justice itself.

2.2 A few more words on the third wave in development of the concept of access to justice

The third, comprehensive wave of understanding of access to justice was simply called "access-to-justice approach" (Cappelletti, Garth, 1978: 222-223), because it treated effective access to justice as a full interest of everybody, without reservation or limitation to any social group or interest. With this new purpose, the right to access to justice was finally recognized as an interest and a right of all, and not only of those who were at the bottom or at the top of the social ladder. Effective access to justice became both the goal and a measure of success of the governments and regimes, a precondition and interest in successful accession to the international organizations on the European soil, and it created a web of expectations for the modern man we described in the introduction of this reflection. The third wave involved all state institutions and made access to justice a common interest. Surely, the successes of the first two waves remained equally relevant (now as the procedural instruments, which they have always been in essence), legitimate, and justified.

The beginning of the third wave and its first results have been detected and evaluated in the late 1970s when scholarly efforts produced broad research reports as part of the so-called "Florence Access to Justice Project"

Fundamental Freedoms and Article 47 of the Charter of Fundamental Rights of the European Union.

supervised by Mauro Cappelletti (Galanter, 2010: 116), which covered South America, the USA, Canada, Australia, Japan and several European countries. This invaluable research project identified several other approaches and standards of effective access to justice, i.e. new instruments in addition to free legal aid and collective claims. First, the research showed that in order to have effective access to justice the parties to the proceedings should bear reasonable, non-excessive costs and obtain final decisions within a reasonable timeframe (Cappelletti, Garth, 1978: 186-195). Second, the research also identified the emergence of the alternative dispute resolution ("the ADR") as another way of effective access to justice, adapted to the type of dispute, nature of interests protected and some personal characteristics of the parties to the dispute, as well as specialized courts for particular types of disputes (Cappelletti, Garth, 1978: 225-227, 232).[3] Third, and most important, it was established that in some cases it is necessary to undertake profound interventions in or reform of the (entire) systemic procedural legislation (e.g. administrative, litigation and enforcement laws) and the (entire) court systems, to make access to justice effective (Cappelletti, Garth, 1978: 228-231, 286-289).

While the first two waves were connected to specific interests, such as helping the poor and fighting for certain public interests, the third wave in the development of effective access to justice overcame these specific interests. It shifted the focus to general interests in access to justice and moved the attention to institutions and procedures. Additionally, many of those new instruments for effective access to justice stemmed from domestic efforts, as determined by the Florence Access to Justice Project. However, more significant changes came as a result of international human rights codifications, particularly at regional level, where European human rights made the most progress and had the most substantive impact on national legislations. In particular, the above listed interventions into the systemic legislation and court systems of the European states are also partially a result of their becoming members of the CoE and signatories to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"). As the most influential legal instrument in the field of human rights protection, the European Convention largely contributed to what may be called "the capacity of all members of political community to call upon the State to solve their differences impartially and efficiently" (Maldonado, 2020: 15). Guarantees contained in articles 6 (right to a fair trial) and 13 (right to effective legal remedy) breathed new life into the concept of effective access to justice that we know today. It was the practice of the European Commission of Human Rights ("the European Commission") and later of the European Court of

3. Galanter (2010: 117-119, 121), however, notes that the ADR may be looked at as a separate phenomenon from the access to justice project, and not necessarily as instrument of its achievement. Namely, he noted that between World War II and the 1970s there was a set of "intellectual triplets", consisting of the project of access to justice, dispute perspective in legal studies and the ADR, born as a result of a "remarkable movement of expansion of accountability and remedy fostered by the courts and legislatures". According to him, new civil rights emerging after World War II, as well as new instruments that were sensitive to the new social rights, social statuses and types of disputes, enabled ordinary and poor people to use courts, remedies and alternatives more boldly and more successfully, and to overcome access concerns more easily.

