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Judicial System Assessment Programme (JSAP)

THEMATIC REPORT 1: COURTS FOR MINOR OFFENCES

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EXECUTIVE SUMMARY

Overview

1. In the light of the cases that they handle, Courts for Minor Offences (CMOs) in Bosnia and Herzegovina should meet the requirements of Article 6 of the European Convention on Human Rights (ECHR), namely that they should be Aindependent and impartial tribunals established by law@ and provide the accused with a number of significant rights.

2. JSAP has found fundamental institutional and political obstacles which prevent CMOs from being Aindependent and impartial tribunals established by law@.

The Institutional Dimension

1. Judges in CMOs tend to be few in number and to lack experience.

2. There is a need for training of Judges of CMOs, particularly on human rights.

3. The physical quality of CMOs and their equipment, the quality of their judges and their capacity to handle the cases coming before them is varied but a large number of them are deficient in these respects.

4. CMOs require a higher level of resources.

5. CMOs generate a large volume of income and have the potential to be abused.

The Technical Dimension

1. Because of the special status of the ECHR under the Constitution of Bosnia and Herzegovina, the Laws on Minor Offences and the Laws on Public Order and Peace should be made compatible with it.

2. The legislative distinction between crimes and minor offences is at the present time somewhat blurred and should be clarified.

The Political Dimension

1. The system of allocating resources to CMOs and the method of appointment and dismissal of judges are not conducive to independence from extraneous political influence.

2. Professionals rather than politicians should have a key role in the appointment of judges

of CMOs.

3. Special priority should be given to creating a unified Cantonal system of CMOs in Central Bosnia and Herzegovina-Neretva Cantons and lawful CMOs for Zepce and Novi Seher.

PREFACE

Minor offences are breaches of legislative and other provisions which are less serious than breaches of the criminal law. By far the most frequent penalty is a fine. The legal consequences and stigma of a minor offence are less serious than those of a crime. Adjudications are made by administrative as well as judicial bodies. CMOs which are funded and organised by the RS and the Cantonal Ministries of Justice deal most frequently with traffic violations. Procedure is regulated in Entity and Cantonal Laws on Minor Offences and the minor offences themselves are defined in a wide variety of legislation.

The system of minor offences is an important part of the legal structure of Bosnia and Herzegovina. In a country with high unemployment and an economy still devastated by the war, the imposition of fines by CMOs often has a significant impact on the lives of citizens. Members of the public of Bosnia and Herzegovina are far more likely to be charged with a minor offence than a crime. So the minor offence system makes an important contribution to the level of public confidence in the rule of law. Moreover, CMOs have hardly been examined by the international community.

An in-depth examination of CMOs was conducted by the JSAP Team in the UNMIBH Sarajevo Region, which covers Sarajevo and Gorazde Cantons and an area of the eastern Republika Srpska adjacent to these Cantons. The other six JSAP teams assessed minor offences courts as part of their evaluation of institutional and technical issues in their regions.

JSAP=s assessment of CMOs in both Entities was conducted by holding discussions with ministers of justice, judges, prosecutors, court personnel, judicial and police officials, lawyers and parties to minor offences matters. Every minor offences court in Bosnia and Herzegovina has been visited or contacted by JSAP. Contact was also made with members of the international community, particularly IPTF local police advisors and human rights officers, and UNMIBH civil affairs officers. Randomly selected minor offences proceedings were monitored, court and case files and case registration and tracking systems were examined. Analysis of minor offences laws was also undertaken.

THE INSTITUTIONAL DIMENSION

The structure of the bodies adjudicating on minor offences

The structure of the bodies adjudicating on minor offences is not straightforward. This is in part a reflection of the complicated institutional framework of post-war Bosnia and Herzegovina, but partly also a consequence of the fact that adjudication on minor offences is divided between administrative and judicial bodies.

In both Entities minor offences are adjudicated in the first instance by CMOs and by administrative bodies. In the RS, minor offence proceedings are conducted in the first instance by a court or an administrative organ, and in the second instance by a competent higher court. 42 CMOs operate in the RS. The five District Courts act as second instance CMOs. There are a total of 82 CMOs in the Federation. Within each Canton, municipal CMOs hear cases in the first instance. Appeals are then heard at Cantonal Minor Offence Appeal Courts in each Canton, except in Bosansko-Podrinjski Canton, West Herzegovina Canton and Canton 10, where regular courts act as second-instance courts. The operation of these courts is set forth in Cantonal legislation.

Bosniak-Croat conflict is reflected in the judicial system of the Herzegovina-Neretva Canton. The arrangement of CMOs largely parallels that of the regular Municipal and Cantonal Courts, with two Minor Offence Appeal Courts one in East Mostar for the Bosniak Municipalities and one in West Mostar for the Croat Municipalities. It should be noted that the Appeals Court for the Croat municipalities has not properly functioned for two years because there have not been enough judges to form the panel.

In the Central Bosnia Canton, although the regular court system is unified, the CMOs are not. The municipalities of Busovaca, Kiseljak, Gornji Vakuf, Novi Travnik and Travnik have each two CMOs: one in the Croat-dominated part and the other in the Bosniak-dominated part.

In addition to the system of CMOs within Cantons there are also bodies which adjudicate on minor offences at Federation level under Federation legislation. Such cases are handled by federation administrative organs in the first instance. Appeals may then be made to the Federation Council for Minor Offences.

