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BOSNIA-HERZEGOVINA

JUSTICE SECTOR DEVELOPMENT PROJECT II IN BOSNIA AND HERZEGOVINA

Report of Short-Term Expert as per USAID JSDP II
Year 4 Work Plan Section 3.2.4

Date: **May 2013**

This publication was produced for review by the United States Agency for International Development. It was prepared by: JSDP II

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Table of Acronyms

BiH	Bosnia and Herzegovina
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FAIA	Freedom of Access to Information Act
JSDP II	Justice Sector Development Project II
USAID	United States Agency for International Development

IDENTIFYING INDIVIDUALS INVOLVED IN CRIMINAL PROCEEDINGS: BALANCING TRANSPARENCY AND THE PROTECTION OF PRIVATE LIFE

Objective of mission

The purpose of my mission was to contribute to two seminars for prosecutors and judges – one held in Sarajevo on 23 April, the other in Banja Luka on 25 April – to discuss, having regard to data protection considerations, whether individuals involved in criminal proceedings may be publicly identified.

Background

Bosnia and Herzegovina (BiH) has a law on the Protection of Personal Data which dates from 2006, and was amended in 2011. Responsibility for overseeing the data protection law rests with the Personal Data Protection Agency (the Agency). The Agency has made findings whose effect is that, in accordance with the data protection law, indictments and reports of criminal proceedings that are made public may not identify the individuals involved, but must be anonymised¹. As a consequence, I understand, of these findings, Part IV of the “Rulebook on Public Access to Information under the Court’s Control and Community Outreach” of the Court of Bosnia and Herzegovina requires the anonymisation of documents, including court decisions, published on the Court’s website. The requirement for anonymisation has given rise to concern, in particular, but not only, among the media.

The European Data Protection Rules

Data protection in Europe has its starting point in the right to private life which is guaranteed, subject to exemptions to safeguard important public interests, by Article 8 of the European Convention on Human Rights (ECHR). The 1981 Council of Europe Data Protection Convention (Convention 108) sets out specific rules for protecting personal data. Again, the main rules are subject to exemptions to safeguard important public interests. There are similar, but slightly more detailed, rules in the 1995 EU Data Protection Directive (the Directive). The Data Protection Law of Bosnia and Herzegovina (BiH) is intended to give effect to the provisions of Convention 108 and the Directive.

Anonymisation in other European countries

It is the practice in many European countries which have data protection law for court reports to be anonymised. It is not clear whether that is done because of the requirements of data protection law, or for other reasons. In some countries anonymisation would appear to pre-date data protection law. It may be, however, that in a particular country the data protection law has been drafted in such a way that the identification of individuals in court reports is in fact prohibited. Another possibility is that, although a country’s data protection law does not prohibit such identification, it has been decided that, as a matter of policy, with the advent of

¹ The issues discussed in this paper cover public identification made both by prosecutors and by courts. For convenience in this paper I shall use the term “court reports” to refer to all forms of publication by the judicial authorities.

new, more powerful and intrusive means of communications, such identification should not take place. In other European countries, which also have data protection laws, court reports are published without anonymisation and the individuals involved are identified. Data protection of itself does not prohibit identification.

My approach

I was invited to take part in this mission as an expert in the field of data protection. Since the official position in BiH is that individuals involved in criminal proceedings must not be identified, I took the view that it was beyond my remit as a technical expert to suggest that they should be identified. I also felt that it was inappropriate for me to argue that, under the BiH data protection law as it currently stands, individuals may be identified in court reports. To have done so would have been to challenge the findings of the Agency. Accordingly, I limited my approach to explaining how the relevant European legal instruments achieve the balance between openness and privacy protection, illustrating the position by reference to judgments of the European Court of Human Rights (ECtHR). My intention was to show that the relevant European legal instruments, and in particular the data protection rules, do not prohibit identification.