Human Rights ("the European Court", "ECtHR") which, together with the increase of various legal issues and corresponding jurisprudence, helped in the formation of the human right to access to justice under the aegis of the CoE.[4]

In the understanding of the European Court, the right to access to justice is for the most part covered by the right to a fair trial and the right to access to court as its component. The very first case in which the right to access to court appeared before the European Commission and Court was *Golder v. the United Kingdom*.[5] What was rather a formal issue – the right to institute court proceedings – became the trigger for much bigger issues. Indeed, Article 6 of the European Convention, which regulates the right to a fair trial, does not contain specific guarantee of the right to institute court proceedings as one of manifestations of the right to access to court, and as such, of the access to justice. However, in its 1974 judgment, the European Court established that in view of the Preamble, the guarantees contained in paragraph 1 of Article 6 and other provisions, and the purpose and goals of the European Convention, which relies on the Universal Declaration of Human Rights, as well as values enshrined in the Statute of the CoE, such as the rule of law which cannot be imagined without access to courts, the right to institute proceedings, as an element of the right to access the court, is inherent to the right to a fair trial and as such was covered by Article 6 of the European Convention.[6] Hence, access to justice is inseparable from the human right to a fair trial.

The second relevant case is *Airey v. Ireland*,[7] which in 1979 established the effectiveness of access to court as seen by the European Court and clarified the significance of the FLA, which had deep implications on its further jurisprudence and developments on the domestic level, as well. Namely, the applicant in this case claimed that she had been deprived of access to court because she was unable to find a solicitor who would represent her in the judicial separation proceedings from her violent husband, because she could not cover the representation costs, nor was there an FLA scheme in family matters in Ireland at the relevant time. The Court established that in order to have a fair trial, the applicant should have **effective** access to court, that is, to be represented by a lawyer in this case, because otherwise it would be difficult for her "to present her case properly and satisfactorily."[8] However, the Court emphasized that "it leaves to the State a free choice of the means to be used towards this end" i.e. to provide the means which would enable an effective right of access to court, because it is not its function to indicate or dictate them.[9] Such means may be, for example, the simplification of a

4. Given the topic of the second part of this reflection, we will focus only to the right to a fair trial in the rest of the first part.

5. *Golder v. the United Kingdom*. Ruling of the ECtHR of 21/02/1975, delivered in Application no. 4451/70.
6. *Golder v. the United Kingdom*, paragraphs 26-36.

7. *Airey v. Ireland*. Ruling of the ECtHR of 09/10/1979, delivered in Application no. 6289/73.

8. *Ibid*., paragraph 24.

9. *Ibid*., paragraph 26.

relevant procedure, or the FLA "for the assistance of lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory,..., or by reason of the complexity of the procedure or of the case."[10] As from this judgment, the effectiveness of access to court has become judicially recognized threshold and standard under the European Convention, the FLA being adopted as one of its instruments, and access to court as one of the emanations of access to justice spread to the entire course of the proceedings, because the applicant complained that both the right to initiate proceedings and obtain the final decision were violated.[11]

In one of its following judgments, the European Court confirmed the *Airey* financial test for the FLA, albeit *a contrario*, where it found no violation of Article 6 because it established that the applicant's income had exceeded the financial criteria determined in the domestic FLA scheme, thus excluding him from it.[12] The European Court also established that the applicant had been represented during the substantial part of the court proceedings, whereas in those phases in which he represented himself, he did so effectively,[13] which passed the test of proper and satisfactory self-representation examined in *Airey*.[14] Finally, the effectiveness of access to court and the FLA were examined again in *Steel and Morris v. the United Kingdom*, in which the applicants were parties to complex domestic civil proceedings concerning damages against McDonald's, but whose equality of arms was jeopardized by the lack of proper legal aid and representation. In this case, the European Court established that "it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage *vis-à-vis* the adversary".[15] Hence, if the equality of the parties is threatened and a reasonable opportunity to present the case is jeopardized in violation of the right to effective access to justice, the State should assist the affected party.

The third relevant case is *Ashingdane v. the United Kingdom*[16], in which the European Court teaches us that in view of its nature, which calls for

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10 *Ibid*.

11. After this judgment an entire body of the case-law emerged dealing with other phases of the proceedings and legal instruments as means of achievement of the effective access to justice, unlimited solely to initiation of the proceedings but covering entire course of the proceedings until the final decision is reached.