Funding

There is considerable diversity in funding arrangements. The RS CMOs are funded from the Entity budget. CMOs in Una-Sana, Posavina, Tuzlanski, Bosansko-Podrinjski and Sarajevo Cantons are financed from the cantonal budget. In the Zenico-Dobojski and the Central Bosnian Cantons, the Cantonal Minor Offence Appeal Courts are funded from the cantonal budget, whereas the municipal CMOs receive funds from municipal budgets. In West Herzegovina Canton and Canton 10, CMOs are financed from the municipal budget. In the Herzegovina-Neretva Canton the system of funding reflects the division in the Canton. The CMOs in West Mostar, Prozor-Rama, Capljina, Citluk, and Stolac receive funding from the municipal budget.

Courts in East Mostar, Jablanica and Konjic are financed from the cantonal budget. Several minor offence court presidents were unable to advise about the budgets of their courts as they do not administer funds allocated to their courts. The adequacy of the funding received by CMOs is variable, reflecting the range of sources.

Physical resources

CMOs in the Federation are generally better equipped, located in marginally better quality buildings and have more space than CMOs in the RS. Courts in the RS are uniformly poorly equipped, accommodated in buildings that are in a bad condition with inadequate space, office supplies, furniture and equipment.

In the Federation, variations exist in the material conditions in CMOs both among and within cantons. In the Bosansko-Podrinjski Canton, the laws require the establishment of three municipal CMOs. Owing to a lack of funds, only one is functioning. It is located in Gorazde and has a huge caseload. The Minister of Justice for the Canton has appealed for funds to establish two more. The CMO in Stolac is located together with a kindergarten. Those in Sarajevo Canton are exceptional: they are in general well-equipped, well-housed and maintained with a sufficient number of functioning computers, although computers in several courts are not programmed for the court=s work.

There were a large number of CMOs in both Entities which lacked a suitable room for hearings. Some CMOs consist simply of a single room or, if there are separate rooms for judges, they do not provide a conducive environment for a hearing.

The CMOs in both Entities tend to be worse equipped than the regular courts: only 2% of those in the RS and 13% of those in the Federation had copying machines; 10% in the RS and 34% in the Federation had computers; and 22% in the RS and 21% in the Federation had fax machines[1].

Many RS courts lack electric typewriters and have only one antiquated manual typewriter. Some have to manage with a single telephone line and the Ljubinje Minor Offence Court (RS) does not have a telephone and has to rely on the pension fund office next door. The President of the Jablanica CMO (Herzegovina-Neretva Canton) acts as the telephone-receptionist as the court=s one telephone is in his office. Some judges were obliged to buy office supplies themselves. Decisions could sometimes not be mailed in a timely fashion: one court even reported that court decisions had not been mailed for between 7 and 10 months because of a lack of funds for postage.

[1] The percentage of first-instance regular courts with copying machines is 15% in the RS and 48% in the Federation; for computers the percentages are 15% and 76% respectively; and for fax machines 54% and 80%.

Legal materials

Most CMOs do not have copies of the GFAP, ECHR and other international legal materials. They often lack copies of applicable criminal laws and other substantive legislation. Receipt of Official Gazettes, particularly in the RS, is infrequent. Some judges reported paying for Official Gazettes from personal funds or borrowing them from other courts for copying. It should be pointed out that CMOs apply a large number of laws and subordinate legislation. So the unsatisfactory access to Official Gazettes is an acute problem.

Human resources

The Cantons and the Republika Srpska have laws on the number of judges required by each court. The prescribed figures appear largely to be based on caseload.

In the RS the Ministry of Justice in its Report on the Work of CMOs in 1998 reported that 89 judges were employed, though under the law there should have been 100. Likewise in the Federation both the generally well-off and the less well-off Cantons have a large proportion of courts with fewer judges than the law requires. In Una-Sana Canton, for example, 6 out of 8 CMOs and in Zenica-Doboj Canton 7 of the 11 CMOs were found to have fewer judges than they should according to the law. These are only rough indicators, but significant nonetheless. Insufficient judges can have a direct impact on the quality of justice: several judges noted that large caseloads caused an increase in the use of the quicker summary procedure.

Judges at CMOs should either have passed the judicial examination or the examination for judges of CMOs. In the Tuzlanski Canton and the Zenica-Doboj Canton people could exceptionally be appointed as judges of CMOs without having passed either of these on condition that they passed one of them within a year of entering service as a judge. In the main there was a tendency for judges not to have much experience. There was even a case of a judge without a law degree.

Salaries for judges of CMOs vary between the Entities and among the cantons. They are broadly similar to those of judges at regular courts. In the RS, monthly salaries varied from 200DM to 500DM. In the Federation, salaries were higher, in some cases as much as 1000DM. Many judges reported that salaries were often not paid in full each month. In the Federation, where salaries are paid from municipal budgets, variations exist within the canton. Low and inconsistent salaries for minor offences court judges have resulted in shortages of judges and increases in the number of inexperienced and poorly qualified judges, reducing the quality of justice.

Minor offences court judges have not received training on the ECHR despite its special place in the Bosnian legal system nor have they participated in any other training of judges offered by the international community. Several judges stated that they should have been involved in training on the new criminal legislation in the Federation provided by ABA-CEELI[2] and local authorities.

[2] American Bar Association Central and East European Law Initiative

Minor offences court judges, the President of the Federal Council and individual customs officers complained that it is time-consuming and difficult to be up-to-date on all the laws, decisions, and decrees that define minor offences. They also said that there were inconsistencies in the legislation, and workshops to address them were suggested. It is fair to conclude that judges of CMOs have been neglected in the training provided by the international community. Low levels of funding often lead to an inability to hire experts. Several judges reported that where parties cannot agree on proceeding without an expert opinion the case is postponed indefinitely or until the court receives adequate funds.