The Argument

My argument was that the ECHR requires a balance to be struck between the requirement for transparency guaranteed by the right to a fair trial in Article 6 and the right to freedom of expression in Article 10 (which together might conveniently be described as the “public’s right to know”), and the right to private life (which encompasses data protection) in Article 8. Similarly, Convention 108 permits a balancing exercise, both in the application of its main rules set out in Article 5 (the data protection principles) and through the provision of its exemptions in Article 9, in considering whether personal data may be disclosed. My material for the seminars comprised: a presentation giving an introduction to data protection; another explaining the interplay of the conflicting rights within the ECHR, and the balancing mechanism within Convention 108; a paper illustrating the issues by reference to judgments of the ECtHR; and a list of questions to facilitate discussion and elicit answers about the way forward.

The Seminars

Both seminars were well attended, with about fifty participants in Sarajevo and over thirty in Banja Luka. As well as my input, there were presentations by representatives of the High Judicial and Prosecutorial Council, the Agency and, in Sarajevo only, the Ombudsman, who oversees the Freedom of Access to Information Act (FAIA). In Sarajevo, there was what might best be described as a creative tension between the representatives of the Agency and the Ombudsman, one strongly defending the right to private life and the other the need for openness. This of itself generated a wider discussion which meant that there was no need, or time, for the group to discuss the prepared questions. With the Ombudsman not represented in Banja Luka, there was no similar bilateral debate. However, for reasons of time there was the opportunity for only a brief discussion on some of the prepared questions.

Consideration

1. Following the seminars and a separate meeting with the Director of the Agency which took place between the two seminars, I am left with the impression that there is a great deal of uncertainty about the precise effect of the legislative framework in which the relevant decisions fall to be taken.
2. The findings of the Agency seem to leave no room for doubt. As I read them, they suggest that the Data Protection Law, taken with other relevant legal instruments, has the effect that individuals must never be identified and steps must always be taken to anonymise court reports. However, the Agency representative at the seminars suggested that the position was not so clear-cut, and that there was scope for identification if the balance between the two competing rights favored openness. If this latter interpretation is correct, it does not seem to be widely known. The Court of BiH Rulebook, which I have mentioned above, also implies that there is a complete prohibition on identification.
3. There also seems to be confusion about the effect of the FAIA. The Agency has proposed amendments to that law. It was to explain his purpose in proposing the amendments that the Director invited us to meet him. If I understand him correctly, he sees a link between the FAIA and the publication of the identities of those involved in criminal proceedings. However, while it is clear that there is a link, the FAIA does not appear to me to be the main driver for the publication of court reports. The FAIA deals with the disclosure of information held by public authorities in response to specific requests. A request may, of course, be made to a prosecutor or a court for information about a particular case. However, in my view the real issue is not FAIA requests, but the pro-active publication of information by prosecutors and courts. Such publication is not governed by the FAIA: prosecutors and courts make the information widely available because they choose to do so, as a matter of policy, in the public interest.
4. In addition to the legal uncertainty, there is also clearly a lack of consensus about the desirability of anonymisation. The difference of view is exemplified by the respective positions taken by the Agency and the Ombudsman at the seminar in Sarajevo. The discussion suggested to me that the position of the other participants in the seminar is rather more nuanced. My sense is that the participants felt that requiring anonymisation in every case was not the right approach. They recognized that there was a need for balance in reconciling the two competing rights, but were uncertain how to achieve it. There appeared, however, to be a widely shared view that it should as a minimum be possible to reveal the identities of those convicted of the most serious offences.
5. The question whether, within the constraints imposed by the international legal instruments, it is desirable for individuals involved in court proceedings to be publicly identified is matter of policy for the relevant state authorities. As noted above, that question is answered in different ways in different countries. Having regard to its recent history, the circumstances of BiH are unique. It is appropriate that it should find a solution to the question of identification that matches its particular needs against the background of that history. What the solution should be is a matter for consideration and debate within BiH. In that debate, it is important to remember that the relevant

European legal instruments do not prohibit the identification of individuals. They impose restrictions, most notably in the form of the limited scope of the important public interests which justify exemptions from the main rules. But, provided that those restrictions are respected, identification may take place.

