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KËRKO DREJTËSI
TRAŽI PRAVDU



**LEGAL AID IN CRIMINAL CASES AND APPLYING
EUROPEAN COURT OF HUMAN RIGHTS STANDARDS
IN KOSOVO COURTS**



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

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TABLE OF ABBREVIATIONS

1. **BC** – Basic Courts
2. **FLA** – Free Legal Aid
3. **CPC** – Criminal Procedure Code
4. **ECHR** – European Convention on Human Rights
5. **ECtHR** - European Court of Human Rights
6. **KBA** – Kosovo Bar Association
7. **KLI** – Kosovo Law Institute
8. **KJC** - Kosovo Judicial Council
9. **OSCE** – Organization for Security and Co-operation in Europe

1. INTRODUCTION

The European community recognizes 'Legal Aid' in criminal, civil and administrative matters as a human right. While many Europeans have the means to afford legal counsel, the governments, judiciaries, and the wider legal community (ie. Bar Associations) of Europe have worked to pass legislation and organize themselves so that this vital legal right is made available to indigent persons without charge. Right to legal counsel is of particular importance in **criminal matters** given the high value we all place on our freedom, and the life-altering stigma that attaches to a citizen upon conviction. Accordingly, as the youngest of these European nations, Kosovo is obliged to establish and implement such legal aid systems in a manner that lives up to the shared human rights principles of the European Convention on Human Rights (ECHR).

In December 2016, the OSCE Mission in Kosovo published their annual Justice Monitor¹ flagging - among other issues - the lack of legal representation of criminal defendants in criminal proceedings at the General Departments of Basic Courts of Kosovo. This report caught the attention of Kosovo Law Institute (KLI) and triggered the implementation of this monitoring project designed to provide more detailed data and insight regarding the Kosovo justice sector's adherence to its ECHR-based obligation to provide legal aid to all who cannot afford it.

The data collected through desk research, trial monitoring and interviews with defendants, judges and lawyers will demonstrate that despite the fact that free legal aid is a right guaranteed within the Kosovo Constitution and directly applicable international instruments, Kosovo's police, prosecutors and courts frequently fail to properly identify and inform indigent criminal defendants of their right to free legal representation in criminal cases under the jurisdiction of the general departments of basic courts monitored by KLI. As a result, these accused citizens remain unaware of this vital right, and consequently, advocates of Kosovo are not properly called upon to defend these indigent citizens.

By exposing this lack of free legal aid delivery in criminal proceeding for defendants who cannot afford a lawyer, this report aims to increase awareness among relevant stakeholders of this serious, and on-going human rights violation and to propose concrete recommendations for Kosovo's state institutions in order to eradicate this blemish on Kosovo's human rights record. Furthermore, this report aims to inform Kosovo citizens of their right to free legal aid guaranteed by the Kosovo Constitution, the ECHR and jurisprudence of the European Court of Human Rights (ECtHR), directly applicable in Kosovo.

The report findings have been collected via desk research and monitoring of judicial hearings within the criminal division of the General Department of the Basic Courts in Pristina, Peja and Prizren. The trial monitoring - conducted during the period of February 1st to May 31st, 2017 - focused on whether criminal defendants were adequately informed of their right, or received defence counsel throughout their respective criminal proceedings, particularly when they could not afford representation.

¹ OSCE Justice Monitor, July 2014- November 2015, available at: <http://www.osce.org/kosovo/208771?download=true>.

2. METHODOLOGY

In this report, the Kosovo Law Institute (KLI) utilized empirical and doctrinal methods of collecting relevant data regarding the State's implementation of its Constitutional and legal obligations to ensure defendant access to a licensed advocate (lawyer) in criminal cases at the general department of the Basic Courts in Pristina, Peja and Prizren. This research methodology was selected to determine the extent to which the courts implemented their Constitutional obligations in regards to the legal representation of defendants, including the implementation of free legal aid in these cases.

2.1. PRELIMINARY RESEARCH:

During January 2017, KLI initially held meetings with the Chair of the Kosovo Judicial Council (KJC) and the Director of the KJC Secretariat, court presidents and heads of the General Department of the Basic Courts in Pristina, Peja and Prizren to inform them about the project KLI was about to implement.

KLI submitted requests for access to public documents at the Basic Court of Pristina, Peja and Prizren for the purpose of analysing them. The cases, dated from 2014, 2015 and 2016, were randomly selected. KLI also conducted desk research regarding ECHR standards as interpreted and explained in ECtHR legal decisions concerning the right to free legal aid in criminal cases.

2.2. MONITORING:

Prior to monitoring in the Basic Courts of Pristina, Peja and Prizren, KLI developed a Monitoring Manual for KLI staff based on OSCE monitoring guidelines. The manual guided KLI in its training of KLI Field Monitors, and subsequently guided the monitors throughout their field work. From 1st February to 31st May 2017, KLI systematically monitored 524 court hearings of criminal proceedings at the General Department of the Basic Courts in Pristina, Peja and Prizren.

2.3. INTERVIEWS

The field monitors interviewed thirty (30) defendants that were subject to criminal proceedings before the criminal division of the basic courts and thirteen (13) judges from these divisions in the monitored courts.