Activity of courts

Caseloads in Federation CMOs vary dramatically with annual caseloads in smaller municipalities of several hundred to caseloads of up to 24,000 in larger municipalities. Caseloads in CMOs in the RS on average are smaller than those in the Federation.

On average, minor offences proceedings are concluded within 1-3 months. Backlogs are smaller in CMOs than in basic and municipal courts. This confirms the proposition that CMOs process a huge volume of cases more quickly than other courts. It also demonstrates a high productivity on the part of judges. The reasons for short hearings with few delays will emerge later.

All courts make annual returns which show the number of cases registered during the year, the number of undecided cases from the previous year and the number of cases decided during the year. In the RS during 1998 103,582 cases were registered, 31,941 were carried over from 1997 and 107,350 were decided, leaving 28,419 cases undecided at the end of the year. In other words, the overall backlog was slightly reduced. Because of the Cantonal and Municipal organisation of the courts in the Federation, the corresponding data for the courts in the Federation are not assembled in a single document. However UNMIBH JSAP enquiries indicate that the situation in the CMOs in the Federation is similar to that of those in the RS in that a significant number had a smaller backlog at the end of 1998 than they did at the beginning.

The organisation of court-files was of varied quality. Some CMOs in the Banja Luka Region were found not to maintain documentation well. Similarly, material in the files of first instance administrative organs sent to the Federal Council is not properly documented or recorded. Contrary to regulations, documents were not attached to files or recorded on the jackets of the files. As a result, they could easily be removed.

Conclusions

1. Because of the significance of the decisions that they take and the judicial standards which they should meet (see the Technical Dimension), CMOs should be allocated a higher level of resources.

2.1. In general, the physical resources in CMOs are variable reflecting the range of sources of funding. However, there were a significant number of CMOs in both Entities and in every Canton except, perhaps, Sarajevo which had major deficiencies, in the form of unsuitable

accommodation and inadequate equipment.

2.2. Additional resources are needed to raise the quality of the accommodation and equipment of CMOs and to ensure that every court has the legal materials it needs.

3. CMOs are able to deal with cases more quickly than the regular courts, but in both Entities there were some with large backlogs.

4. Judges of CMOs, like their counterparts in the regular courts, tend to be few in number and to lack experience. This is a consequence of both the war and low salaries. The salaries of judges of CMOs should be increased as well as those of judges in the regular courts.

5. Training and other initiatives should be directed at judges of CMOs so as to raise their level of awareness of the relevance of the ECHR and other international instruments for their work. There are indications that they have had even less training on human rights than judges of regular courts.

THE TECHNICAL DIMENSION

Structure of the legislation

The legislative framework for minor offences is more complicated than that for criminal offences. There is procedural and general legislation at Cantonal and Entity levels and substantive legislation defining individual minor offences and their penalties at Municipal as well as Cantonal and Entity levels.

The procedural and general legislation consists of the twelve Laws on Minor Offences (LMOs): one for each Entity and one for each Canton. They define minor offences, liability, sanctions and procedure. Individual minor offences and their penalties are set forth in laws, regulations and even decisions of administrative bodies at various levels. In each Entity minor offences are defined in a large number of individual laws covering traffic, public order and peace, financial operations and so on. In the Cantons minor offences are defined in laws, decrees and decisions of the Governments of the Cantons and decisions of the municipal councils. Some Cantonal LMOs provide expressly that the laws which define minor offences are Cantonal. This has been taken by at least one judge in the Zenica-Doboj Canton to imply that legislation setting forth minor offences at Federation level does not apply within the Cantons. Accordingly since there is no Cantonal law on public order and peace, possession of firearms or food safety, some CMOs have regarded themselves as incompetent to handle such cases. Legislation of the so-called ACroat Republic of Herceg-Bosna@, though not legally valid, is still applied in CMOs in Croat-dominated parts of the Federation.

Procedure

The LMOs are very similar. Unless stated otherwise, the procedure is the same in each of them.

Minor offences may be committed not only by natural persons but also by legal persons, such as companies and socially owned enterprises, and by responsible persons in legal persons. It should be noted that legal persons may not be liable for criminal acts under the Criminal Codes of either Entity. In all the LMOs in the Federation minor offences are defined as breaches of public order. In the RS law they are defined as both breaches of public order and breaches of regulations on economic or financial transactions.

CMOs can order pre-trial detention in specific cases. Detention may not last more than 24 hours within which time the accused must be examined and the minor offence adjudication made.

Proceedings are begun at the request of an authorized organ or injured person. Authorized organs include the Public Prosecutor, the police and other state bodies.

On receipt of a request to initiate minor offence proceedings, a judge of a CMO decides whether to do so or to dismiss the request on specified grounds. The judge also decides whether to institute summary or regular procedure for minor offences.

In summary procedure, guilt is determined without summoning or examining the accused on the basis of written material in the request. Where parties object to summary procedure, the matter will continue in regular minor offences procedure. Most cases are decided in summary procedure, without recourse to regular procedure.

In regular procedure there is an opportunity for oral statements before the court from the accused, the injured party, the agent that requested initiation of proceedings and witnesses. Confrontations in which witnesses who have given conflicting testimony address each other on the disputed points may be held. The court is required to ensure that before a decision is made it has all the evidence, including expert evidence and evidence from site inspections. Proceedings are to be conducted quickly and briefly. The court shall evaluate evidence based on its free conviction. The accused has the right to present evidence, to submit motions and to present his or her own defence or be represented by defence counsel. Appeals may be made against what has been decided in regular proceedings, and even the extraordinary remedies of repetition of proceedings, petition for judicial protection and request for protection of legality are available. Throughout Bosnia and Herzegovina regular proceedings were only followed in a minority of cases.

