



International  
Support  
Policies  
to  
South-East  
European  
Countries

Lessons  
(Not)  
Learned  
In

## CHAPTER III

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### THE ROLE OF INSTITUTIONS IN PEACE BUILDING

#### 1. International Context

The Dayton Peace Agreement (DPA) is a masterful diplomatic creation precisely because of its imprecision, allowing all sides, including the international community, to claim some kind of victory. However, the document's fundamental contradictions – declaring a unified State of Bosnia-Herzegovina while recognizing two antagonistic Entities as constituent parts of the country; proclaiming democracy while entrenching ethnically based institutional structures and political parties; reaffirming individual rights while legitimizing ethnic majoritarianism – have raised from the outset serious concerns about which vision of political process in B-H would prevail. As a result, two different interpretations of the Dayton Peace Agreement still compete on the ground. One maintains a "positive" approach, trying to make use of DPA provisions as a foundation towards the ultimate goal of re-establishing Bosnia-Herzegovina as a single State (internally modified as laid down in the Constitution) and facilitating the work of common institutions, implementation of international standards of human rights and civil society development. The "negative" option also evokes the DPA in its arguments for a further partition of the country along ethnic lines, strengthening ethnic based institutions in all walks of life and restricting the civic cohesion of the society as a whole.

The legacy of the B-H war is inevitably enshrined in the DPA. High political prices had to be paid for the brand of peace achieved in Dayton. Firstly, the Agreement sent the wrong message to warlords worldwide by implicitly legitimizing the gains of sectarian violence, which often amounted to commission of war crimes and crimes against humanity. Secondly, it marginalizes the United Nations in favor of NATO, as the central international mechanism for conflict resolution. However, it can be argued that regional organizations like NATO, OAU and OAS are, in principle, preferable for handling conflict situations within their regions, rather than the United Nations. But, of all the three major international players during the B-H war (European Union, United Nations and NATO) Bosnia-Herzegovina was only a Member-State of the UN. Given the long tradition and fruitful membership of the Former Yugoslavia in the UN, the world organization was perceived as the most logical instrument to deal with the crisis on behalf of the international community. Other institutions were, for better or for worse, seen as "alien" and more "interventionist" than the UN, at least until it had become clear that the UNPROFOR mission was running into a failure.

At the same time, it should be pointed out that the Dayton Agreement has implicitly put Bosnia-Herzegovina under the "protectorate" of the international community. I am aware that this label is rather controversial, but it sounds more acceptable than "trusteeship". Leaving aside political sensitivities regarding the definition of the Dayton institutional structure in Bosnia-Herzegovina, let me illustrate my argument about the protectorate. First and foremost, the Office of the High Representative (OHR) acts as the steering power on behalf of the international community and is based in Sarajevo. The OHR is instructed "to facilitate the Parties"

own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement". The Constitutional Court of Bosnia-Herzegovina is composed of nine members, three of whom are foreign nationals appointed by the President of the European Court of Human Rights. A foreigner serves as the Governor of the Central Bank appointed by the International Monetary Fund. The Human Rights Ombudsman was appointed by the Organization for Security and Cooperation in Europe (OSCE). The Human Rights Chamber consists of a majority of foreign members (8 out of 14) appointed by the Council of Europe. Finally, the international armed force deployed in Bosnia-Herzegovina is without precedent, as far as manpower, weaponry and its mandate are concerned.

In this light, the respective roles of the United Nations, OSCE, Council of Europe and other international organizations, both in coordination with NATO and alone, in the process of implementation, are much larger and more responsible than the politicians have presented it to the general public in their respective countries. This kind of role and responsibility has never been fully acknowledged, but "nation building", democratic elections, and the rule of law were expected to occur, by some miracle, within months in a country where the blood on the ground is still very fresh, where half of the population does not reside where it did in 1991, where distrust is still running high, and any possible new political thinking is overwhelmed by territorial-ethnic entrenchment. In this context, the international community has been rather reluctant to admit the full scale of its responsibility for appropriate actions towards institution building in B-H. It relied too often on the SFOR presence, minimizing the importance of the civilian component of the Agreement. The process of reconstruction of the democratic government structure, including first and foremost access to justice and law enforcement, was for a long time overshadowed by efforts to tame political and ethnic leaders and persuade them to be more cooperative.

