

SETTING PRIORITIES TO EXPAND THE EU-BiH STRUCTURED DIALOGUE ON JUSTICE TO ADDITIONAL RULE OF LAW MATTERS

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Proposal for new priorities:
GENDER EQUALITY
ANTI-DISCRIMINATION POLICIES
HATE CRIME AND HATE SPEECH
FREEDOM OF ASSEMBLY

INTRODUCTION

1. The above-mentioned organizations welcome the involvement of Bosnian-Herzegovinian civil society organizations into the EU-BiH structured dialogue on Justice. We call upon EU and BiH representatives to further strengthen the role of civil society in this process, enabling civil society to continue being the corrective of state politics. For that purpose, the role of civil society organizations should become more structured and transparent.
2. We call to expand the structured dialogue to four more specific Rule of Law topics: gender equality, anti-discrimination policies, hate crime and hate speech and freedom of assembly.

GENDER EQUALITY

Legal framework

3. Gender equality in public life is guaranteed by the BiH Gender Equality Law, adopted in 2003 and amended in 2009. Gender equality is guaranteed if both genders are represented with min. 40% at all levels of administration (legislative, executive and judicial powers).
4. According to the 2013 adopted Law on Amendments to the Election Law of Bosnia and Herzegovina, equal representation of genders exists when one of the genders is represented by at least 40% of the total number of candidates on that list (before the amendment, the quota was fixed at 30%).

Implementation¹

5. According to the percentage of women in ministerial positions and parliaments, Bosnia and Herzegovina can be compared with countries such as Saudi Arabia and Cambodia since the BiH Council of Ministers is exclusively composed of male members, while the representation

¹ The data is based on the draft version of the Annual Report on Women Rights in Bosnia and Herzegovina in 2013 (published by Sarajevo Open Centre, final version will be published on www.soc.ba at the end of March 2014).

- of women in the Parliament is imperceptibly better.
6. The new 40% quota will result in a higher number of female MPs in the directly elected parliamentary chambers. Gender equality in state, entity and cantonal governments will still depend on political party decisions.
 7. Women face discrimination at different levels, and violations of the Law on Gender Equality are not isolated cases. In October 2013, the Council of Ministers of the BiH Parliament appointed seven members for the Council of the Communications Regulatory Agency of Bosnia and Herzegovina. Among those seven members, no women were included even though the second ranked candidate on the list that was prepared by the Parliamentary Ad Hoc Committee to implement the procedure of appointment of the Council of the Communications Regulatory Agency of BiH was a woman, Marija Milić. The Council of Ministers didn't take into account equal gender representation, which is regulated by the Law on Gender Equality in Bosnia and Herzegovina.
 8. Women cover only 35% of senior positions in BiH Institutions.
 9. In September 2013, the Council of Ministers adopted the new Gender Action Plan (GAP) of Bosnia and Herzegovina (2013-2017). The challenge will be in the next years to see how the new GAP is going to be implemented, and the budget allocated for that implementation.
 10. BiH has still the lowest level of female participation in the workforce in the Southeast Europe. Current strategies at the state and entity levels are not seriously committed to the adoption of measures and programs aimed at increasing the competitiveness of women in the labour market and reducing gender-based discrimination in employment.
 11. Other forms of discrimination influence the level of economic participation of women, most notably the fact that the rights for parental leave are regulated differently in different parts of BiH, as well as the fact that maternity leave is not always paid (for example, there are no payments at all in the Hercegovina-Neretva Canton) and that some women are left jobless after becoming pregnant.

ANTI-DISCRIMINATION POLICIES

(with a focus on discrimination based on sex/gender, sexual orientation and gender identity)

Legal framework

12. The BiH Gender Equality Law, adopted in 2003 and amended in 2009, is the first law that prohibits discrimination on the grounds of sex/gender (*spola*) and sexual orientation (*spolne orijentacije*).
13. The BiH Anti-Discrimination Law from 2009 covers the prohibition of discrimination on the grounds of sex/gender and “sex expression and/or orientation.”² The terms (grounds on which discrimination is prohibited) are not defined and are left to the interpretation of the attorneys, prosecutors and judges.
14. Gender identity (crucial for trans persons) is not covered by the law (but can be covered under “sex expression,” if there is a will for a broad interpretation of the attorneys, prosecutors and judges). Different laws on the state, entity and cantonal levels do cover sex/gender, sexual orientation and gender identity.