In proceedings monitored by the Sarajevo UNMIBH JSAP Team, the procedure established by law was largely followed: the charge was read by the judge, accused persons, the injured party, the agent that initiated the request for proceedings and witnesses were allowed to give oral statements and advised that sanctions existed for failing to tell the truth, but they did not take an oath. The judge asked questions. Their actual statements were not recorded but summarized orally by the judge and typed. Persons were asked to sign their statements after the judge summarized them. Confrontations occurred in which two witnesses made contradictory statements in each other=s presence. Where the judge believed evidence was missing, another date was set to hear that evidence or have a confrontation. Expert evidence of damage estimates and personal injuries was introduced in traffic cases and in cases of fights and assaults medical evidence was considered. It appears that minor offences judges rarely obtain expert evidence on their own initiative. In proceedings observed by JSAP, police gave evidence before the court about assaults and traffic violations without referring to any documentation or their notes of the incident. Judges rendered decisions and penalties. Discussions were held about the ability of convicted persons to pay fines. The proceedings were informal and controlled by the judge.

All judges and lawyers interviewed stated that most persons represent themselves in minor offences proceedings both at first instance and on appeal. This was confirmed by JSAP observation. There are no public funds available for the provision of defence counsel. Usually requests to initiate proceedings are submitted by the police or the injured party. CMOs rarely receive requests from prosecutors and only where the act was viewed as having been wrongly classified by police or the medical evidence did not warrant a criminal charge.

Sanctions

The sanctions applicable for minor offences are very similar in all the LMOs.

In the LMOs of the Federation and Zenica-Doboj and Central Bosnia Cantons the only possible

punishment is a fine, which may be replaced by an admonition. In the LMOs of the other Cantons and the RS the punishments available are a fine or a term of imprisonment of up to 60 days. In both Entities the minimum sentence of imprisonment for a criminal offence is 15 days. So there is an overlap in the sentences of imprisonment that can be imposed for crimes and minor offences. In addition to these punishments, Aprotective measures@ may be imposed. These include confiscation of articles and suspension from driving motor vehicles for a period of between one month and one year. According to judges of CMOs and local police, weapons used in the commission of minor offences are the articles most often confiscated.

The various LMOs impose different upper and lower limits for fines. The LMO of Canton Sarajevo is not untypical. The normal range of fines for individuals is 10-500 DM, for legal persons and owners of private enterprises 50-5,000 DM and for responsible persons[3] up to 1,000 DM. For minor offences that constitute a severe violation of a law, the upper limit for fines may be increased to 1,000 DM for individuals; to 10,000 DM for legal persons and owners of private enterprises; and to 2,000 DM for responsible persons. The range of fines for minor offences and crimes overlap. Under Article 39(1) of the Criminal Code of the Federation, a fine may be between 200 KM and 2,000 KM, with the possibility of fines of up to 100,000 KM for crimes committed out of greed. If a member of the public fails to pay a fine, it may be converted to a term of imprisonment. Although there have been indications that some courts do this too readily, very few people are imprisoned for the failure to pay fines for minor offences.

Certain authorised persons such as police officers may pronounce and charge on-the-spot fines. A receipt for the fine charged should be issued specifying the minor offence committed and the amount of the fine imposed. Local police argue that the collection process for on-the-spot fines is strictly regulated. One officer is responsible for ordering specific officers in the field to collect the fines. Tariffs regulate the amount of the fines that can be legally charged. A specified number of on-the-spot fine forms with serial numbers are distributed to the officer who also has a number. The fine is recorded and collected and a receipt is issued in situations where an offence has been witnessed or found by police or inspectors. Police maintain that the procedure ensures that there is no abuse. However, it does not appear to guard against the reported situation of police offering citizens the option of paying an on-the-spot fine in a reduced amount without a record or receipt so that the police can pocket the money.

Fines are generally imposed by CMOs. Prison sentences are very rare. For example, during 1998 the CMOs in Central Bosnia Canton imposed 10,842 fines and only 21 prison sentences and similarly in Una-Sana Canton, the figures were 15,419 and 27. Many judges commented that fines prescribed in LMOs are too high and onerous for citizens given current economic conditions. Payment of fines in installments is often ordered to assist offenders to pay. Judges reported that sometimes offenders volunteer to go to prison rather than pay fines. The most frequent ground of appeal in minor offence cases is related to the amount of the fine imposed by the first instance court or organ. Many judges made the point that the fines collected by CMOs generate a large volume of income for the canton, municipality or government.

[3] Officials of public or private bodies who have certain legal responsibilities arising from their work.

The distinction between minor offences and crimes

The distinction between minor offences and crimes is important in several respects.

Firstly and most obviously, the penalties for minor offences are less severe. Imprisonment is exceptional and the fines imposed tend to be lower. The procedure is usually quicker and less formal, designed to punish and fine rather than establish guilt or innocence.

Secondly, a criminal conviction or the existence of criminal proceedings against someone have legal consequences which may be detrimental to that person in employment, education, the process of obtaining travel documents and so forth. To give one example, under Article 8/2/5 of the Law on Employment Relations and Salaries of Officials of Organs of Administration in the Federation of Bosnia and Herzegovina (Official Gazette of the Federation, 13/98), one of the general conditions for employment in an organ of administration and administrative service of the Federation is that no criminal proceedings should be conducted against that person or that the person has not been convicted for a criminal offence which constitutes a hindrance to the establishment of an employment relationship in the organ. There are no corresponding provisions in the case of minor offences.