## **2. The Current Political and Institutional Framework**

It is now almost six years since the Dayton Peace Agreement set down the constitutional framework establishing the State of Bosnia-Herzegovina and its two Entities. Progress has been made in taking forward Dayton's provisions, but the majority of constructive steps so far have been taken under pressure from the international community or by directive of the High Representative, who was put into place by the international community to oversee the implementation of the Agreement. Overall, Bosnia-Herzegovina's progress towards a non-discriminatory, multi-ethnic, democratic and prosperous country has been too slow and often disappointing. The three main ethnic communities remain mutually suspicious and essentially distinct, politically and socially. It is unclear as to what extent these arrangements are a true reflection of the wishes of ordinary people. There are indications, from the municipal (April 2000) and parliamentary (November 2000) elections, of movement away from the mono-ethnic hard-line parties and politicians.

Following the latest parliamentary elections (November 2000), Bosnia-Herzegovina has entered a new phase of political identity. Prior to the elections the country was known for its devastating war and ethnic conflicts (1992-1995), and had been labeled as a political bastion of hard-core nationalism. Three nationalist and ethnically defined political parties had been in power since November 1990, all three

survived the war and resumed political power and full control over all institutions, starting afresh from the first post-war elections in September 1996. The control over institutions meant that, in reality, a nationalist hegemony over all political and business structures was imposed in the country. In addition to “government” institutions, i.e. Entity, cantonal and municipal authorities, even companies and, in particular, public corporations were in the hands of one or the other ethnic establishment. In the Republika Srpska it is quite obvious that anything and everything is identified and labeled as Serb or Serbian, from the theatre in Banja Luka to “Srpsko Sarajevo” (the outskirts of Sarajevo which were included in the territory of RS). In the Federation of Bosnia-Herzegovina, the ethnic element and its implementation in everyday life and politics ignored this Entity as a single quasi-state structure and produced a two-track, parallel decision-making process and separate institutions including public corporations (under Croat, or Bosniac control). Where joint institutions existed, as on the level of the State of Bosnia-Herzegovina, they were made inoperative because of ethnic isolation-driven politics and obstruction. It paralyzed those institutions. In everyday life, the jargon was accepted and people in general, as well as foreign officials and the media, referred to these institutions as “Serb, Croat or Muslim (Bosniac) controlled”.

What sort of change can be expected in relaxing the institutional structure in Bosnia-Herzegovina and marginalizing the influence of nationalistic power-structures that, by and large, lost the elections but are still alive and kicking? The change is inevitable but it is not going to come soon and may never come in full. It is fair to say that during the years of nationalist politics and ethnic criteria, which served as the only valid test of acceptance and success in all walks of life, the room for non-nationalist programs and activity was extremely narrow. More to the point, the environment for democratic opposition to nationalism was very hostile, and it is amazing that opposition parties managed politically to survive at all throughout the 90s. This explains the relatively weak democratic coalitions, now in power, not only in Bosnia-Herzegovina. The same is true for Croatia and the FR Yugoslavia at the beginning of the 21<sup>st</sup> Century. Nationalism, like a terminal disease, tries to swallow and control everything. Political parties, religious groups, NGOs that operate under nationalist labels, identify themselves as a “watch dog” of their respective national interests and try to monopolize all available appropriate political and social space. In times of conflict with other ethnic groups or other states, it is “understood” that nationalism equals patriotism, resulting in demonizing institutions and individuals that are not “patriotic”. Democratic opposition parties in the former Yugoslavia were challenged with this distorted mindset, and very few managed to maintain their credibility and reputation intact. A long road lies ahead for many of them to rehabilitate from the autistic times of extreme nationalism.