12. *Glaser v. The United Kingdom*. Ruling of the ECtHR of 19/09/2000, delivered in Application no. 32346/96, paragraph 99.

13. *Ibid*., paragraphs. 99-100.

14. See fn. 9 above or *Airey v. Ireland*, paragraph 24.

15. *Steel and Morris v. the United Kingdom*. Ruling of the ECtHR of 15/02/2005, delivered in Application no. 68416/01, paragraph 62.

16. *Ashingdane v. the United Kingdom*. Ruling of the ECtHR of 28/05/1985, delivered in Application no. 8225/78.

regulation by the State, the right of access to court is not an absolute right and it introduced the proportionality test which the domestic bodies may apply in the matters of access to court, as well. In this case, the applicant, who suffered from mental illness and was detained in a special hospital, complained that he could not submit a claim against the relevant medical authorities in relation to his prolonged two-year stay in the special hospital, in view of the grounds listed in relevant domestic legislation, which did not allow him to submit the intended claim. The European Court did not find a violation of Article 6 of the European Convention in this case since:

> "Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access 'by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals'...In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court, it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field...Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired...Furthermore, a limitation will not be compatible with Article 6 para. 1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."[17]

Soon after, in its admissibility decision in the *Munro v. the United Kingdom*, in which the applicant complained about the lack of the FLA in domestic defamation proceedings he initiated, the European Commission confirmed that the means to be used to ensure the effective right of access to court are within the discretion of the states, but "that it is not in every case that the free legal aid will be appropriate or necessary", that the right "to a fair hearing must be determined by reference to the particular facts and circumstances of an individual case" and that the availability of the FLA may be conditioned with the "prospects of success of the proceedings."[18]

2.3 On different approaches in understanding of the access to justice

There are different approaches to understanding the notion and scope of access to justice in the literature.

According to the narrow approach, access to justice signifies "the possibility for the individual to bring a claim before a court and have a court adjudicate

17. *Ibid*., paragraph 57.

18. *Munro v. the United Kingdom*. Ruling of the ECtHR of 14/07/1987, delivered in Application no. 10594/83.

it" (Francioni, 2007: 1-2) or in other words, it is "the right to judicial remedy before an independent court of law." (Francioni, 2007: 4). In more substantive terms, it is an individual's right both to bring a claim before a court and have their "case heard and adjudicated in accordance with substantive standards of fairness and justice" (Francioni, 2007: 2), which in fact is "a standard of review of the administration of justice in the states where the infringement of a right has occurred" (Francioni, 2007: 2). In an even narrower sense, to have access to justice means being provided with legal aid in a situation of not being able to afford proper legal representation and financial means to cover costs of the administration of justice (Francioni, 2007: 2).

In a wider sense, the notion of access to justice cannot be limited solely to the access to the official state courts, but also includes administrative bodies, arbitration and other ADR methods, quasi-judicial institutions as well as tribal courts which apply local customary laws (Friedman, 2010: 3-4; Francioni, 2007: 4-5). Vera Shikheman (2018: 457) also notes that there are attempts to reduce the notion of access to justice to being financially capable of bringing a case before a judicial or other institution. However, she (Shikheman, 2018: 457) notes that the problem is not only financial, but rather substantive – individuals who bring their cases before the competent bodies have the right to have their cases adjudicated in a fair and just manner (similar, Francioni, 2007: 2)

These perspectives do not necessarily match the three waves of development of effective access to justice instruments. They rather concern the dispute mechanisms available to citizens i.e. the mechanisms at their disposal to achieve the justice they seek. However, the narrow understanding of access to justice may be attributed to the earliest ideas of access to justice, the proponents of the FLA, diffuse claims and their procedural interests, while the broader perspective and understanding of access to justice is closer to the third wave, because its interest lies in the resolution of a dispute (*justice*?), an interest that requires both the procedural (institutional) and substantive fairness.