Finally, there is a difference in stigma. This follows basically from the first two distinctions.

Legislative overlap between crimes and minor offences

It has already been noted that the penalties for crimes and minor offences overlap. In addition, there are certain actions which could be classified as either crimes or minor offences.

In the case of assaults, the Public Prosecutor is obliged to prosecute only those resulting in death or grievous bodily injury. There is no legally binding definition of grievous bodily injury. Cases of light bodily injury may be prosecuted by private individuals, but this is unlikely to happen if the alleged perpetrator is a member of a powerful group in the local community. As a result, some quite serious assaults which for whatever reason the Public Prosecutor does not consider that he is obliged to prosecute are treated as minor offences.

Legislation in force in both Entities allows the same action to be classified as both a crime and a minor offence (Article 42(2) of the Criminal Code of the Federation and Article 50(2) of the Criminal Code of the Republika Srpska). LMOs contain provisions requiring the court to take account of its material competence and to assign a case to another court if that other court is competent (e.g. Article 90 of the LMO of the Republika Srpska). However, there is no express provision in any legislation which imposes on a CMO an obligation to decline jurisdiction if a case which ought to be automatically prosecuted is referred to it. At the very least, there is a need for a provision which obliges judges of CMOs to refer cases which are to be automatically prosecuted to the public prosecutor. This will not on its own solve the problem, which can only ultimately be resolved by a change in the framework within which CMOs operate, but it is a necessary prerequisite.

The overlap in penalties for crimes and minor offences has already been alluded to. In view of the nature of minor offences it seems anomalous that imprisonment should be a possible punishment. At the same time there are some minor offences such as the possession of certain firearms and assaults which fall short of causing grievous bodily harm, for which mild penalties are not always appropriate. The classification of acts as crimes or minor offences and the penalties for them should be reviewed so that the fundamental distinction between them is not undermined.

The distinction between crimes and minor offences in practice

Specific police officers are tasked to initiate requests for most minor offence proceedings. Police say that these officers fully understand the distinction between crimes and minor offences. However the IPTF is doubtful about this. Minor offences and crimes are handled by separate departments in larger police stations. When a request for initiating a minor offence procedure has been made, police follow the request, may appear as witnesses at the hearing and keep a file in the event that they are asked to provide further information or decide to appeal the adjudication.

According to some police, prosecutors and minor offence court judges, medical assessment of the extent of bodily injury *dictates* the classification of an assault as a crime or a minor offence. However, strictly the final decision on classification should be taken by the court. As mentioned above, criminal legislation in both Entities does not precisely specify or outline what types of injuries are light or grievous. Doctors= criteria tend to differ from those of judges. Where an injury has occurred and it is unclear whether it is grievous or not, police initiate a request for minor offence proceedings and request a medical report. If medical evidence confirms a grievous injury, police indicate that they send the matter to the prosecutor for possible criminal proceedings.

Often in a case with a political dimension an action which should be prosecuted as grievous bodily harm goes through the CMOs. For example, there have been incidents of police abuse in the classification of assaults in Canton 10 and Novi Grad (RS). In April 1998, in Novi Grad, a group of Bosniaks who visited a cemetery were met with a mob of rock-throwing Serb demonstrators. The Bosniaks were chased away from the area. Serb authorities identified instigators and participants (all Serbs) involved in the incident and charged them with minor offences under the Law on Public Order and Peace. The acts committed fall within the description of criminal acts prohibited under RS criminal law. The judicial authorities, however, chose to proceed by way of minor offences law and procedure [4].

[4] Other examples of the same phenomenon were apparent in the aftermath of riots in Drvar on 24 April 1998 and the delayed response of the criminal justice system to an aggravated assault on tax collectors in Stolac on 1 August 1998. In both cases Croat local authorities proceeded after

Cases of family and domestic violence are routinely dealt with in the CMOs rather than criminal courts. A judge of a CMO in the RS reported that when women report such crimes to the police, police classify the offence as a disturbance of public peace to be processed in the CMO. Police and CMOs only intervene if the incident occurred in public and the privacy of the home is not considered under their authority. Where bodily injury occurs, victims of domestic violence face the same problem as other victims of assaults: cases of light bodily injury are generally handled by CMOs unless the victim is able to pursue the matter in a criminal court through private prosecution.

Several judges of CMOs in the UNMIBH Mostar Region advised that often cases in which an injury had been deliberately inflicted on someone are sent to them because they are more efficient, irrespective of the nature of the injury. This is not a legally valid reason and shows how the decision to classify can be misused by police and judicial officials.

Compatibility of minor offence legislation with the European Convention on Human Rights

It has not been possible to provide a comprehensive assessment of the conformity of all the LMOs with the European Convention on Human Rights (ECHR). The question of whether the minor offence procedure should meet the conditions for a fair trial set forth in Article 6 of the ECHR will be addressed. The fact that it should means that a substantial review of procedural legislation is needed. Two problematic areas from the ECHR perspective have been examined: findings of liability in both criminal and minor offence systems and the Laws on Public Order and Peace.

The need for minor offence proceedings to meet the conditions set forth in Article 6 of the ECHR

> Article 6(1) of the ECHR provides, inter alia:
>
> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

As has been explained, a minor offence charge does not amount under Bosnian domestic law to a criminal charge. However, a very large number of such charges would be so classified for the purposes of Article 6 of the ECHR.