Understood in this context, one should not expect miracles in Bosnia-Herzegovina in the next 18 months, i.e. before the next election. It is true that “The Alliance” is now in control of legislative bodies in the Parliament Assembly of B-H and in the Parliament of the Federation (FB-H). It is true that new officials have been appointed throughout the country. However, the parallel institutions, mentioned above, and a peculiar “sub-system” under control of nationalist establishments, which existed outside the Dayton institutions, is still showing signs of vitality. The recent attempt to revive the “Republic of Herceg-Bosna” is a good example. Also, it is very uncertain to what extent the new governments will be efficient in preventing their respective ethnic leaderships from retaining their *de facto* control over public corporations (electricity and gas supply, phone services), as well as banks, military and police forces, and secret services.

The goal of democratizing institutions at all levels of government in Bosnia-Herzegovina is to make them accountable within the legal system, or more specifically to make each public official responsible for his or her performance, regardless of the individual's political or ethnic affiliation. The ultimate goal of institution building is to appoint people to certain responsible positions according to civil servant merits, where each policeman, judge or municipal official, diplomat or ministry chief of department will be unaffected by the change of government and cannot make a career as a protégé of his or her political bosses or "national leaders". Complementary to this is the securing of the rule of law and access to justice at all levels of government, so as to secure public trust in State structures and confidence that individual rights and freedoms will be protected without discrimination.

The international community in B-H has a crucial role in supporting this process. As a matter of principle, the international community should concentrate on the process and the framework provided for institution building in the DPA. It appears that, so far, OHR and OSCE have been focusing on individuals, trying to eliminate those who obstructed the process, and promoting those who would move it forward. In spite of these efforts, the full use of Dayton institutional and procedural potentials has not been achieved. It has taken far too long for the international community to realize and to accept that rule of law is the key issue and the most objective foundation for stability in the country. Short term political settlements, removal of non-cooperative politicians and officials, imposition of laws, etc., are necessary measures but far from the only ones that would encourage Bosnia-Herzegovina to overcome its political and constitutional paralysis. It goes without saying that for a country defined as a country of three peoples, the protection of their respective national interests is crucial for maintaining social balance and political stability. But this should be the task of constitutional institutions and their procedures. If this process is left to political parties, or self-styled ethnic leaders, it can be hijacked and manipulated for short-term political purposes.

This idea assumes the question of choice between proportionality and parity in ethnic representation in government institutions. In the context of "constitutionality" of all three peoples, the only alternative for Bosnia-Herzegovina is to try to avoid majoritarian principles and policy at all levels. If the "national quota" is understood to be the foundation of the Constitution of B-H, then all three peoples must be equally represented in the legislative branch of government. We subscribe to the view that "strategic national interests" (meaning the interests of Bosniacs, Croats and Serbs) in Bosnia-Herzegovina must be respected. It is equally important that they are seen to be respected. The executive and judicial branch are much more subject to civil servant merits, while the ethnic background of officials should never take precedence in appointments. However, it is clear that this ideal of civil service criteria (in judiciary, local governments, public administration, police force, etc.) is subject to the parallel process of securing rule of law and due process in administration of justice. It is a long process and no one should be frustrated by its slowness. Countries with far more advanced democratic experience than B-H are still struggling with guaranteeing full professionalism, rule of law and impartiality of state institutions for all under their jurisdiction.

### **3. Rule of Law and its Institutional Aspects**

Few institutions in any country are more important for evaluating the performance of the government than its judicial system. In the process of re-building the trust of the general population and sense of belonging to the country, the rule of law and administration of justice on all levels – are *condition sine qua non* of bio's future. This section will concentrate on the judicial system and its importance for State building as well as for day-to-day functioning of the country.

The most important area in the institution building process is the judicial system and functioning of justice. Its role in providing for fair trials, promotion of justice and public safety is well known. There is also a growing awareness that a judiciary able to resolve cases in a fair and timely manner is an important prerequisite for economic development. In many developing countries, the judiciary is not consistent in its conflict resolution, and carries a large back-log of cases, stifling private sector growth and causing the erosion of individual and property rights. This problem is not unique for B-H, but in a country where the culture of lawlessness saw its opportunity during the war, it is crucial to address this issue from all its aspects. Experience has demonstrated that backlog creates opportunity for corruption and the use of various forms of illegal interventions to speed the process up. Although the situation in the judiciary, namely salaries for judges and the procedures for appointing judges and court officials have improved over the past 2 years, a long period of neglect of the system is still very much a burden. Poor resourcing of the judiciary inevitably led to backlogs. Cases still pile up due to the lack of competent judges and the fact that the time necessary to process a case is prolonged by outdated office equipment, inadequate communications and over-reliance on expert witnesses.