Implementation

15. Information about discrimination on the grounds of sex/gender, sexual orientation and gender identity, as well as on any other ground, is not collected or tracked because the BiH Ministry

² In local language, the terminology that is used is: “(s)polnog izražavanja i/ili orijentacije”, which literally means “sex expression and/or orientation”. Sex in this case refers to “(s)pol”, i.e. biological sex. Local translation for gender is “rod”, gender identity is “rodni/spolni identitet”, and sexual orientation is “seksualna/(s)polna orijentacija”.

of Human Rights and Refugees did not create the database (it was supposed to be created 90 days after the adoption of the Anti-Discrimination Law in 2009).

16. The BiH Ombudsman Institution on Human Rights works on complaints. The decisions of the Ombudsman Institution are not binding. The very low number of registered cases based on gender/sex (14 cases in 2013) and sexual orientation (4 cases in 2013) is a sign that there is a low level of trust in this human rights mechanism.
17. There are no publically known court cases regarding discrimination on the grounds of sexual orientation or gender identity, although discrimination cases on those grounds have been documented.³
18. Existing discrimination court cases show that legal proceedings are not efficient, as some cases take up to three years to be solved.⁴ Other cases, like the “two schools under one roof” case in Mostar, have failed on second instance and are now on the Federation of Bosnia and Herzegovina (hereinafter FBiH) Supreme Court level. Citizens do not trust the judiciary system and there have not been any trust-building efforts coming from institutions, especially not targeted at marginalized groups like the LGBT community.
19. Laws are not harmonized with the Anti-Discrimination Law; even this was supposed to happen 90 days after the adoption of the law. As a result, different laws (like the labor or higher education laws) have different anti-discrimination clauses that inconsistently address sexual orientation and gender identity. For example, the draft of the new FBiH Labor Law did not include sexual orientation in its anti-discrimination clause, reducing the level of protection at workplace to only the Anti-Discrimination Law.
20. The BiH Ombudsman Institution has very limited resources to work on anti-discrimination cases. According to the Anti-Discrimination Law, it was supposed to get a special budget line, but the anti-discrimination department at the Ombudsman Institution has never gotten it.
21. Judges and prosecutors countrywide either completely lack or have limited training related to the new Anti-Discrimination Law. The result of this is that the law is not implemented as it is defined by the provision of the law text⁵.
22. BiH never adopted a countrywide anti-discrimination strategy that would define concrete and realistic measures on how to fight discrimination (including on the grounds of sex/gender, sexual orientation and gender identity), prejudices and the promotion of tolerance and equality on the state, entity, cantonal and local levels.
23. The family laws of FBiH, Republika Srpska (hereinafter RS) and Brčko District (hereinafter BD) define marriage and domestic partnership as a union between a woman and a man. Even though jurisprudence (for example, the case *Schalk and Kopf vs. Austria*, 30141/04) of the European Court for Human Rights indirectly binds BiH, as a Council of Europe member state, to extend its legislation to recognize some of the rights and obligations (i.e. social rights) that come out of the union between same sex couples. It is the opinion of the European Court that same sex couples in stable de-facto relationships are also protected by Art. 8 of the European Convention for Human Rights and Fundamental Freedoms. There was no attempt to adopt registered partnership for same-sex couples law in any of the BiH federal units.
24. Among other things, same sex couples cannot access reproductive technologies or adopt a child, as such rights are limited by law only to married couples and heterosexual couples in domestic partnerships, constituting clear discrimination.

³ See i.a. Pink Report. Annual Report on the Human Rights Situation of LGBT persons in BiH: <http://soc.ba/en/pink-report-annual-report-on-the-human-rights-situation-of-lgbt-persons-in-bih-in-2012/>

⁴ See a big number of policy papers and analysis on the problems with the Anti-discrimination law implementation <http://analitika.ba/en/projects/overview-ad-framework-and-practice-bih>

⁵ Ibid.

25. There is no medical support for transsexual persons. Surgeries have to be done abroad, while the official social security system is not covering any costs. However, once the sex reassignment is done, transsexual persons can legally change their name, personal number (JMB) and documents. Only the BD Law on Birth Register Books does not cover “sex reassignment” as a ground for legal change of personal data. Civil society organizations called the BD Government in 2013 to amend the law, which the government refused to do. The case is, at the moment, at the Ombudsman Institution.
26. There is also no legal provision regarding intersex children and decisions being made about their sex and sexual/gender identity, although such surgeries are practiced in BiH. Data about intersex children is not collected or tracked.