In deciding whether a charge is criminal under Article 6 three criteria must be applied: whether the offence belongs to the domestic criminal law of the state in question; the Avery nature of the offence@; and Athe nature and degree of severity@ of the penalty which may be imposed (Engel v. Netherlands A 22 (1976); Ozturk v. FRG A 73 (1984)). In Ozturk the offence of causing a traffic accident for which a fine of DM 60 was imposed was found to be criminal for

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much international pressure.

the purposes of Article 6(1), on the grounds that the general character of the rule and the purpose of the penalty were both Adeterrent and punitive@. In the recent case of Lauko v. Slovakia of 2 September 1998 consideration was given to the imposition of a fine under minor offence legislation by a local administrative office on an Applicant for accusing his neighbours without justification of causing a nuisance. The European Court of Human Rights found that the fact that the minor offence of which the applicant was convicted was not characterised under domestic law as >criminal= had only a relative value. The Court then examined the second of the three criteria given above and stressed the general character of the rule in question, as well as the fact that the applicant had been sentenced to a fine and ordered to pay the costs of the proceedings:

> The fine imposed on the applicant was intended as a punishment to deter reoffending. It has a punitive character, which is the customary distinguishing feature of criminal penalties.

The Court summarised its position as follows:-

> In sum, the general character of the legal provision infringed by the applicant together with the deterrent and punitive purpose of the penalty imposed on him, suffice to show that the offence in question, was, in terms of Article 6 of the Convention, criminal in nature. Accordingly, there is no need to examine it also in the light of the third criterion.

It follows from Engel, Ozturk and Lauko that minor offence proceedings should meet the standards for a fair trial set forth in Article 6 of the ECHR. This conclusion is of immense importance. A person accused of a minor offence has a number of significant rights such as :

> (1) the right to Aa fair and public hearing within a reasonable time by an independent and impartial tribunal established by law@ (Art.6(1) ECHR).
>
> (2) the right Ato have adequate time and facilities for the preparation of his defence@ (Art. 6(3)(b) ECHR)
>
> (3) the right Ato examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him@ (Art. 6(3)(d) ECHR)

Procedural legislation on minor offences should be checked for compatibility with the standards established by the ECHR in the case of persons charged with criminal offences. These standards can only fully attained if certain institutional and political preconditions are met. The system of funding CMOs and the appointment and conditions of tenure of judges militate against the attainment of these preconditions[5]. Even the requirement of a public hearing can be more difficult to achieve in cramped accommodation.

The classification of the same act as both a crime and a minor offence

[5] This will be further discussed in the Political Dimension.

Persons are frequently charged and punished for the same act in a minor offence proceeding and before a criminal court. Judges and police said that the penalty ordered by a CMO is taken into consideration by a criminal court. Article 48(2) of the Criminal Code of the Federation and Article 50(2) of the Criminal Code in force in the Republika Srpska provides that a fine paid as punishment for a minor offence shall be recognised as part of a new sentence pronounced for a criminal offence whose characteristics include those of a minor offence.

This may well be inconsistent with Article 4(1) of Protocol No. 7 of the ECHR, which sets forth the principle of double jeopardy:

> No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

The Strasbourg case law on this provision is not well-developed. Gradinger v. Austria A328 (1995) is one of the few which are relevant. It concerned an accident caused by the Applicant while driving his car which led to the death of a cyclist. On the one hand, he was convicted under the Criminal Code by the Regional Court of having caused death by negligence (Article 80 of the Criminal Code). The Regional Court held that the applicant had drunk alcohol before the accident but not so as to constitute the aggravated offense of homicide committed while under the influence of alcohol (Article 81(2) of the Criminal Code), which implies a blood alcohol level of at least 0,8 grams per litre. On the other hand, an administrative authority found that this level was attained and that the Applicant had therefore committed the administrative offence of driving a vehicle while intoxicated under section 5 of the Road Traffic Act. The European Court of Human Rights held:

> The Court is fully aware that the provisions in question [of the Criminal Code and the Road Traffic Act] differ not only as regards the designation of the offences but also, more importantly, as regards their nature and purpose. It further observes that the offence provided for in section 5 of the Road Traffic Act represents only one aspect of the offence punished under Article 81 par. 2 of the Criminal Code. Nevertheless, both impugned decisions were based on the same conduct. Accordingly, there has been a breach of Article 4 of Protocol no 7.

In Oliveira v. Switzerland of 30 July 1998, the Court took what seems to be a somewhat different approach. The Applicant=s car veered on to the other side of the road while she was driving on an icy surface. It collided with another car whose driver was seriously injured. The Applicant was found by a police magistrate decision to have failed to control her vehicle and given a fine of 200 CHF. Later she was convicted of the criminal offence of negligently causing physical injury by a District Court and fined 1,500 CHF. The Court went on to quash the fine of 200 CHF and said that any part of that fine which had already been paid was to be deducted from the fine which it was imposing, thereby reducing the fine to CHF 1,300. The Strasbourg Court held:

> The case was a typical example of a single act constituting various offences (>concours ideal d=infractions=). The characteristic feature of this notion is that a single criminal act is split up into two separate offences, in this case the failure

> to control the vehicle and the negligent causing of physical injury. In such cases, the greater penalty will usually absorb the lesser one. There is nothing in that situation which infringes Article 4 of Protocol 7 since that provision prohibits people being tried twice for the same offences whereas in cases constituting various offenses (>concours ideal d=infractions=) one criminal act constitutes two separate offences.