An effective judiciary offers access for the general population and provides predictable results and adequate remedies. Many judiciaries, however, suffer from a dysfunctional administration of justice, lack of transparency, and the acceptance of corruption. The basic elements of an effective judicial system may be absent in many cases, including: relatively predictable outcomes within the courts; accessibility to the courts by the population, regardless of income and educational level; reasonable time for disposition, and adequate court-provided remedies. In such cases, lack of confidence in the administration of justice runs high and is most pronounced among small economic units and low-income families.

The judiciary's inability to satisfy the growing demand for decisions is one of the most challenging and important aspects of judicial reform. Significant backlogs and time delays are common. Politicized appointments, lack of quality control standards for work performed by judges and court personnel, lack of proper requirements for career entry and promotions, and lack of a practical model against which to assess the character and psychological suitability of applicants for the position of judge all add up and contribute to the poor performance of courts.

Two major features of the constitutional position and organizational management of the judicial system of Bosnia-Herzegovina need to be highlighted. One is its century-long European legal tradition and the other is the currently fragmented court structure, which is divided along ethnic and Entity lines.

### **3.1. European Foundations of the Bosnian Legal System**

Bosnia-Herzegovina inherited its legal system from the former SFR of Yugoslavia. Although this system is often characterized as communist, authoritarian,

totalitarian, etc., it needs to be taken into account that legal thought (doctrine), legislation and the judiciary in this region have deep roots in continental European legal history. In the countries and provinces that preceded the “unification of South Slavs” in 1918, there were a couple of far reaching codifications of civil law dating back to the mid-19<sup>th</sup> century. In Slovenia and Croatia (while those countries were part of the Austro-Hungarian Empire), the Austrian *Allgemeine Burgerliches Gesetzbuch* (ABG), from 1811, was in force and applied. Bosnia-Herzegovina was formally bound by the Turkish Civil Code, but the influence of ABG after the Berlin Congress (1878) was very strong in case law, and was explicitly enforced, finally, after the annexation in 1907. Serbia adopted its own Civil Law Code in 1844, which in fact represented a shortened version of ABG. In Montenegro, the 1888 codification of customary law was firmly based and structured according to the *Code Civil Napoleon* and German *Burgerliches Gesetzbuch*. This trend was also followed in criminal law and criminal procedure.

These origins and legal foundations were, in substance, incorporated in the new legal system of the post-Second World War Yugoslavia, except for the rules and principles that were found to be incompatible with the new (communist-socialist) constitutional and economic order. This meant that one-party political rule (that of the Communist Party), social property (with very restricted private ownership) and the protection of the communist-socialist ideology in criminal law had to be adopted as a leading tenet of the new legislation and the new “rule of law”. However, the system did not ignore contemporary tendencies in European Law completely. As an illustration, the Yugoslav Law of Obligations (1982) borrowed heavily from the Swiss Law of Obligations, and in the late 1980’s there were some serious attempts to introduce certain changes in company law and legislation to deal with potential private and foreign investment.

Although the SFRY looked over one shoulder to European legal standards, its successor States have had no experience of a truly democratic legal system or independent judiciary. The discrepancy between relatively modern legislation and its implementation in real life was huge and often arbitrary. The rule of law and the due process of law were hardly compatible with the unquestionable power of the one and only political party, which had a grip on all walks of life. Paradoxically, the judiciary was also very well organized, institutionally well structured and staffed; judges were professionally well trained, highly qualified and well paid.

Bosnia-Herzegovina inherited all this mish-mash of a long, but controversial, judicial tradition. The court system and legislation were not spared the devastation of war in this country, and the new Bosnia-Herzegovina is finding it difficult to free itself of its legacy, but at the same time there is little evidence of enough political will to benefit from its positive aspects either.

### **3.2. The Institutional Structure of the Court System**

The General Framework Agreement for Peace in Bosnia-Herzegovina put one of the main prerogatives of any state - administration of justice - into the hands of the two Entities, leaving B-H without any responsibilities in establishing the judicial system (and therefore law enforcement) at the State level. Consequently, B-H is a State with two, quite separate, legal systems and two judiciaries that rarely meet at the central level, except for very few and extraordinary procedural matters. Not even an Association of Judges (or prosecutors) exists at the State level.

Currently, as far as access to justice for citizens of B-H is concerned, however, it stops at the Entity borders. In the Republika Srpska the Supreme Court acts as the last instance of the regular court procedure, whereas in the FB-H a two-tiered system is applied - the Supreme Court acts as the court of last instance in the Bosniac-majority Cantons only. After the appeals process through the courts, only the appeal process of the Human Rights Commission is left.

These dualities in justice, that of two separate legal systems, are further (and greatly) complicated within the FB-H, by the large amount of autonomy the Cantons possess in formulating their own laws. In the Croat-majority Cantons (Cantons 2, 8, 10 and the "HVO half" of Canton 7), there is no recognition of the authority and jurisdiction of the Federation Supreme Court, meaning that there is no appeal beyond the Cantonal Court. The Cantonal Courts are the courts of last instance. This has obvious consequences if questions of ethnic bias come into play, for example if a Bosniac is convicted of a serious crime in a Croat-majority Canton. If the same defendant was convicted in a Bosniac Canton, then he could appeal that decision to the Federation Supreme Court. Cantonal legislation, making the Supreme Court the final instance in criminal/ human rights cases, must be amended.

The B-H judiciary is in transition from the former SFRY system in which a weak judiciary ceded much control to the police to determine guilt in the field of criminal justice investigation. Following the war, the two separate legal systems in B-H have only nominal central institutions and functions, even if the B-H Constitution allows for the formation of more State court institutions. Within the Federation (FB-H), loopholes in the legislation of the Supreme Court allow Croat-majority Cantons to refuse to recognize the authority and the jurisdiction of the Supreme Court, thus containing all court functions within the jurisdiction of that Canton. Weak roles for Public Prosecutors, plus anomalies in the legislation which make it hard for strong, Federation-level judges to try cross-cantonal crimes, leave Cantonal Courts open to political influence from ruling parties.

Judges themselves are not invulnerable to abusing their positions for personal gain, or from political and ethnic prejudices. Irresponsible media reporting, or reporting which tends to "Hollywood-ize" the cult of personality of either judicial figures or infamous criminals, interferes with judicial independence before cases get to court.

Without an independent judiciary, Bosnia-Herzegovina cannot develop a resilient democratic society where the common citizen can rely on the laws to protect him from predators in and out of government. And without that resilience, the country has no chance of prospering or developing into a modern European State. The ghettoization of politics is robbing Bosnians of a future in so many sectors – but Justice is one of the most important of all.

### **3.3. Transition and Some Common Problems in the Judiciary**

The latter feature has been very much reinforced by nationalist police forces in the country since the fall of communism. The European tradition is still reflected in, by and large, highly educated judges, a well structured court system (in the former Yugoslavia), elaborate legislation on court procedures and the organization of the judiciary, popular respect for the judiciary in general, etc. In spite of its European roots, and declaratory acceptance of European legal standards, successor States of the SFRY have had no experience of a truly democratic legal system or independent



judiciary. The discrepancy between relatively modern legislation and its implementation in real life has been huge and often arbitrary. The rule of law and the due process of law were hardly compatible with the unquestionable power of the sole political party, which had a firm grip on all walks of life. The communist system in Bosnia-Herzegovina was replaced by an oversimplified glorification of national (ethnic) interests as the paramount criterion for any public office, including the judiciary. In its crude interpretation it made many judges face the wall and declare their ethnic background, only to be used for political manipulation by their respective national/political leadership. The war in B-H sharpened this trend to the extreme, ethnically cleansing all State institutions and public offices. It goes without saying that the "purge" resulted in an unbalance between a number of suddenly created vacancies and potential jobholders in the judiciary in particular. It is open to speculation to what extent this affected the quality of the court system in the country as a whole. However, it can be suggested that it affected the independence of judges to a great deal. Most of the experienced judges have felt threatened by the new criteria that had little to do with their professional experience and performance in court. Newly appointed judges, after having gone through an "instant promotion system", could feel grateful to the new political/national masters, but may experience professional deficiencies in their work. Both groups are exposed to the risk of "institutionalized" political corruption.

Furthermore, if we look into the institutional structure of the judiciary, it appears that the procedure of selection and appointment of judges is only part of the problem. Providing financial resources for the functioning of the judiciary is another key factor in determining the level of independence of judges. In the former Yugoslavia, judges were very well paid. The budget for court functioning and maintenance of administration, office facilities, equipment, etc., was provided from the resources of each Republic (member State of the Federation). The budget was fixed and adopted by the Republic parliament. The same parliament would appoint judges for all courts within a Republic. Municipal authorities had neither responsibility nor any influence upon appointing judges of municipal courts or the running of the courts.

The challenge here concerns not only the implementation of the rule of law but also the achievement of intermediary and instrumental objectives, such as the transformation of institutions from their role of one political party instruments to democratic rule. One salient aspect of this challenge is the replacement – in the judicial branch – of the old ruling class, with its links to the totalitarian system/supreme national leader, by a new class eager to introduce novel values. Replacing the old order has proved extremely difficult and complex since the recruitment of new judicial personnel calls for an inspection of their special professional qualifications, while at the same time their recruitment must be carried out in full compliance with the need to keep the judiciary independent and subordinated exclusively to the law.

These types of problems are further aggravated by the reaction of groups and interests predisposed to delay the transition process as a whole in an attempt to protect their often-concealed economic and political interests.

The existence of basic principles of organization, which establish the professional nature of the job and strictly lay down the incompatibilities of the holders of judicial offices and their exclusive subordination to the law, limits the discretionary power of political authorities in this field. The very nature of these principles has at times suggested removing jurisdiction from bodies that are the direct expression of political power and assigning the task of supervision to neutral bodies that are autonomous and independent from other powers (note the practice of judicial councils in Romania, Bulgaria and Croatia). Overall, such judicial independence seems

desirable, notwithstanding the risk that the judicial branch could become a separate body from the state. This brings up the obvious question: *Quis custodiet ipsos custodes?* This is a question that constantly arises in West European countries which have, to a certain extent, adopted the model of so-called self-management of the judiciary.

### 3.4. Risks of Institutionalized Corruption

Low salaries are often blamed for corruption in judiciary. Not only have the stipends given to judges and their staff in many countries been historically low, they have also often been devalued by high inflation rates. Today there is a greater consciousness that judicial salaries need to be higher, and as a result many judges and staff have received raises. Salaries that would make possible a reasonable lifestyle may remove the temptation of corruption.

Some countries are testing the idea of tying promotions and raises to performance. Traditionally, in many countries, tenured judges have had no monetary incentives to improve performance. This innovation, however, has the drawback of making judges more vulnerable to outside influences in their decision-making. The question of who decides whether a judge receives a raise, and under what circumstances they do so, should be carefully considered if this measure is adopted.

Related to the question of abuse is the question of private gain: which types of private gain are considered corrupt and which are not? Clearly, if a plaintiff slips money to a judicial staff member to expedite certain procedure, it is a matter of private gain. But what if a judge succumbs to political pressure from above, rather than to a bribe, in deciding for a certain party? Are decisions by judges who will feel their careers threatened if they make a certain ruling construed as corrupt? By this definition, most of Latin America's judges who worked under military rule, many of whom are still on the bench, were corrupt. Eighty percent of the judges working today in Argentina also worked under the military regime. Pressure from above was also rampant in Soviet dominated countries, where it was common for judges to receive phone calls telling them how to rule – a practice called “telephone justice”. Many of these judges have had to adapt to working within a more independent judiciary. Furthermore, is an American judge when she decides a case on policy-making grounds rather than by following precedent corrupt? And what of judges who behave properly in court, but lead immoral personal lives?

There is a difference between judges bowing to political pressure from above, or “political corruption”, and judges who, at their own initiative, bend the rules to secure material private gain, or “personal corruption”. