



Enhancing the rule of law:

Role for civil society organizations in Bosnia and Herzegovina

Elma Demir

Justice for Who?

The B&H justice system is exemplified by various inefficiencies: limited access to justice, complex and non-harmonized procedures and legal practices, corruption, and lack of human and financial resources resulting from poor planning. The latest EU policy progress report supports this claim implying that judicial institutions in B&H are slow, unaffordable, and oftentimes biased and discriminatory. Their proceedings are unnecessarily complex, non-transparent, and intimidating. Lack of information limits access to justice, as basic information about rights and procedures is not readily available. Care for court and prosecution users is not at the adequate level. Economic costs of judicial proceedings hinder access to courts in most cases, and many citizens are unable even to initiate a legal process, let alone carry it through. In such system, it is not surprising to find widespread corruption. Transparency International corruption reports positions the judiciary as one of the most corrupt sectors in Bosnia and Herzegovina each year. The judicial system in general, is perceived as a web that catches the small fish but gets broken by the big ones. It is not surprising then that public trust in judicial institutions is low. Through a recently conducted survey on 1000 citizen responses, USAID Justice Sector Development Project in B&H found that 45% of respondents believe that judges and prosecutors make decision influenced by political pressure, corruption or favor their acquaintances, while 61% of respondents find that judiciary needs to become more independent. As a result, ordinary citizens can protect and consume their rights only with great difficulties, if at all, although provisions for various rights are generously incorporated into the legal framework of the country. Exercise of these rights, particularly by poor and disadvantaged social groups, remains limited as justice sector problems disproportionately affect the poor.

Why have reforms not result in desired change?

Since the end of war in Bosnia and Herzegovina, local and international stakeholders have invested great effort in establishing structural and proce-

dural mechanisms that should bolster the effectiveness of the judiciary and institute the rule of law. Undertaken justice sector reforms have resulted in increased efficiency and professionalism of the judiciary. Nevertheless, abundance of problems remains on the judicial agenda, which threaten to undermine successful parts of the reform. Most reforms have not resulted in real changes in people's lives due to failure of the judiciary to act in the interests of the people it is meant to serve. To date, the judiciary as a whole is weak when compared to other branches of the government, and lacks popular understanding and support.

Strategies to fix and reform the inefficient justice system in Bosnia and Herzegovina have proven to be difficult to implement. They focused on traditional approach: strengthening the justice sector powers over the executive; make procedures more efficient; foster better coordination between justice institutions; develop strong rules and criteria for election of judges and prosecutors, just to name the few. Although this approach is important and necessary, assessments of justice sector reforms in many countries showed that is not sufficient and should be supported by an additional strategy that works on building the justice sector based on pressure "from below" making its objectives coincide with local priorities and needs. Thus, justice reforms in B&H failed mostly because of their focus on administration and procedures: they affect institutional changes but oftentimes they do not challenge power relations or consider needs of common citizens. New strategy is necessary that would "involve constructing a healthy relationship between state and society so that social actors and individual citizens are empowered to oblige the government to uphold the rule of law and fulfill its promises."¹

Why reforms did not result in desired change?

Development practice and studies suggest that engagement of citizens, civil society organizations, and media in the judiciary can significantly lead to improvement of efficiency and performance of judicial institutions and office holders. Modes of such civic engagement range from public demonstrations, pro-

¹ McIlvain, Ashley. „Toward a more sustainable democracy: Public Participation in Justice Sector Reform.“ Master of Arts in Law and Diplomacy Thesis. Tufts University, 2005.

tests, advocacy campaigns, investigative journalism, public interest lawsuits, to participatory budgeting, public expenditure tracking, monitoring of public service delivery, free legal aid, etc. These actions and mechanisms have been commonly defined as social accountability. Empirical research shows that social accountability, particularly when institutionalized, can produce considerable results in operations (e.g., improved performance, the introduction of corrective measures) and processes (e.g., institutional, behavioral and relational changes).

The importance of social accountability has been recognized in Bosnia and Herzegovina as well. The Justice Sector Reform Strategy of B&H (JSRS) - the key judicial policy that incorporates instructions and reform measures for all justice sector institutions in the country - incorporates reform measures for inclusion of civil society organizations in decision-making, monitoring and implementation processes. However, although the Strategy sets the ground for greater participation of civil society actors with an objective to improve social accountability in the judiciary, it does not incorporate clear measures of such involvement or identifies social accountability mechanisms. In this instance, the Strategy includes a single measure: "Explore modalities for a more active engagement of the NGO sector in B&H in monitoring the justice sector work in B&H." The Action Plan for implementation of the Justice Sector Reform Strategy in B&H - that provides more detailed instructions for reform activities - includes four reform activities within the above-defined reform measure:

1. Apply positive experiences and standards of justice institutions which promote increased cooperation between civil society and the judiciary;
2. Enable CSOs to monitor the justice sector and court proceedings, including allowing them access to court proceedings and facilities where incarcerated individuals and suspects are kept;
3. Ensure ongoing publication of information on the rights of all the parties to the proceedings;
4. Establish a system of providing grants for CSOs that are in line with the strategic priorities of the ministries of justice and justice institutions.