The Court distinguishes this from Gradinger Ain which two different courts came to inconsistent findings on the applicant=s blood alcohol level@ and held that there had been no violation of Article 4 of Protocol 7. However the Court=s reasoning in Gradinger did not stress these inconsistent findings. Also there was a dissenting opinion in Oliveira in which Gradinger was applied and a breach of Article 4 of Protocol 7 was found.
The comparison between those two decisions of Strasbourg Court shows that the application of Article 4 of the Seventh Protocol is uncertain. In any event, the present provisions allowing a person to be the subject of both criminal and minor offence proceedings in respect of the same act are highly questionable from the standpoint of the ECHR and the principle of double jeopardy. Provisions which ensured that a person could not be the subject of both proceedings would make for a neater and more rational arrangement.

Laws on Public Order and Peace

A new RS Law on Public Order and Peace (Official Gazette of Republika Srpska, 26/97) was published in October 1997. It defined various minor offences, such as participating in a fight, engaging in prostitution, begging and so on. In April 1998 three Council of Europe experts commented on the law, although at the time its status was questionable because the RS Government under Milorad Dodik had purported to suspend its application. The vagueness of the language used to delineate the minor offences was criticised and a number of provisions were found to be inconsistent with the ECHR, in particular, with the freedom of expression requirements of Article 10 and the freedom of peaceful assembly requirements of Article 11. A further Law on Public Order and Peace came into force in the RS during 1998 (Official Gazette of the Republika Srpska 10/98), which is in essence the same as the one of October 1997.

As is the case with the vast majority of the laws adopted by the Republika Srpska and the Federation, the RS Law on Public Order and Peace is a slightly amended version of a pre-war law (Law on Public Order and Peace, Official Gazette of the Socialist Republic of Bosnia and Herzegovina, 42/90). Many of the criticisms made by the three Council of Europe experts apply also to this law. For example, both define as minor offences Aquarrelling, shouting and behaving in a rude and insolent manner@, Aby speaking or writing or in some other way violating or belittling the constitutional order@ and Atelling or spreading false information or statements that may cause disturbance among the citizens or jeopardise public order and peace@. All of these were found to be problematic from the perspective of the ECHR.

CMO judges indicated that although they were aware of the ECHR, they had little opportunity to apply it in minor offences proceedings. It is not the practice of CMOs to use or rely on the ECHR.

The status of CMOs

There is uncertainty about the status of CMOs. They have a number of features which separate them from the rest of the judicial system. They are not expressly mentioned in any of the Constitutions of the Entities or the Cantons. The summary procedure which they follow in the majority of cases is structurally similar to administrative procedure and aims to promote efficiency and a swift decision. Some administrative organs also adjudicate on minor offence procedures. The CMOs do not form part of the hierarchy of regular courts. However a vast majority of the cases before the CMOs have to meet the requirements of Article 6 of the ECHR which include adjudication by Aan independent and impartial tribunal established by law@. This is critical. In addition judges of CMOs in both Entities expressed the view that their courts should be part of the judicial system to obtain respect and recognition for the important role that they perform within society and to function more effectively.
The status of CMOs should be raised to ensure that they are better able both to meet the standards of Article 6 of the ECHR and to perform their important tasks. This can be achieved by fully integrating them within the judicial system.

Conclusions and Recommendations

1. The absence of substantive minor offence legislation on public order and peace, possession of firearms and food safety from some Cantonal legislation is apparently sometimes preventing prosecution of these categories of minor offences.

2. CMOs not only make decisions which have a significant effect on people=s lives, but also they need to meet the requirements of Article 6 of the ECHR. These requirements can only be met fully if certain institutional and political preconditions are satisfied. The status of CMOs should be raised and they should be placed unambiguously in the judicial system.

3. There are indications that the Laws for Minor Offences and related legislation in which minor offences are defined contain many provisions which are not compatible with the ECHR. Their amendment is plainly necessary. The Council of Europe Comments on the Law on Public Order and Peace of the Republika Srpska provides a sound basis for amendment of not only that law, but also the other laws on Public Order and Peace in force in Bosnia and Herzegovina. A review should be conducted of the compatibility of all the LMOs with the ECHR. Since they are so similar, this is less of an undertaking than it might appear.

4. Although the distinction between crimes and minor offences is an important one, it is somewhat blurred at the moment. Actions which are criminal by any standards are sometimes treated as minor offences and there is a significant group of penalties which may be imposed for both crimes and minor offences.

> 4.1. The Public Prosecutor is obliged to prosecute only those assaults which result in death or grievous bodily injury. There is no legally binding definition of grievous bodily injury. Cases of light bodily injury may be prosecuted by private individuals, but this is unlikely to happen if the alleged perpetrator is a member of a powerful group in the local community. As a result, some quite serious assaults which for whatever reason the

Public Prosecutor does not consider that he is obliged to prosecute are rather inappropriately treated as minor offences. This phenomenon can be tackled in two ways:

(a) The definition of infliction of bodily harm which is a crime should be more broadened and made more precise. It should certainly include any infliction of bodily harm which incapacitates the victim for at least two days or causes unconsciousness.

(b) There should be an unambiguous statutory obligation on Judges of CMOs to refer all cases which, in their opinion, constitute crimes to the competent public prosecutor.

4.2 Given the legal significance and stigma of minor offences by comparison with crimes, it is anomalous that a penalty of imprisonment should be available for them. At same time there are some minor offences which are not prosecuted as crimes but for which mild penalties are not suitable.

5. The value of fines should be reviewed, with a view to a reduction in the light of judges= dissatisfaction with the present levels.

THE POLITICAL DIMENSION

Appointment and dismissal of judges

The employment conditions of judges of CMOs make them subject to political pressure.