2.4. ANALYSIS OF FINAL COURT DECISIONS

Based on the Law on Access to Public Documents, KLI was able to have access to 45 randomly selected, final court decisions reached during 2014, 2015 and 2016 by the judges of the Criminal Division of the General Department of the Basic Courts of Pristina, Peja and Prizren. KLI analyzed these 45 decisions in order to identify the alleged criminal offences

addressed by the court, to identify sentences imposed by the court, and to analyze the practice of calculating the court expenses.

2.5 JUSTICE STAKEHOLDER FOCUS GROUP

On 22nd May 2017, KLI held a focus group with representatives from the judiciary, prosecution, Kosovo Bar Association, Ombudsman, Ministry of Justice, Free Legal Aid Agency and NGO's where the preliminary findings of this report were discussed. Conclusions have been integrated into the analytical portion of this report.

3. PROVISION OF LEGAL AID IN KOSOVO: AN ECHR-DRIVEN LEGAL FRAMEWORK

3.1 ECHR AND THE KOSOVO CONSTITUTION

Under Article 6 (1) of ECHR, everyone has the right 'to a fair...hearing . . . in the determination of their civil rights and obligations or of any criminal charge'.² This implies that an adequate degree of 'equality of arms' will be afforded to all persons before courts of law³. In relation to criminal offences, Article 6 (3) (c) states that every person has the right 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 interest of justice so requires'⁴. Meanwhile, Article 14 (3) (d) of International Covenant on Civil and Political Rights provides a similar right to free legal assistance in the determination of criminal charges⁵.

According to the Constitution of Kosovo, these two international documents are directly applicable in Kosovo and have supremacy over the laws of the Republic of Kosovo.⁶ Furthermore, Article 53 of the Constitution stipulates that human rights and fundamental freedoms guaranteed by the Constitution are interpreted in accordance with the decisions of the ECtHR⁷ - thus obliging the courts in Kosovo to be guided by the case law of the ECtHR.

In addition to this, the same standards of free legal aid are embodied in Article 30(5) of the Constitution of Kosovo which stipulates that 'Everyone charged with a criminal offense... shall have assistance of legal counsel of his/her choosing... and if she/he does not have

² Article 6 of European Convention for Human Rights, available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf. (hereinafter ECHR).

³ *Ibid.*

⁴ *Ibid.*

⁵ International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations, available at: <https://treaties.un.org/doc/publication/unt/volume%20999/volume-999-i-14668-english.pdf>.

⁶ Article 22 of the Constitution has been subject to unilateral obligations with regard to the Direct Implementation of International Agreements and Instruments. Human rights and freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, applied directly to the Republic of Kosovo and have priority, in case of conflict, to the provisions of the laws and other acts of public institutions. (1) Universal Declaration of Human Rights; (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; (3) International Covenant on Civil and Political Rights and its Protocols.

⁷ Article 53 of the Constitution of the Republic of Kosovo, June 15, 2008, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>.

sufficient means, to be provided free counsel'⁸. Through the legislative process, Parliament sought to implement and elaborate on this Article 30 right to legal aid in two separate pieces of legislation, namely the Criminal Procedure Code of Kosovo (CPC) and the Law on Free Legal Aid (FLA).

3.2 CRIMINAL PROCEDURE CODE AND THE RIGHT TO FREE LEGAL AID

The CPC essentially addresses the right to free legal aid in two separate articles labelled as Mandatory Defence (Article 57)⁹ and as “Non-mandatory Defence (Article 58)¹⁰. Article 57 of CPC explicitly states the circumstances in which a defendant is entitled to defence counsel at public expenses: such a when the defendant is impaired¹¹, “at detention hearings and throughout the time when he or she is in detention; if the indictment has been brought against him or her for a criminal offence punishable by imprisonment of at least ten (10) years and in all cases when a defendant seeks to enter an agreement to plead guilty to a crime that carries a punishment of one (1) year or more of long period imprisonment or life long imprisonment”¹².

In all Article 57 Mandatory defence cases, if the defendant does not engage a defence counsel, it is the court’s obligation or another competent body to assign a defence ex officio at public expense¹³. The application of this provision in practice is being done constantly. According to Judge Naser Foniqi, Head of the Criminal Division at the General Department in Basic Court in Pristina, any time a defendant does not have legal representation and the sentence for the offence according to the CPC is of a serious nature, he personally took care to inform such defendants of their rights stipulated by article 57 of the CPC, in particular their right to request the Court to assign ex-officio representation¹⁴.

Meanwhile, Article 58 of CPC broadens the scope of application for appointment of defence counsel at public expense to ‘the criminal proceedings being conducted for a criminal offence punishable by imprisonment of eight (8) or more years’, or when it is in ‘*the interest of justice*, independently from the punishment foreseen... *if he or she is financially unable to pay the cost of his or her defense*’ (emphasis added).¹⁵ KLI must stress that in drafting this phrase, the Parliament of Kosovo dutifully, and identically tracked the language of Article 6.3(c) of the ECHR, demonstrating a clear legislative intent to ensure that all justice sector actors would adhere to ECHR Article 6 standards in their treatment of criminal defendants charged with crimes calling for jail terms of less than 8 years.

⁸ *Ibid*, Article 30.

⁹ Criminal Procedure Code of Kosovo, Art. 57, No. 04/L-123, available at <https://gzk.rks.gov.net/ActDetail.aspx?ActID=2861>. (hereinafter CPC).

¹⁰ *Ibid*, Article 58.

¹¹ CPC Art 57 provides right to counsel “when the defendant is mute, deaf, or displays signs of mental disorder or disability and is therefore incapable of effectively defending himself or herself...”.

¹² *Ibid*.

¹³ CPC Article 57, para 2,

¹⁴ Interview for “Oath to Justice” TV show, Effective Legal Remedies, broadcasted on June 16, 2017, at Radio Television of Kosovo, available at: <http://betimiperdrejtesi.com/emisionet/mbrojttja-efektive-juridike/>.

¹⁵ CPC Art. 58.

With regard to informing the defendants of this right to counsel, CPC Art. 58(2) does not clearly identify the state actor obligated to provide this information. Rather Art 58(2) merely states that “the defendant shall be instructed on the right to defense counsel at public expense before the first examination¹⁶. In interviews with criminal defendants interviewed by KLI, it has become apparent that, in almost all monitored cases, defendants were not informed of this right.

ECtHR caselaw clearly requires *judges* to exercise control over criminal proceedings and to ensure criminal defendants an “equality of arms” in such proceedings.¹⁷ Therefore, the current CPC language inappropriately places the burden to request the appointment of a defense counsel at public expense upon the indigent defendant.¹⁸ Next, such requests get approved by the court or other competent authority (ie. Police, Prosecutor) depending upon the stage of the case in the procedure¹⁹ and only then is the defendant obligated to complete a statement listing his or her assets and declaring that he or she cannot afford legal counsel²⁰.

3.3 FREE LEGAL AID LAW

The Law on Free Legal Aid (FLA) establishes the system for free legal aid in Kosovo, including legal aid in criminal procedure²¹. The FLA establishes the Free Legal Aid Agency and sets the criteria citizens must meet in order to receive free legal aid (qualification, financial and legal criteria)²². However, unlike the CPC, the FLA law does not make a distinction between ex officio criminal cases requiring mandatory criminal representation (CPC Art. 57) and discretionary criminal representation (CPC Art. 58).

Rather, Article 4, para. 2 of FLA requires criminal representation *at all stages of the criminal procedure regardless of the number of years of potential imprisonment*, so long as all qualifications defined in FLA Art. 6 have been satisfied.²³ In short, it would appear that the CPC’s discretionary language in 58(2) - guiding judges to provide legal counsel to poor defendants for crimes carrying sentences below 8 years – has been severely curtailed by the mandatory language of the FLA Art 4(2) – which not only affords indigent defendants free

¹⁶ CPC Article 58, para 2.

¹⁷ Timergaliyev v. Russia (<http://hudoc.echr.coe.int/eng?i=001-88888>). The failure of a lawyer to appear in the appeal proceedings and the decision of a court to examine the case nonetheless, violated Art. 6 in conjunction with Art 6-3(c) of the ECHR. In this decision, the Timergaliyev Court elaborates on the concept that the judge is "the ultimate guardian of the proceedings" and thus a positive obligation (propriety motu) to act to prevent the inequality of arms triggered by the absence of the defendant’s lawyer.

¹⁸ CPC Art 58, para, 2

¹⁹ CPC Article 58, para. 3.

²⁰ CPC Article 58, para. 4.

²¹ Free Legal Aid Law Art 1 (hereinafter FLA) No. 04/L-017, available at <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2803>.

²² FLA, Art. 6.

²³ FLA Art 4, para 2.

legal counsel for crimes carrying short jail terms, but also affords representation for alleged crimes carrying no sentence at all, including minor offences.²⁴

Given the precise subject matter of the FLA law, its focus on preserving human rights, and the principle of *Lex Specialis*, all Kosovo courts are obligated to provide legal counsel to indigent defendants “in the interests of justice” in every criminal case and minor offence case, regardless of the length of potential sentence.²⁵ Similarly, given the importance of preserving the rights of the accused early on in the procedure, prosecutors and police are equally obligated to exercise their authority in a manner consistent with Art. 4 of the FLA.²⁶

3.4 ECTHR JURISPRUDENCE: THE “FINANCIAL” AND “INTEREST OF JUSTICE” CRITERIA

Even if Kosovo’s judges reject the *Lex Specialis* argument set out above, and ignore the FLA language by adhering to CPC Art. 58(2) language, they remain under a strict obligation to exercise their Art. 58 discretion in a manner that does not violate the defendant’s ECHR Article 6 right to legal counsel. Should they follow this alternate path, we submit that they will find themselves under a similar obligation to provide counsel.

As presented above, CPC Art 58 specifically references the ECHR Article 6 “financial” (sufficient means) and “interest of justice” criteria in its text. However, since these concepts have never been properly defined or interpreted further in any individual Kosovo court decision, we must turn to ECtHR jurisprudence for guidance.