6. In that connection, the following passage from the judgment of the European Court of Human Rights in the case of *Z. V Finland*, which I used to illustrate my presentations, is worth repeating:

“99. As to the issues regarding access by the public to personal data, the Court recognises that a margin of appreciation should be left to the competent national authorities in striking a fair balance between the interest of publicity of court proceedings, on the one hand, and the interests of a party or a third person in maintaining the confidentiality of such data, on the other hand. The scope of this margin will depend on such factors as the nature and seriousness of the interests at stake and the gravity of the interference ...”

7. The questions that I prepared for the seminars address issues of the kind envisaged in the final sentence of that extract. They may be helpful in considering the way forward. For convenience, I set them out below, with one or two minor amendments.

“In Bosnia and Herzegovina:

- a) Is it desirable in principle to permit the public identification of those involved in criminal proceedings?
 - b) If such identification should be permitted, should there be any restrictions on the circumstances in which identities are disclosed? For example:
 1. Whose information should be disclosable? All those involved in the proceedings or just the defendant?
 2. Is the seriousness of the offence relevant?
 3. Is the nature of the personal information revealed in court relevant?
 4. Is it relevant whether the defendant was convicted or acquitted?
 5. Is the status of the defendant relevant: public figure or ordinary member of the public? What about children and other vulnerable individuals?
 - c) If public identification should be permitted, should individuals be able to ask the court not to identify them? If so, on what grounds?
 - d) Is the form in which the information is made public important? For example, should a distinction be made between publishing the information in the form of a hard copy report of the court proceedings, publishing a video recording of the proceedings and making the report available on the internet?
 - e) If public identification should be permitted, what steps are needed to permit this?”
8. I would draw attention to an important point on question c). During the seminars, the question was raised about posting information about identifiable individuals on the internet. Specifically, it was felt to be unfair that the information would remain available to the public after the convicted person had completed his or her sentence. It was suggested that it was not possible technically to ensure the removal of the information. That suggestion was contested. I am not an IT expert and do not know which of those views is correct. However, the underlying concern is an important one. Principle 18 of

Council of Europe Recommendation (2003)13 on “The provision of information through the media in relation to criminal proceedings”² says on this point:

“In order not to prejudice the re-integration into society of persons who have served court sentences, the right to protection of privacy under Article 8 of the Convention should include the right to protect the identity of these persons in connection with their prior offence after the end of their court sentences, unless they have expressly consented to the disclosure of their identity or they and their prior offence are of public concern again or have become of public concern again.”

Summary of conclusions and recommendations

1. There seems to be uncertainty about the extent to which, if at all, the data protection law currently permits the identification of individuals in court reports. The Agency should clarify its view on this point, possibly by issuing guidelines.
2. There also seems to be uncertainty about the effect of the Law on Freedom of Access to Information. That law does not seem to me to be central to the issue.
3. The question of the extent to which, if at all, it is desirable for individuals involved in criminal proceedings to be identified in court reports is a policy matter. That policy may properly reflect the particular needs of BiH against the background of its unique history.
4. If it is decided as a matter of policy that court reports should be capable of identifying individuals to an extent that is not currently permitted, it will be necessary to amend the law should its interpretation by the Agency as expressed in its Opinion(s) and Decision(s) remain unchanged.
5. In amending the law to permit such identification, it will be necessary to ensure that the amendments are compatible with the relevant European legal instruments. The relevant European legal instruments, and in particular the data protection rules, do not prohibit identification.

² This Recommendation was referred to by the Agency representative in her presentation at the seminars. I was not previously aware of it. It deals with the dissemination of information by the media rather than, for example, directly by the courts on their websites, but the issues it raises are nonetheless relevant.