3. Free legal aid in Serbia

Following the change of political regime in October 2000, Serbia joined the democratic regimes which rest on human rights and the rule of law. These two formative standards of modern democracies, that Serbia embraced 25 years ago, had formed the baseline for dubious normative and institutional reforms in Serbia, some of which are still ongoing. When it comes to FLA, it took more than a decade for the Serbian authorities to establish the FLA system at the normative and then at the institutional level. Nevertheless, it seems that the job is still unfinished in the institutional, administrative and substantive aspects, which makes the access to FLA still limited to a certain part of the domestic population.

The first legal intervention, relevant for our reflection, is the new democratic/non-socialist Constitution adopted and promulgated in 2006,[19]

19. Constitution of the Republic of Serbia, *Official Gazette of Republic of Serbia*, nos. 98/2006 and 115/2021.

which in Article 36 guarantees equal protection before the courts and other state bodies, entities exercising public powers, and bodies of the autonomous provinces and units of the local self-government ("the LSG"). Furthermore, Article 67 guarantees the right to "legal assistance". Pursuant to this provision, everyone is guaranteed the right to legal assistance, under the conditions stipulated by law (paragraph 1), which legal assistance is provided by attorneys at law, as an independent and autonomous service, and by the legal assistance established in the units of the LSG in accordance with the law (paragraph 2). Conditions for providing the free legal assistance (and other related issues) are left to be regulated by law (paragraph 3 of Article 67).

Provisions of Articles 36 and 67 of the Constitution provide the legal grounds relevant for the beneficiaries in the first place, whose rights are protected thereby. However, in reality, Article 67 caused a clash among domestic legal professionals as potential FLA providers, which marginalised beneficiaries and their rights and certainly deprived them of effective access to FLA.

Namely, even though states are left considerable margin of appreciation in establishing the system of instruments and measures which enable effective access to justice, and the monopoly that the attorneys strive to achieve or maintain is not a rare occurrence in practice (similar, Palačković, Čanović, 2020: 68, Maldonado, 2020: 17), the constitutional dimension of the FLA system in Serbia, which forms its legal baseline, is considered unjustifiably restrictive and discriminatory from the perspective of FLA providers, because it entrusts only attorneys at law and certified lawyers employed in the units of the LSG with the power to provide FLA. Non-governmental organizations ("the NGOs"), according to a restrictive interpretation of provision of Article 67 of the Constitution, are not entitled to provide FLA. The approach in which NGOs are excluded from the legal assistance scheme at the constitutional level (and thus largely from the FLA system) is damaging for the beneficiaries and their rights in Serbia. This is because there have been numerous NGOs which distinguished themselves by their long-term work with various vulnerable groups, their specialization in social rights and their experience in providing legal and other means of support to marginalized individuals and/or entire groups long before the appropriate legislation was even discussed (Mileusnić, 2020: 7-8), not to mention that they were basically the only ones who have been providing FLA until 2018 (Vasić, Filipović, 2021: 7). However, after more than a decade of tensions between the bars and representatives of NGOs and various interpretations of Article 67 of the Constitution and its operationalization (Mileusnić 2020, 8), in 2018 the State finally adopted legislation which formally excluded NGOs from being direct providers of FLA. This is despite the fact that, in practice, some attorneys registered with local bars do provide FLA through NGOs and are being remunerated through projects and other means of financing that NGOs have at their disposal. As we will see below, a certain space is left to NGOs by the operation of relevant legislation to provide FLA in cases concerning asylum and discrimination, but this kind of engagement is very limited in nature. This limited engagement certainly damages beneficiaries who could seek FLA from NGOs that are specialized in the fields of law relevant to their violated rights.