To receive free legal assistance ECtHR takes into account a) the person’s sufficient means to pay for legal assistance and b) the “interest of justice”.²⁷

Regarding the financial criteria, domestic authorities are obliged to define the financial threshold as they see fit, so long as the decision on financial eligibility for legal aid is based on law and not arbitrary based.²⁸ However, when determining the financial means of a defendant in the case of **Pakelli v. Germany**, the ECtHR ruled that the defendant’s lack of sufficient means to pay for legal assistance is not required to be proved “beyond all doubt.” The financial prong of the test is satisfied if there are “some indications” that a defendant is indigent, and there are no “clear indications to the contrary”.²⁹ Thankfully, Kosovo has already established a rational, policy-based fiscal criterion for the Free Legal Aid Agency to

²⁴ *Ibid.*

²⁵ See Besa Arifi & Dr. Dennis Farrington, *Pro Bono Legal Aid*, South East European University (2012), Section 3.6 pg 46, https://www.seeu.edu.mk/files/research/ProBono_LegalAid.pdf (hereinafter *Legal Aid*). This research offers a similar *lex specialis* discussion involving the free legal aid and criminal procedure laws of Republic of Macedonia where the former adheres more closely to ECHR Art 6.3(c) requirements.

²⁶ *Ibid* at Section 3.7, pg. 47, wherein the authors engage in an excellent overview of all “critical stages” early on in the criminal proceedings that, pursuant to ECtHR case law, require the defendant to have the support of legal counsel.

²⁷ Case of *Quaranta v. Switzerland*, no. 12744/87, date 24 May 1991, Available at: [https://hudoc.echr.coe.int/eng#{"appno":\["12744/87"\],"itemid":\["001-57677"\]}](https://hudoc.echr.coe.int/eng#{) (hereinafter *Quaranta*).

²⁸ Case of *Pakelli v. Germany*, application no.8398/78, date 28 April 1983, available at: [https://hudoc.echr.coe.int/eng#{"appno":\["8398/78"\],"itemid":\["001-57554"\]}](https://hudoc.echr.coe.int/eng#{) (hereinafter *Pakelli*).

²⁹ *Ibid.* The *Pakelli* Court relied on “some indications” that the applicant had been unable to pay for his lawyer, including tax-related statements, and the fact that the applicant had spent the previous two years in custody while his appeal on points of law were pending.

confirm “fiscal need” amongst potential FLA recipients which appears to include half the population.³⁰ However, Kosovo’s Ombudsperson has pointed out that the government provides only a fraction of the funds necessary to pay for legal counsel in a manner consistent with the FLA law.³¹

As far the “interest of justice” criteria, according to the ECtHR, the “interest of justice” criteria requires the fulfilment of certain conditions such as: (1) the seriousness of the offense; (2) the complexity of the case; and (3) the ability of the defendant to provide his or her own representation.³² These conditions were set by the court in the case of *Quaranta v. Switzerland* where the applicant was accused of drug use and trafficking and was liable to imprisonment (not exceeding three years) or a fine.³³ The Court held that there was a violation of Article 6 (3) (c) because the interests of justice required that the applicant be given free legal assistance during appearances before the investigating judge, and at trial, since his appearance in person without the assistance of a lawyer did not enable him to present his case in an adequate manner.³⁴ On the foundation of *Quaranta*, the EctHR has built the standard that the right to free legal aid attaches when a potential sentence may be imposed by the court upon conviction. In short, the State obligation to provide criminal defence to indigent defendant arises when a defendant risks imprisonment.³⁵ With respect the ‘complexity’ criteria, in adversarial systems relying on cross examination as in Kosovo, complexity exists since the skills of a criminal defence attorney are required to maintain equality of arms vis-à-vis the prosecutor.³⁶

The ECtHR also makes it clear that courts have a positive obligation to protect a defendant’s ECHR Art 6 rights by ensuring “equality of arms” in criminal proceedings. As demonstrated in the *Artico* case, this obligation includes the need for courts to initiate disciplinary procedures against advocates who fail to exercise their responsibilities.³⁷

³⁰ FLA Art. 8 (... all persons whose gross family income is lower than the average family income)

³¹ Interview with Mr. Hilmi Jashari, Ombudsperson, for “Oath for Justice” TV, Effective Legal Remedies, broadcast on June 16, 2017, at Radio Television of Kosovo, available at: <http://betimiperdrejtesi.com/emisionet/mbrojtitja-efektive-juridike/>.

³² *Quaranta case*.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Case of *Quaranta v. Switzerland*, no. 12744/87, date 24 May 1991, Available at: [https://hudoc.echr.coe.int/eng#{"appno":\["12744/87"\],"itemid":\["001-57677"\]}](https://hudoc.echr.coe.int/eng#{).

³⁶ Legal Aid at Section 3.2, pg. 41.

³⁷ Case of *Artico v. Italy*, no. 6694/74, date 13 May 1980, [https://hudoc.echr.coe.int/eng#{"dmdocnumber":\["695301"\],"itemid":\["001-57424"\]}](https://hudoc.echr.coe.int/eng#{).

4. MECHANISMS FOR FREE LEGAL AID DELIVERY

The Free Legal Aid Agency³⁸ was established in May 2006 and has a mandate to provide and ensure equal access to justice for the citizens of the Republic of Kosovo, in promoting, respecting and protecting the principles of human rights and the rule of law in Kosovo³⁹.

According to the FLA law, the Republic of Kosovo exercises its activity as an independent body responsible for providing free legal assistance in civil, criminal, administrative and minor offense areas for all citizens of the Republic of Kosovo, whom are denied access to justice, due to lack of financial means, and who meet the criteria set by law. Free legal aid shall be delivered to all persons whom fulfil the criteria defined in the law in criminal, civil and administrative proceedings. However, due to a failure of the State to allocate funds for criminal cases to the FLA Agency in manner consistent with FLA Law, the Agency has no funds to provide legal aid in criminal cases, and is only provided government funds for civil and administrative cases. Even these funds are very limited and the Agency risks being closed⁴⁰.

Despite the Agency's criminal legal aid delivery mandate being legislated since 2006, Parliament has continued to deliver funds for criminal legal aid to court and prosecutor budgets for distribution.⁴¹ This has effectively kept the courts and prosecutors responsible for reimbursing all court costs related to legal representation in criminal cases performed by advocates.

³⁸ More about Free Legal Aid Agency you can find at: <http://www.anjf-rks.net/>.

³⁹ Free Legal Aid Law, No. 04/L-017, available at <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2803>.

⁴⁰ Head of Free Legal Aid Agency appears in front of Legislative Committee of Kosovo Assembly, April 19, 2016, Rrokum TV news story, available at: <http://www.rrokum.tv/lajme/agjencia-per-ndihme-juridike-falas-rrezikon-me-u-mbyll/>.

⁴¹ The Law on Budget of Kosovo (2006-2017).

5. KOSOVO'S CURRENT PRACTICE OF FREE LEGAL AID IN CRIMINAL PROCEEDINGS

Basic Court - Pristina

General Department – Criminal Division

The General Department of the Basic Court in Pristina currently has thirty-two (32) judges, of which eight (8) are within the Criminal Division. On 1st January 2017, the Criminal Division of the Basic Court of Pristina had a total of 13,568 cases in procedure. The average number of cases per judges is 1696.

Basic Court -Peja

General Department – Criminal Division

The General Department of the Basic Court in Peja currently has seventeen (17) judges, of which five (5) are within the Criminal Division. On 1st January 2017, the Criminal Division of the Basic Court of Peja had a total of 1739 cases in procedure. The average number of cases per judges is 347.

Basic Court -Prizren

General Department – Criminal Division

The General Department of the Basic Court in Prizren currently has twenty-three (23) judges, of which eight (8) are within the Criminal Division. On 1st January 2017, the Criminal Division of the Basic Court of Pristina had a total of 3832 cases in procedure. The average number of cases per judges is 479.

| Court/ Criminal Division | Number of Judges | Number of cases | Average number of cases per judge | Number of population |
|--------------------------------|---------------------|--------------------|--------------------------------------|-------------------------|
| Pristina | 8 | 13.568 | 1696 | 470.583 |
| Peja | 5 | 1.739 | 347 | 277.007 |
| Prizren | 8 | 3.832 | 479 | 371.770 |

Table 1: General statistics regarding the Criminal Division of the Basic Court in Prishtina, Peja and Prizren on January 1, 2017.

5.1 FINDINGS OF THE MONITORING AND THE SITUATION IN PRACTICE

From 1st February to 31st May 2017 KLI monitored a total of 524 court hearings⁴² within the Criminal Division of the General Department at the Basic Courts of Pristina, Peja and Prizren. In BC Pristina, a total of 197 court hearings were monitored, while in BC Peja a total of 141 court hearings were monitored, and in BC Prizren a total of 186 court hearings were monitored. The table below shows the total number of court hearings monitored, held and those adjourned.

| Basic Courts/ General departments/ Criminal Divisions | Number of hearings schedule d | Number of hearings held | Number of hearings adjourne d |
|---|---|----------------------------------|---|
| Pristina | 197 | 141 | 56 |
| Peja | 141 | 82 | 59 |
| Prizren | 186 | 96 | 90 |
| Total | 524 | 319 | 205 |

Table 2: Statistics on the hearings monitored.

In total, 667 defendants were subject to criminal proceedings in 524 monitored court hearings. Out of 667 defendants, 457 (68.51%) of them did not have any legal representation while 163 (31.49%) defendants had legal representation. This data has been set out in Table 3 below.

| Basic Courts/ General departm ents/ Criminal Divisions | Total number of defendants | Number of defendants with advocate | Number of defendants without advocate | Number of defendants who paid for their advocate | Number of defendants who received free advocate (ex-officio) |
|--|----------------------------------|---|--|--|--|
| Pristina | 254 | 89 | 165 | 77 | 12 |
| Peja | 172 | 32 | 112 | 25 | 7 |
| Prizren | 241 | 42 | 180 | 29 | 13 |
| Total | 667 | 163 | 457 | 131 | 32 |

Table 3: Monitoring statistics disaggregated by representation of defendants with/without advocates.

⁴²Summaries of the monitoring reports for each court hearing in criminal divisions of Basic Courts in Pristina, Peja and Prizren are daily posted on “Oath for Justice” website, Available on: www.betimipërdrejtësi.com.

The statistics prove that in general crime department cases, a majority of defendants did not have legal representation. In the 163 cases where defendants did have legal representation, only 20% received legal aid, while 80% of these defendants paid for their own defence. In practice, free legal aid in general crime cases is only provide ex officio when Article 57 criteria are met (ie. pre-trial detention hearings), but very rarely offered as discretionary free legal aid (Art. 58). As a result, our sample reveals that only 32 of 667 defendants in general crimes department cases received defence counsel at the public's expense.

KLI was able to collect data on the financial status of 379 defendants during its monitoring phase. Of this smaller sample, a total of 116 defendants (30%) declared themselves to have low income or to be under the social welfare scheme in the 3 monitored courts.

| Courts monitored | Low income defendants | Average Income defendants | Sufficient income defendants | Wealthy | Under Social Welfare pension scheme | No information |
|------------------|-----------------------|---------------------------|------------------------------|---------|-------------------------------------|----------------|
| Pristina | 32 | 68 | 0 | 0 | 2 | 10 |
| Peja | 14 | 82 | 3 | 1 | 15 | 3 |
| Prizren | 52 | 38 | 4 | 1 | 1 | 53 |
| Total | 98 | 188 | 7 | 2 | 18 | 66 |

Table 4: Monitoring statistics disaggregated by financial status of defendants.

5.2 DATA COLLECTED FROM DEFENDANT INTERVIEWS

The KLI field monitors interviewed 30 defendants, undergoing criminal proceedings at the Basic Courts of Pristina, Peja and Prizren.⁴³ Of these 30 defendants, twelve (12) came from low income families, eleven (11) from average income families, two (2) were from good income families. Finally, two (2) defendants were on social welfare, bringing the total number of defendants eligible under FLA Art 4 in this interview sample to 14 of 30 (46%). Out of thirty defendants only eight (8) had legal representation of which six (6) were given authorisation and two (2) were ex-officio (free legal representation).

Of the defendants on social welfare only one was provided with ex-officio representation while the other had engaged legal representation with their own funds. Defendant no. 4 explained that he was not offered legal representation during police interviewing and that he was not aware that he was entitled to a lawyer during the interview. He was subsequently arrested and held for 48 hours. This is an alarming fact and a violation of Article 11 paragraph 5 and 6⁴⁴ and Article 53 paragraph 2⁴⁵ of the Kosovo Criminal Procedure. Moreover, it is a violation of Article 6 paragraph 3 (c)⁴⁶.

Furthermore, of the total number of 30 defendants, eight (8) were arrested and only two (2) had legal representation during police questioning/interviews. Consequently, of the thirty defendants only three (3) had legal representation during the interview/questioning with the prosecutors.

KLI's interviews of defendants reveal that many defendants were not made aware of either their CPC Art. 58(2) right "to request defence counsel at public expense", or their FLA Art 4 right to free legal aid. Alarming, when made aware of this fundamental right during KLI interviews, the majority of interviewed defendants - believing in their innocence - declared that they do not need a lawyer because either they believed in their innocence or because they believed they could better defend themselves. Thus, not only are courts failing to uphold defendant's Constitutional rights, but our interviews reveal a dangerous level of *rights illiteracy*, particularly given Kosovo's recent adoption of an adversarial criminal justice system.

⁴³ KLI Questionnaire for Defendants, The interview contained a total of sixteen questions. The questions for the interviews were then transferred into a thematic analysis to gather the relevant information. The thematic analysis concentrated on: 1. the gender; 2. economic status; 3. profession; 4. criminal offence/sentence; whether arrest was made; whether legal representation retained during police questioning, or during prosecution and appearance at trial/court; 5. whether legal representation was retained directly by defendant or via CPC Art. 57 or 58.

⁴⁴ Kosovo Criminal Procedure Code – Article 11 – Adequacy of Defence - paragraph 5. At the first examination the court or other competent authority conducting criminal proceedings shall inform the defendant of his or her right to a defence counsel, as provided for by the present Code. Paragraph 6. In accordance with the provisions of the present Code, any person deprived of liberty shall have the right to the services of a defence counsel from the moment of arrest onwards.

⁴⁵ Kosovo Criminal Procedure Code – Article 53 para. 2 - Before every examination of the suspect or the defendant, the police or other competent authority, the state prosecutor, the pre-trial judge, the single trial judge or the presiding trial judge shall instruct the suspect or the defendant that he or she has the right to engage a defence counsel and that a defence counsel can be present during the examination.

⁴⁶ ECHR Article 6 para. 3 (c) 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.

5.3 INTERVIEWS WITH JUDGES

KLI field monitors interviewed 13 judges from the General Departments of the Basic Courts in Pristina, Peja and Prizren⁴⁷ regarding representation of defendants with a defence counsel at the criminal division and implementation of free legal aid in the courts. Judges during these interviews were questioned regarding: 1. the number of cases per judge assigned or at work; 2. Whether in practice the defendants have legal representation; 3. Whether it is common for defendants to request ex-officio representation; 4. Whether, in their opinion, the lack of legal representation affects the quality of judicial proceedings, and/or the rights of the defendants.

The KLI questionnaire confirmed that each judge's estimate about the substantial size of their respective caseloads agreed with official statistics gathered by KLI from the court (see table 4 below).

| Judges | Number of cases |
|----------|-----------------|
| Judge 1 | 360 |
| Judge 2 | 2000 |
| Judge 3 | 2000 |
| Judge 4 | 450 |
| Judge 5 | 450 |
| Judge 6 | 700 |
| Judge 7 | 550 |
| Judge 8 | 200 |
| Judge 9 | 1801 |
| Judge 10 | 1700 |
| Judge 11 | 2005 |
| Judge 12 | 360 |
| Judge 13 | 300 |

Table 4: Statistics on the cases each interviewed judge has at work

All judges interviewed by KLI acknowledge the importance of defendants having legal representation throughout all stages of criminal proceedings⁴⁸. Nevertheless, each judge interviewee confirmed the accuracy of KLI monitoring data by stating that only an average of 5-10% of defendant's requests free legal representation.⁴⁹ However, each judge offered

⁴⁷Annex 2, interviews with judges.

⁴⁸ *Individual Judge Interviews*. See also, Interview with Naser Foniqi, Head of Criminal Division at general Department in Basic Court in Prishtina, Kreshnik Radoniqi, President of the Basic Court in Peja and Teuta Krusha Head of Criminal Division at general Department in Basic Court in Prizren, For "Oath for Justice" TV, Effective Legal Remedies, broadcasted on June 16, 2017, at Radio Television of Kosovo, available at: <http://betimiperdrejtesi.com/emisionet/mbrojttja-efektive-juridike/>.

⁴⁹ In cases where free legal aid is requested, judges confirmed that defendants have to prove they are eligible for free legal assistance.

a variety of practical reasons why the courts fail to provide free legal aid to indigent defendants in general crime cases.⁵⁰

First, according to the judges, the CPC obliges judges to assign defence counsel at public expense only in cases of mandatory defence, as prescribed under Art. 58 of CPC⁵¹. Second, judges claim they do not have a sufficient budget to be able to assign defence counsel at public expense for general crime cases⁵². Specifically, some judges reported having “restrictions with regards to funds that are distributed by the KJC regarding legal representation.”⁵³ Therefore, courts are instructed not to engage lawyers apart from the cases that are mandatory⁵⁴. Third, with regard to the unimplemented aspect of the FLA Law (see *infra* Sec. 3(c)), judges do not refer defendants to services of the Free Legal Aid Agency because they are aware that the Agency struggles with funding issues as well⁵⁵. Last, but not least, judges agreed with civil society concerns that low income or indigent defendants fail to request defence counsel at public expense because they remain illiterate about this ECHR-protected right.⁵⁶

With regard to quality of legal defence, a significant number (4) of the 13 judges interviewed expressed grave concerns about the quality of criminal defence provided by KBA advocates, and suggested that defendants are better served not having an advocate present.⁵⁷ However, the remaining nine (9) judges stated that the provision of legal representation enables the defendant to better understand his/her rights - especially during plea bargaining. These same judges also pointed out that defendants with advocates arrived to court with a superior understanding of court proceedings than did unrepresented defendants.⁵⁸

As an alternative to offering free legal aid, all judges stated that they try their best to respect the defendants’ rights when they do not have legal representation. In some cases, the judges stated that they try to speak the ‘same language’ as the defendant in order for them to understand. Of the 13 interviewed judges, 10 of them stated that prosecutors always try to find exculpatory evidence in cases they are appointed as required by law. However, three (3) judges interviewed stated that prosecutors rarely present exculpatory evidence to benefit unrepresented defendants.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, Interview with Kreshnik Radoniqi, President of the Basic Court in Peja.

⁵² *Ibid.*, Focus group held on May 22, 2017 with Judges, Prosecutors, Advocates and representatives of Civil Society.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, Interviews with defendants, Focus group held on May 22, 2017 with Judges, Prosecutors, Advocates and representatives of Civil Society.

⁵⁷ *Individual Judge Interviews*, Four (4) of thirteen (13) judges expressed their concerns with legal representation - whether authorised or ex-officio - because according to their experience, lawyers have a tendency to cause more problems rather than resolving issues. Judge 2 explained that lawyers sometimes do not allow defendants to plead guilty because they want to financially benefit from the defendant. Judge 3 stated that in majority of cases the defendants are better than their lawyers at defending themselves.

⁵⁸ *Ibid.*

5.4 ANALYSIS OF FINAL COURT DECISIONS

KLI during the analysis of forty-five (45) random selected final court decision resulting in conviction taken from the Basic Courts in Pristina, Peja and Prizren, found that the most common criminal offences based on the analysis included, 11 cases of **Aggravated Theft**⁵⁹ punishable by 3 to 7 years of imprisonment, 6 cases of **Light Bodily Injury**⁶⁰ punishable by a fine or up to three (3) years of imprisonment, 7 cases of **Theft**⁶¹ punishable by a fine and by imprisonment of up to three (3) years, 7 cases of **Fraud**⁶² punishable by a fine and imprisonment of three (3) months, 4 cases of **Falsifying Documents**⁶³ punishable by a fine or by imprisonment of up to three (3) years.

Of the 45 final judgements analysed, KLI found that courts pronounced effective jail sentences in all these cases. The sentences imposed varied from imprisonment of as little as 15 days up to 3 years or more.⁶⁴

Moreover, out of the 45 analysed cases, 16 had ex-officio legal representation in the final hearing, 24 had authorised legal representation and 11 did not have any legal representation.⁶⁵

During the analysis of the forty-five (45) final court decisions, KLI found that courts are extremely lenient with respect to calculating court expenses – especially legal representation fees – of convicted defendants who, (if not indigent) are required by law to reimburse the State.⁶⁶ Regardless of the number of hearings held for each judicial issue- which often exceeds 3 to 5 hearings – courts have uniformly established the practice of assigning judicial expenses from only 25 to 100 Euro. In all 45 decisions collected, judges ignored their obligation to calculate actual costs of the criminal defence, and instead uniformly issued ruling requiring defendants to pay a lump sum averaging only 25 to 100 Euro. When this topic was raised during the May 2017 Focus Group of Justice Sector Stakeholders, all participants agreed that the funding loss to the State resulting from this practice should no longer stand.⁶⁷

⁵⁹ CPC Art. 327

⁶⁰ CPC Art. 188.

⁶¹ CPC, Art. 325.

⁶² CPC Art. 335.

⁶³ CPC Art. 398.

⁶⁴ Annex 1- sentences imposed by the criminal divisions in the Basic Courts of Pristina, Peja and Prizren.

⁶⁵ *Ibid.*

⁶⁶ CPC Art. 450(2) states in pertinent part, “The costs of criminal proceedings include the following . . . 2.7 remuneration and necessary expenses of defense counsel [including] . . . Art.450(7) . . . The remuneration and necessary expenses of a defense counsel appointed under Article 57(2) or 57(3) or Article 58 of the present Code shall be paid from budgetary resources and shall not be paid by the defendant [and pursuant to Art. 453(1) . . . the guilty defendant . . . must reimburse the costs of criminal proceedings.”

⁶⁷ Justice Sector Stakeholder Focus Group (May 2017), Regarding the current “lump sum” expense calculation practice, focus group members proposed that judges must determine court costs by accurately calculating all costs of the proceeding including all court hearings, **costs of legal defence**, costs of expert witnesses and regardless of the total of this expense, issue order for payment of all costs to convicted defendants, unless the legal aid was received pursuant to the defendants poor economic status.

6. CONCLUSION

Despite Kosovo's well-established hierarchy of ECHR-based constitutional provisions, and subsidiary legislation (the CPC and the FLA Law) and the existence of delivery mechanisms for free legal aid, including the FLA Agency, Kosovo's free legal aid system does not function for defendants accused of crimes below eight (8) years of imprisonment who do not have financial means to have legal assistance.

State-sponsored free legal assistance is a fundamental right of the person accused of an offence which may involve jeopardy of his life or personal liberty. However, this right is not limitless and is subject to limitations based on the criteria already set by ECHR and expanded upon in a variety of ECtHR decisions which include: 1) financial means, and 2) the "interest of justice" which has been further defined as an assessment of a) the seriousness of the offence and the severity of the potential sentence, b) the complexity of the case; and c). the social and personal situation of the defendant.

Whether Courts ultimately apply the more comprehensive, liberal criteria set out in Article 4 of the FLA Law, or the less strict, but still substantial requirements set out by the ECHR, the State has an unavoidable, and immediate obligation to calculate, set aside, and deliver government funds to the FLA Agency so that Courts may properly grant legal aid to indigent defendants in a manner consistent with Kosovo's legal framework. A failure by the State to provide such resources to indigent defendants accused of a crime below eight (8) years of imprisonment not only violates Article 58 of the CPC and Article 4 of FLA Law, but it also contravenes Article 30 (5) of the Constitution and Article 6 (3) (c) of the ECHR directly applicable in Kosovo. With respect to identifying existing funds, KLI also concludes that a substantial sum of unreimbursed 'ex officio' legal fees (from convicted defendants) represents not only a failure of the courts, but a potential resource for offsetting the State's financial burden.

While the most pressing concern is the lack of State commitment to protecting this fundamental right via necessary funding, the data collected by KLI also reveals that courts, judges, prosecutors and police do not fully understand their constitutional mandate to provide a lawyer to an indigent defendant when the interest of justice so requires.

8. RECOMMENDATIONS

- State should allocate sufficient budget to cover free legal aid services for indigent defendants.
- Courts should immediately begin recovering court costs from convicted defendants who received State-funded legal aid without a financial need for these services.
- Institutions and bodies in the Kosovo Legal System including the Kosovo Bar Association (KBA) the Free Legal Aid Agency, the wider lawyers community and the government should organize efforts to provide free legal services for those citizens who cannot afford it.
- Judges, prosecutors and the police should implement Article 4 of the FLA Law and/or interpret Article 58 of CPC of Kosovo in line with ECtHR jurisprudence when making determinations about the “interest of justice” affecting defendant’s ECHR 6.3(c) rights.
- Parliament should amend Article 58 of the CPC in order for the “interest of justice” principle to be clarified so that it explicitly states criteria set by the ECtHR: a) seriousness of the offence and the severity of the potential sentence, the b). complexity of the case; and the c). social and personal situation of the defendant.
- The KBA, due to its Constitutional obligation to deliver FLA, should demonstrate leadership by advocating for State funds for FLA, but also to expand on their existing KBA pro bono obligations by establishing mechanisms (ie. Legal Clinics or Pro-bono Center) that enable KBA members to offer indigent citizens free representation in criminal cases.
- The Supreme Court of Kosovo should give a legal opinion on the application of the European Court practices regarding the provision of legal representation of defendants in all criminal cases.
- The Court of Appeals to unify judicial practices regarding punitive policies.
- Approval of the adequate legal framework determining the judicial expenses and judicial lump sum.
- General Departments to implement Article 450 of the Criminal Procedure Code with regards to criminal matters.