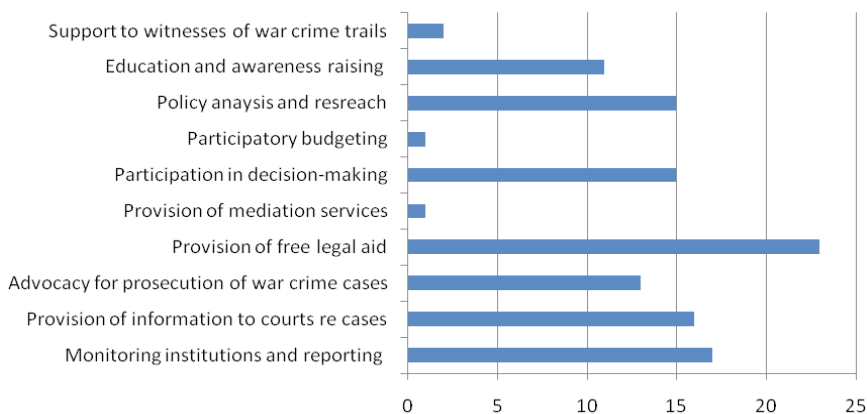
Implementation of these reform activities has been very limited in three past years. So far, only one instrument has been established by the B&H Ministry of Justice in December 2009: *Memorandum on Establishment of Mechanisms for Monitoring and Evaluation of Implementation of the Justice Sector Reform Strategy in Bosnia and Herzegovina* provides a basis for participation of five civil society organizations² in monitoring and reporting on implementation of the JSRS. In addition to this activity, B&H Ministry of Justice conducts regular consultations with NGOs on proposed legislation on the national level and includes different NGOs in its strategic planning activities through working groups for creation of strategic plans and regulation, such as the Strategy for Care of Court Users in B&H; Strategy for Solving War Crime Cases; Strategy for Transitional Justice. In other instances – particularly on the lower levels of the government - inclusion of civil society happens occasionally, if at all.

Understanding the importance of the judiciary in protection of citizens' rights, civil society organizations have initiated various activities and projects themselves that should increase the transparency and effectiveness of the judiciary. These social accountability initiatives have already resulted in improved access to justice. Many NGOs have carried out tremendous work where justice sector initiative is lacking, such as free legal aid, mediation, raising legal awareness, and processing war crimes.

On the other hand, civic engagement that focuses on strengthening accountability of justice sector institutions and personnel - such as monitoring, oversight, participatory decision-making and budgeting - is in its commencement phase. Comprehensive civic oversight over courts and prosecutors' offices, which could generate stronger civic demand for transparency and accountability is still lacking. Specific courts and prosecutors' offices, as well as particular cases, need to be monitored regularly and continuously in order to effectively monitor for corruption, abuse of power or political pressures. Furthermore, systematic monitoring of selection, appointments, and disciplinary measures of judges and prosecutors by civil society is not present as well. These are quite important as they provide means to advocate for inclusion of marginalized populations into justice system and eliminate corruption. Since B&H key problem is not the existence of judicial standards, but lack of their implementation in practice, external public oversight over judicial institutions and procedures will be crucial. Participatory budgeting within the judiciary – including the activities of formulating budgets, public expenditure tracking, and budget analysis/review – does not take place. Judicial budget preparation and monitoring is complicated by the fact that 14 judicial budgets exist

² Association for Democratic Initiatives; Helsinki Committee for Human Rights of B&H; Your Rights B&H; Human Rights Office Tuzla; and Center for Civil Initiatives.

Graph 1: CSO activities in the justice sector





and that executive branches of the government have strong say in how these budget will look like, and that institutions do not follow established financial regulations and report differently across different jurisdictions. Finally, civic engagement related to the rule of law remains sporadic and unsynchronized reducing the benefits of such action.

Readiness for cooperation

Results of conducted national survey on social accountability initiatives in B&H justice sector³ show that justice sector institutions are willing to cooperate with the civil society. However, both sides agree that preconditions to efficient cooperation needs to be addressed first: trust and dialogue between the civic and justice sectors are missing. Uncertainty about possible mechanisms driving that cooperation exists as well.

Courts find that better cooperation could be initiated through more frequent communication between courts and NGOs, better and timely information-sharing, and through establishment of partnerships. These partnerships should be created, according to courts, by creation of legal framework for civic engagement in courts and its realization in practice through implementation of joint activities. Other justice sector institutions find that civic engagement in the judiciary could be enhanced by development of mutual respect, dialogue, better exchange of information, and work synergy where their goals overlap in order to use more efficiently limited resources. Civic engagement could be improved through better application of regulation on public consultations and the JSRS as well. NGOs and trade union find that both sides - civic sector and judicial institutions - need to start to trust each other and consider themselves as partners and not as opposing sides. Particularly, judicial institutions need to open up for contact and cooperation with NGOs, use expertise NGOs have in specific areas and take into consideration reports/requests/actions they receive from NGOs more seriously. Judicial institutions need to provide requested data and explanations, and communicate with citizens, media, trade unions and NGOs more frequently and readily and respect laws on freedom of access to information. On the other side, NGOs should profile themselves to work in the judiciary, become more transparent in their work as well, and inform and involve judicial institutions in their activities. Furthermore, NGOs need to become more studious and analytical in approaching and researching specific judicial issues.

Recommendations

Participatory public policy making

1. Broaden public participation in decision-making and consultation processes at the na-

tional level. B&H Ministry of Justice should work on implementing broader public consultations - particularly in areas of specific interest to NGOs such as free legal aid, mediation, access to justice, etc. - and sign contracts with different NGOs (that work in scope of its various authorities) in order to conduct consultations jointly as envisaged in the Rules on consultations in writing legal regulations. Furthermore, in its strategic planning processes, B&H Ministry of Justice should ensure wider public participation. Additionally, within planned changes to the Law on the B&H High Judicial and Prosecutors Council (HJPC), the B&H Ministry of Justice should conduct broad public consultations on the proposed Law and institutionalize instruments for civic participation, particularly of professional associations, within the HJPC.

2. Develop and include clear measures pertaining to civic engagement into the Justice Sector Reform Strategy of B&H (JSRS). B&H Ministry of Justice should initiate changes to the JSRS Action Plan in relation to civic engagement in the judiciary and include measures proposed in this policy paper. Institutions need to speed up implementation of activities pertaining to civic engagement.

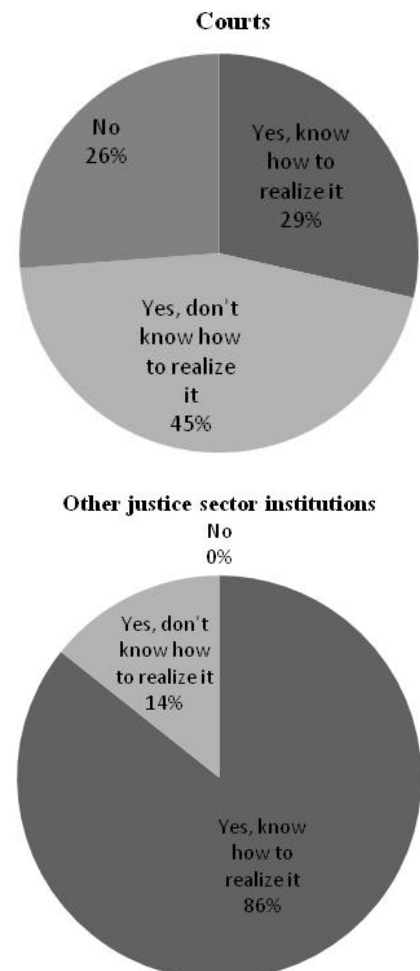
3. Instigate public participation at entity and cantonal level. Ministries of justice on entity and cantonal level need to make changes to their rulebooks on internal procedures in order to institutionalize instruments for civic participation into their work, particularly those related to public consultations and inclusion of civic stakeholders into working groups responsible for preparation of regulations. In addition, these new rules should incorporate clear financing, sanction, evaluation and monitoring measures in order to ensure their application in practice. Broad public consultations need to be held on regulation that deals with issues of specific interest to NGOs such as free legal aid, mediation, access to justice, etc.

4. Create country-wide promotion of public consultations. B&H Ministry of Justice, in cooperation with entity and cantonal justice ministries, could initiate country-wide promotion of existing consultation mechanisms. This campaign could be implemented in partnership with NGOs.

5. Initiate and include the public into revision of ethics codes for judicial personnel and court and prosecutors' office procedures. Justice ministries should initiate changes to the JSRS Action Plan and incorporate measure of revision of ethics codes and judicial institutions' procedures. The revision processes should include consultations with the public, with an objective to instigate better service delivery and reduce corruption.

6. Compilation of justice sector legal and policy analyses. Justice Network in B&H, par-

Graph 2: Interest in development of better cooperation with NGOs



³ This paper presents a shorter version of a policy study Social Accountability of the Judiciary in Bosnia and Herzegovina.

Since 2009 **Elma Demir** has been working as Project Manager and Research Analyst in Association for Democratic Initiatives (ADI) - non-governmental organization that has been active in justice sector for many years - and coordinates work of Justice Network that gathers 57 NGOs active in justice sector in Bosnia and Herzegovina. Previously she worked as Research Analyst in Parliamentary Assembly of Bosnia and Herzegovina, NATO Mission in B&H, Dartmouth Institute for Information Infrastructure Protection (IP3). At Dartmouth she was engaged as Teaching Assistant for undergraduate course on academic writing and research as well. Elma also participated in great number of projects of various NGOs, political parties, trade unions and public institutions as consultant, advisor and/or researcher, and conducted research and wrote policy papers on various policy issues. She holds BA in Political Sciences from University of Sarajevo, and is finalizing her master studies for a degree in Globalization Studies from Dartmouth College (USA).

ticularly its website, presents a valuable resource where various legal studies and policy papers could be gathered, published and promoted to justice stakeholders.

Participatory budgeting

7. Justice sector institutions need to prepare and executive budget in accordance with adopted financial regulations, i.e. program budgets. This measure is important not only for civic engagement in budgeting, but for the overall performance and efficiency of the justice sector.

8. Conduct public consultations on justice budgets. Justice ministries should use public consultations as a mechanism for civic participation in the budget preparation and adoption processes, particularly in the phase before their budget proposals are sent to finance ministries.

Citizen monitoring and evaluation of public policy and service delivery

9. Establish formal procedures for review of NGO JSRS monitoring report. Create obligation in JSRS Action Plan that each recommendation made by NGOs needs to be considered with an additional obligation towards justice institutions to provide justification when certain recommendations are not included in the JSRS Action Plan.

10. Broaden NGO JSRS monitoring activity. Invite additional NGOs with capacities to participate in JSRS monitoring and reporting activities, especially professional associations.

11. Conduct public survey on JSRS implementation. B&H Ministry of Justice should conduct nation-wide survey on JSRS implementation in order to measure effectiveness of implemented reforms and receive input for future priorities.

12. Initiate external judicial oversight activities. NGOs should initiate monitoring and evaluation activities pertaining to court procedures and work of prosecutors' offices as well as continuous monitoring of selection, appointments, and disciplinary measures of judges and prosecutors.

Raising public awareness about citizens' legal rights and public service

13. Develop strategic plans for promotion of citizen's rights and legal mechanisms. Justice institutions need to initiate broad advocacy campaigns on specific rights and legal mechanisms for their protection. Aside engagement with media, these should incorporate more accessible information on websites and premises of justice institutions. Furthermore, such campaigns could include NGOs as partners.

14. Revise formal training system for judges and prosecutors in order to enable NGOs to provide trainings. Trainings that NGOs provide in areas of their expertise, such as human rights, mediation, free legal aid, environmental law, etc.

should become part of the formal training system for judges and prosecutors. In addition to provision of trainings, NGOs can participate in education of judicial personnel by providing materials or actual instructors. Aside regular NGOs, professional associations, bar associations and legal academies need to be included in the system as well.

Provision of public service by civil society organizations

15. Adopt national framework law on free legal aid and incorporate NGOs as legal aid providers. Lacking legislation on free legal aid, particularly national framework law, needs to be adopted as soon as possible. In accordance with international standards and B&H obligations based on signed conventions, NGOs, including professional associations and legal universities, need to be incorporated into the law as legal aid providers.

16 Implement JSRS activities pertaining to mediation. Implementation of reform measures on mediation in the JSRS has been constantly delayed. This practice needs to be changed and serious commitment to mediation needs to be demonstrated through promotion of mediation and allocation of necessary financial resources. Special effort should be made in creation of mediation services in communities throughout the country, and strengthening capacity of holders of judicial functions to promote and carry out mediation.

17. Develop nation-wide mediation promotion campaign. Ministries of justice and courts need to develop and facilitate extensive promotion campaign for mediation.

18. Incorporate mediation in the Strategy for Solving Delayed Court Cases. Mentioned Strategy should give a considerable role for mediation in resolving backlogs, while B&H Association of Mediators should be included as provider of mediation services within mentioned Strategy. Financial resources should be allocated for implementation mediation activities.

19. Extensive internship program for courts and prosecutors' offices should be developed. Justice ministries in cooperation with judicial institutions need to develop and realize broad internship programs that will provide institutionalized mean for participation of law students and volunteers in solving backlogs and court delays.

20. Create civic support networks for courts and prosecutors' offices. Justice ministries in cooperation with judicial institutions, as well as NGOs, need to initiate creation of civic support networks that would provide support to courts and prosecutors' offices in relation to their work. These civic networks should be based on issues or existing needs (transitional justice, corruption, labor, organized crime, human trafficking, etc.).