There are additional provisions in the Constitution which regulate FLA in the context of the procedural human rights, contained in the second chapter titled "Human and Minority Rights and Freedoms". Specifically, pursuant to paragraph 2 of Article 32, which guarantees the right to a fair trial, if the person does not understand or speak the official language of the court, such person has the right to the assistance of an interpreter free of charge. The right to free assistance of an interpreter is also guaranteed if the person is blind, deaf or dumb. Also, any person deprived of liberty without a court decision will be informed promptly about, among other things, the right to be questioned only in presence of a defence counsel of their own choice or "a defence counsel who will provide legal assistance free of charge if they are unable to pay for it" (paragraph 1 of Article 29). Finally, according to paragraph 3 of Article 33, a person charged with the criminal offense, but without sufficient means to pay for a legal counsel, is entitled to a free legal counsel when the interests of justice so require, and in compliance with the law. In May 2013, the Constitutional Court of Serbia rendered its decision on the constitutionality of the provisions of the Code on Civil Procedure which concerned party representation. In the said decision, it was established that the availability of legal assistance is not a matter of a state's good will, but a state's obligation, since a right without the possibility to be exercised becomes illusory.[20] Seven years later, the jurisprudence of the Constitutional Court confirmed that the Constitution guarantees everybody the right to legal assistance, that the purpose of the legal assistance is achieving equal protection of rights before the competent bodies and ensuring efficient realization of access to court and other public authorities and that the right to legal assistance also includes the right to FLA under certain conditions.[21] However, interpretation and further operationalization through the relevant legislation of the above discussed Article 67 of the Constitution are in collision with the position of the Constitutional Court This is because the State, despite the margin and freedom it enjoys, very likely limited the beneficiaries' efficient realization of access to justice by narrowing down the pool of the legal professionals who can effectively provide FLA.

The FLA finally came to its fruition in November 2018 with the adoption of the Law on Free Legal Aid ("the FLA Law") in the National Assembly, which has been applied since 1 October 2019.[22] The FLA Law was adopted 12 years

20. Ruling of the Constitutional Court of Serbia of 23/05/2013, delivered in Application no. IUz. 51-2012.

21. Ruling of the Constitutional Court of Serbia of 03/12/2020, delivered in Applications nos. IUo. 2013/2019, IUo. 143/2019 and IUo. 203/2017, in the procedure for assessment of the constitutionality of certain provisions of the Statute and the Code of Professional Ethics of the Lawyers of Vojvodina Bar Association.

22. The FLA law is *lex specialis*, which regulates the administrative procedure for obtaining the FLA and other relevant details. However, there are certain relevant provisions which concern the FLA and 'poverty right' of the parties to the proceedings in the Family Law, Law on Prevention of Domestic Violence, Code of Civil Procedure, Code of Criminal Proceedings and Law on Misdemeanour Proceedings. In addition to the FLA Law, the MOJ adopted six additional rulebooks which regulate in detail the FLA request form, records that units of the LSG should keep, manner of registration of the FLA/FLS providers, training that the employees of the LSG should finish in order to obtain relevant certificates and procedure for referral of the beneficiaries to the registered and competent providers.

after the adoption of the 2006 Constitution, eight years after the adoption of the 2010 Strategy for the Development of the Free Legal Aid System in Republic of Serbia,[23] but also as one of the tasks of the 2013-2018 National Judicial Reform Strategy.[24] The obligation to adopt relevant legislation with regard to FLA also stemmed from the ratification of the European Convention and Serbia's membership in the CoE,[25] and was one of the preconditions in the European Union ("the EU") accession process.

There are three types of FLA according to Article 3 of the FLA Law: FLA in a narrow sense,[26] free legal support[27] ("the FLS") and FLA in cross-border disputes within the EU. While the last type of FLA is reserved for when Serbia becomes a member of the EU, the other two types have been exercised in practice since 2019. The types of FLA which are stipulated by Article 3 reflect the division between the primary and secondary types of FLA recognized in the study of FLA (for more see Palačković, Čanović, 2020: 68).

FLA in a narrow sense is the type of FLA which is provided by attorneys at law and the FLA departments of the units of the LSG. NGOs may provide FLA in narrow sense only in accordance with legislation which regulates issues of asylum and non-discrimination, and this is the only possibility where they may provide FLA under the same conditions as the attorneys and the units of the LSG. When it comes to FLS, its providers may be public notaries (who can issue only notarial deeds as part of their FLS and no other service), mediators and the law faculties (through the legal clinics). In 2022, the German Agency for International Cooperation ("the GIZ") conducted the research on FLA in Serbia. Among other findings, the research showed that in 2022, all law faculties which had legal clinics stopped providing FLS because of the difficulties they encountered in registration with the Ministry of Justice ("the MOJ") and yearly reporting, which the MOJ is not willing to overcome, as well as because of the limited number of services they are permitted to provide as the FLS providers, namely solely providing general legal information and filling out forms (Novaković, 2022: 30-33).

All subjects who wish to provide FLA in a narrow sense and the FLS must be registered with the MOJ, whereas the lawyers employed with the FLA units of the LSG must be certified by the MOJ after they complete the specialized training. Their licence is valid for three years.

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23. Strategy for Development of the Free Legal Aid System in Republic of Serbia. *Official Gazette of Republic of Serbia*, no. 74/10.

24. 2013-2018 National Judicial Reform Strategy. *Official Gazette of Republic of Serbia*, no. 57/13.

25. Explanatory Note to the Draft Law on the Free Legal Aid, Ministry of Justice of Republic of Serbia, 2018, pp. 2-3.

26. Article 6 of the FLA Law prescribes several types of the free legal aid in narrow sense: providing of legal advice, preparation/drafting of written submissions, representation and defence (in criminal, civil, administrative and misdemeanour proceedings).

27. Pursuant to Article 11 of the FLA Law, free legal support includes several types of the primary legal aid: providing of legal information, filling out the forms, preparation of notarial deed and mediation in dispute settlement.

Each year since the FLA Law came into force, the MOJ publishes the yearly report which contains figures relevant for the functioning of the FLA system in Serbia. The number of registered FLA and FLS providers is a relevant indicator of the functionality of the FLA system.

Registered FLA in a narrow sense providers					
	2019	2020	2021	2022	2023
Units of the LSG	150	155	138	165	202
Attorneys	3672	3213	3510	3797	4247
NGOs	18	22	24	26	28
Registered free legal support providers					
	2019	2020	2021	2022	2023
Mediators	43	45	57	58	59
Notaries	16	17	17	17	17
NGOs	23	30	37	36	39

Overview of the registered FLA and FLS providers since the FLA Law came into force. [28]

As can be seen from the above figures, the number of units of the LSG with certified providers and registered attorneys is growing, which is a satisfying fact. However, the figures also indicate that when the FLA Law started to be applied in 2019, the system of the FLA departments of the units of the LSG was in fact not ready, because it was incomplete, although it should have been prepared and ready to fulfil its legally prescribed obligations before the FLA Law came into force. This is because it is the certified lawyers of the units of the LSG which do not only provide FLA, but in the first place administer the requests for FLA and FLS. There is an entire administrative procedure, prescribed in Articles 27-37 of the FLA Law, pursuant to which the requests for FLA and FLS can be submitted at and approved only by the FLA department of the LSG unit according to the place of residence of the applicant. Hence, if a unit of the LSG does not have an FLA department and a minimum two certified lawyers employed, then the applicant can neither apply nor obtain FLA. In view of the above, it may be concluded that a considerable number of beneficiaries has been left without effective access to FLA and FLS since October 2019. Besides, some research shows that many potential beneficiaries have not been informed of the possibility to request and obtain FLA and FLS. This obligation to inform the public rests with the units of the LSG (Trifković, Ćurčić, Marković, 2020: 12-20;

28. Data presented in the table is extracted from the Annual Reports of the MOJ for 2019, 2020, 2021, 2022 and 2023, published on its official web-site, https://www.mpravde.gov.rs/tekst/32939/godisnji-izvestaj-ministarstva-pravde-o-pruzanju-besplatne-pravne-pomoci.php (Accessed on: 09/05/2025).

Turanjanin, Čanović, 2022: 54, 56; Turanjanin, 2024: 60-61). Moreover, early research detected a frequent practice of the employees of the FLA departments to provide only oral instructions to applicants and direct them to the NGOs for further counselling, without issuing formal and written decisions of their requests for FLA or FLS (Trifković, Ćurćić, Marinković, 2020; Mileusnić, 2020). Finally, one later research from 2022 showed that among 112 attorneys who were interviewed, only 27 were assigned cases by the FLA departments of the LSG (Turanjanin, Čanović, 2022: 53). That number was unusually low, particularly because in 2020 the Bar Association of Serbia introduced the Call centre for the FLA (to prevent corruption and enable equal allocation of the cases) through which lawyers from the LSG units can obtain information on available attorneys who they should refer the cases to (Novaković, 2022: 28).

Moreover, given that there are 226 registered public notaries in Serbia,[29] the fact that there is less than 10% of them registered as FLS providers and that in six years their number did not grow at all, is equally troublesome. These figures may imply either lack of awareness of the significance of FLA on part of the public notaries, or failure of the State to motivate and support the public notaries to provide FLS. Consequently, a number of FLS beneficiaries are left without the possibility to realize their rights free of charge, despite clear legal guarantees.

Furthermore, according to Article 4 of the FLA Law, the FLA is available to the following general categories of individuals: citizens of Republic of Serbia, persons without citizenship, foreign citizens with permanent residence in the Republic of Serbia and other persons who enjoy the right to free legal aid in accordance with other law or a ratified international agreement, if (i) they fulfil conditions to receive financial social assistance or child benefit (members of the family or a household of this person also have the right to FLA and FLS), or (ii) do not fulfil conditions to receive financial social assistance or child benefit, but would have fulfilled conditions to obtain those two benefits had they personally covered the costs of legal assistance. According to the Explanatory Note to the Draft Law on the Free Legal Aid ("the Explanatory Note") the adopted approach in determining the financial status of potential beneficiaries is not static, but enables the assessment of all relevant circumstances in each case, as well as access to FLA to a much wider circle of beneficiaries, in particular to those who have to bear significant costs that would cause financial difficulties.[30] The above approach is natural in FLA schemes because it, in the first place, embodies the main purpose of FLA, which is to provide FLA to financially weak individuals, even to those who are not beneficiaries of state financial support.

However, besides the above categories, there is a special list of vulnerable categories who have the right to FLA and FLS pursuant to paragraph 3 of Article 4 of the FLA Law. This special list includes (i) children whose rights, obligations or interests, based on law, are being decided of in court proceedings or in proceedings before a state or administrative body, (ii)

29. Registry of the public notaries is publicly available on the website of the Chamber of the Public Notaries: https://beleznik.org/kancelarije?page=1 (Accessed on: 09/05/2025).

30. Explanatory Note on the Draft Law on the Free Legal Aid. 2018, p. 5.

persons who are under a security measure of a mandatory psychiatric treatment or a treatment in a healthcare institution or a protective measure of mandatory psychiatric treatment, (iii) persons who are in the process of partial or complete deprivation of legal capacity or a restoration thereof, (iv) persons who enjoy a legal protection from domestic violence, (v) persons who enjoy legal protection from torture, inhuman or degrading treatment or punishment or trafficking in human beings, (vi) persons who seek asylum in the Republic of Serbia, (vii) refugees, persons under the subsidiary protection or internally displaced persons, (viii) disabled persons, (ix) children who are protected by accommodation assistance in the system of social protection, (x) children and youth whose social housing service, guaranteed until the age of 26, has been terminated, (xi) adults and elder people who have been placed in social housing without their personal permission, (xii) persons who are entitled to a right to determination of the time and place of birth in non-contentious proceedings, and (xiii) persons who are parties to the forced eviction and re-settlement proceedings in accordance with the law which regulates housing.

The above list of categories of vulnerable groups as FLA and FLS beneficiaries is one of the positive aspects of the FLA Law. This is because it recognizes not only the poor, as the most affected, but also various social categories whose additional particular status, legal capacity, personal characteristics, vulnerability, and lack of family protection or support require wider social engagement and particular legal support. The extension of the pool of the FLA/FLS beneficiaries to those whose weak social status is not conditioned by their finances is a true embodiment of the goal of the FLA Law, which is to enable every person effective and equal access to justice (Article 2), and confirms that FLA can be an effective legal instrument for increasing social justice, despite its certain limitations. On the other hand, meeting the needs of the above 12 categories may be challenging for the FLA system, because their circumstances require legal professionals with particular experience and attention. It is also necessary to regularly assess if the FLA system responds properly to the needs of the beneficiaries, but this issue is understudied in Serbia. There have only been two researches concerning victims of violence as FLA beneficiaries: one conducted as early as 2020, and another in 2022. The former research concluded that victims of gender-based violence and discrimination were not properly recognized by the FLA Law, and as such could not benefit from the guarantees contained in the Istanbul Convention (Vasić, Filipović, 2021: 33-35). As for the later study, it showed that 80,4% of the respondents were never contacted by the FLA departments to be assigned the representation of victims of domestic violence in the criminal proceedings (Turanjanin, Čanović, 2022: 52), even though there were strong indications in the MOJ's yearly reports that the most frequent requests for legal assistance were coming from female victims of domestic violence. We can only guess what has happened in the meantime from the figures, as more profound and substantive studies are missing.

In any case, the general figures are showing an increase in the number of applicants and beneficiaries within the FLA system in Serbia, which further requires the system to be ready to respond to their needs effectively. Additionally, further disaggregation of data could help in following the

implementation of the FLA Law and improvement of the quality of the FLA system.

	2019	2020	2021	2022	2023
FLA requests submitted	1287	6883	4601	4944	6508
FLA requests approved	1096	5367	4345	4805	6321
No. of beneficiaries assigned to attorneys	/	954	602	576	932

Overview of the total number of FLA and FLS requests submitted and approved.[31]

The early yearly reports of the MOJ show that in the greatest number of the cases, FLA was provided in domestic violence cases, family law, inheritance, and various administrative and non-contentious proceedings. However, in the last two reports, the manner of reporting has improved, so the overview and research are easier, whereas the statistical data as to the types of legal fields in which FLA was mostly requested and provided is better presented. Statistics for 2022 and 2023 are presented in the table below.

	2022	2023
Family law	75,77%	45,47%
Inheritance	2,63%	8,87%
Contracts	9,20%	8,28%
Criminal law	4,60%	17,06%
Administrative law	1,90%	/
Property rights	4,60%	11,83%
Labour law	0,65%	/
Constitutional law	0,65%	/
Domestic violence	/	7,69%
Private international law	/	0,59%

31. Data presented in the table is extracted from the Annual Reports of the MOJ for 2019, 2020, 2021, 2022 and 2023, published on its official website, https://www.mpravde.gov.rs/tekst/32939/godisnji-izvestaj-ministarstva-pravde-o-pruzanju-besplatne-pravne-pomoci.php (Accessed on: 09/05/2025).

Other	/	0,21%

Overview of the legal fields in which FLA was provided in 2022 and 2023.[32]

An overview of the types of the legal fields in which FLA is being sought and provided is very indicative of the variety of problems that the applicants have. This is a challenge that cannot be met only with a high number of providers, but also with qualified and experienced providers. Only once the quality FLA and FLS are provided is effective access to justice possible. Yet, this is illusory in many cases, but does not justify underdevelopment, stagnation, or absence of further progress of an FLA system.

4. Conclusion

Right to access to justice, in its latest stage of development, is the broadest, most ambitious and most important unwritten human right. It is the broadest because the idea and ideal of justice that lie at its foundation require the engagement of an entire state. It is the most ambitious because it seeks the eyes of the state and society to be open to everyone and everyone's problems. It is the most important unwritten human right because it can be achieved with numerous and various legal instruments and approaches, which vary from state to state. It is so wide in its scope and ambitious in its goals and purpose of achieving procedural and substantive justice that modern legal systems have to undergo serious, and often expensive, reforms. What conditions the effective exercise of the right to access to justice is not solely its principled normative dimension, but also its implementation through the engagement and involvement of numerous subjects and the readiness of institutional capacities to accomplish goals that are set.

The right to free legal aid has distinguished itself over time as a just and useful instrument of access to justice. It has become a legal entitlement of not only the poor, but of all those whose vulnerability makes them unable to seek justice properly. However, the case of Serbia proves that effective access to justice requires effective access to free legal aid, and that is not possible if the required support system is not built, available, and functional. Such support system requires clear, unambiguous, and predictable legislation, settled, professional, and objective administration of free legal aid requests, as well as the conscientiousness, competence and availability of legal professionals to provide guaranteed legal aid.

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