The procedures for appointing and dismissing judges of courts for minor offense are set forth in laws. In both the Republika Srpska and the cantons the appointment is made essentially by the legislative and the executive branches of government. In Republika Srpska judges are appointed and dismissed by the government. The bodies responsible for appointment and dismissal of judges in the Federation differ from Canton to Canton, but the Cantonal Government, the Ministry of Justice, the Municipality Mayor and the Municipal Council are all frequently assigned an important role. In the Zenicko-Doboj and the Posavina Cantons judges in CMOs are only appointed for a four-year term and in the Tuzla Canton for an eight-year term.

Dual court systems in the Federation of Bosnia and Herzegovina

Two minor offense court systems were found in the so-called mixed cantons.

Serious problems were reported in the courts for minor offenses in Central Bosnia canton. In several municipalities in the canton there were two courts for minor offenses each applying different rules. The dual courts operate in contravention of a 1998 cantonal law that requires each of the seven municipalities to operate only one minor offence court. Unified CMOs do not exist in Busavaca, Gornji Vakuf, Novi Travnik, Travnik and Kiseljak. CMOs in the Croat-dominated areas of the canton not only apply the law of the so-called ACroat Republic of Herceg-Bosna@ but also use its seals. Different seals are, of course, used in the other courts for minor offenses in the Bosniak dominated areas. This causes difficulties for members of the public who find that a document issued by one court is not accepted by another. Efforts have been made to create a unified system of CMOs in the canton, but to no avail. CMOs generated 672,480 KM in fines and court costs during 1998. This revenue, though less than what is generated by the regular courts, constitutes a powerful reason for not unifying them.

In March this year the Herzegovina-Neretva Canton adopted its LMO, which sets out a system of CMOs with a single Cantonal Appeal Court for Minor Offences. Although this was a welcome development, the law has some significant gaps. It did not set forth the manner and procedure either for establishing Municipal CMOs or for nominating their Judges. Article 327 provides that this is to be done in a subsequent law which has not yet been adopted. Also the single Cantonal Appeal Court for Minor Offences has not yet been set up.

CMOs were not regulated in the Law on Courts of the Herzegovina-Neretva Canton which the High Representative imposed. So there is an urgent need for adoption of the Cantonal law foreseen in Article 327 of the LMO. In the meantime, there continue to be separate arrangements in the Croat and Bosniak parts of the Canton, with Herceg-Bosna legislation applied in the Croat municipalities and only the courts in Bosniak municipalities sending appeals to the Appeal Court for Minor Offences in East Mostar.

In two smaller mixed Bosniak/Croat areas CMOs have been neglected in efforts to create unified structures. In Zepce there has been no judicial process in minor offences since the unification of the police on 10 April 1999. The police take the quite reasonable view that the 66 cases of alleged minor offences which they have investigated cannot be referred to any but a competent legal and unified court, which does not yet exist. They have sought the assistance of the international community in setting up such a court. Similarly the negotiations which led to a unified Bosniak/Croat police force in Novi Seher from August 1998 did not take account of the need to establish a CMO for the area. The police have therefore been refusing to send cases of minor offences to any court. Since there is a six-month statute of limitations, many are now time-barred. It is clear that there is an urgent need for unified CMOs to be established for both Zepce and Novi Seher.

Political influence on decision-making

In the Technical Dimension it was pointed out that in politically sensitive cases of serious assault, persons responsible tend to be improperly handled in the CMOs and not in the criminal system where they should be. The lack of judicial independence in cases of political significance has also been observed in the regular courts. Judges indicated that they would be more independent if they had a higher and more stable salary and job security. Without those essentials, some said that they were subject to outside influences and pressure.

Excessive dependence on municipalities in the Federation

Judges in the Federation expressed dissatisfaction with the extent to which they were dependent on municipalities. Those whose courts were funded by the municipality were unhappy with the arrangement. They had a preference for receipt of funds from Cantonal budgets stating that this was more consistent and conducive to independence. While CMOs use in some cases the municipality switchboard, fax machine, copier and so on, they can hardly be seen as independent, especially while at the same time they are hearing complaints brought by municipal organs. Judges are concerned about this. They are seen as an arm of the municipality whereas they are or should be a separate judicial institution. It is encouraging that control over CMOs is increasingly passing from the municipalities to the Cantons.

Conclusions and recommendations

1. The institutional framework within which CMOs operate undermines their independence. The procedures for appointment and dismissal of judges of CMOs and the method of funding of the courts themselves create dependence on the legislative and executive branches of government.

2. CMOs should be Aindependent and impartial tribunals established by law@ and should be in a position to satisfy Article 6 of the ECHR. This high standard of judicial independence is not being met in part because of the institutional framework within which they operate.

3. The independence of CMOs from extraneous political influence should be promoted by amending the method of appointing and dismissing judges of CMOs and by altering the funding arrangements. The situation is parallel to that of the regular courts. Efforts are already being made to ensure that professionals rather than politicians have a key role in the appointment of judges in the regular courts. Thought is also being given to changing the funding of the regular courts. In both these processes, CMOs should not be forgotten.

4. Cantonal Governments, rather than municipalities, should fund the CMOs throughout the Federation to ensure consistency and to promote judicial independence.

5. The LMOs of the Zenicko-Doboj, the Posavina and the Tuzla Cantons should be amended so that judges of CMOs are not appointed for a limited period.

6. The dual system of CMOs in the Central Bosnia and Herzegovina cantons is inconsistent with the principle of the rule of law and undermines the goals of the Washington Agreement and the Federation Constitution. Priority should now be given to their unification.

7. There is an urgent need for unified courts of minor offences to be established for both Zepce and Novi Seher.

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