HATE CRIME AND HATE SPEECH

Legal framework

27. The BiH state-level Security Ministry and the Organization for Security and Co-operation in Europe (OSCE) called BiH federal units (FBiH, RS and BD) to adopt amendments on their criminal laws and to include hate crime regulation. The RS and BD did so in 2010, i.e. including the grounds of sex/gender, sexual orientation and gender identity in the hate crime definition. FBiH did not adopt amendments on criminal law.
28. Since December 2012, a non-formal coalition⁶ has been advocating for the adoption of hate crime regulation in the Criminal Law of FBiH. Even the amendments that were adopted in July 2013 in the FBiH House of Representatives have not been adopted in the second chamber - the FBiH House of Peoples. Civil society advocacy actions have continued after this failure.
29. Hate speech provision, covering, for example, sexual orientation and gender identity, is not included in the Criminal Laws of FBiH, RS or BD. There has been no attempt to amend the criminal laws to include hate speech provisions.

Implementation

30. Information about hate crime acts on the grounds of gender/sex, sexual orientation and gender identity is not systematically collected or tracked. Nevertheless, the police are working on concrete cases and some of them are in the prosecution phase.
31. A countrywide LGBT community research project⁷ showed that every third LGBT person has had their rights violated, but only every seventh case of violence has been reported to the police. This is a clear sign of mistrust towards law enforcement institutions. Beside rights prosecution, law enforcement institutions need to start investing into trust building, especially towards minority groups (i.e. returnees, LGBT people, Roma).
32. The Police of the Canton Sarajevo have been cooperating since 2012 with civil society organizations that are working on LGBT rights. Educational and informative actions took place and the police committed to continue working on LGBT rights issues in 2014 by including LGBT and hate crime topics in the police permanent education. Other police units did not show special interest in working on these issues.
33. Judges and prosecutors countrywide have no or limited training related to hate crime provisions.
34. The brutal attacks on the LGBT arts festival “Queer Sarajevo Festival” in September 2008 have never been prosecuted despite the fact that eight people were hurt and everything was reported to the police. The case has been in the BiH Constitutional Court since 2011.

⁶ <http://soc.ba/en/hate-crime-to-be-introduced-into-the-criminal-code-of-federation-of-bih/>

⁷ 2013 LGBT community research report: <http://soc.ba/en/numbers-of-life-2/>

FREEDOM OF ASSEMBLY

35. Freedom of assembly is guaranteed by the constitution and laws, but in practice, different minority groups are prevented from using it, including LGBT people. After the attack on the Queer Sarajevo Festival in September 2008 when 8 persons were hurt, nobody was prosecuted. The case was submitted to the BiH Constitutional Court in 2011. The BiH Constitutional Court answered that this case has no priority, indirectly saying that the freedom of assembly for LGBT people, one of the most fundamental human rights, is not a priority for the highest judiciary authority in BiH.
36. On February 1st 2014, the LGBT film festival Merlinka in Sarajevo was attacked by a hooligan group. Even though the event was registered with the police 16 days in advance, the police were 50 minutes late to the festival location. During this attack, two festival speakers were physically hurt and 25 other participants experienced fear. Even though the main human rights institutions and ministries were invited to condemn the attack, only the BiH Human Rights Ombudsman Institution did so. The BiH Ministry for Human Rights and Refugees published their reaction 14 days after the attack.
37. Other public events have been forbidden, like the marking of May 31st – the White Ribbon Day (remembering the killing of non-Serbs in Prijedor).

RECOMMENDATIONS

1. Introduce an obligatory 40% gender quota regulation for state, entity and cantonal governments
2. Amend the BiH Anti-Discrimination Law to include gender identity and sexual orientation (as opposed to the existing grounds: sexual expression and/or orientation)
3. Amend the FBiH Criminal Law to include hate crime and hate speech provisions, including, for example, on the grounds of sex/gender, gender identity and sexual orientation
4. Amend the RS and BD Criminal Law to include hate speech provisions, for example, on the grounds of sex/gender, gender identity and sexual orientation
5. Draft, with active civil society involvement, and adopt an anti-discrimination strategy that defines concrete and realistic measures on how to fight discrimination (including the grounds of sex/gender, sexual orientation and gender identity) and prejudices and promote tolerance and equality on state, entity, cantonal and local levels
6. Draft, with active civil society involvement, and adopt legal provisions (for example, a registered partnership law) that regulates the rights and obligations of same sex unions
7. Draft legal provisions under which medical support to transsexual persons during sex reassignment procedure should be provided; based on those legal provisions, sex reassignment costs should be covered by the official social security system
8. Law enforcement institutions' representatives (police, prosecutors, judges) should be trained on gender equality, anti-discrimination, hate crime and hate speech regulation, focusing on marginalized groups (i.e. women, Roma, returnees, LGBT persons)
9. The judiciary should implement trust-building actions for marginalized groups (i.e. women, Roma, returnees, LGBT persons)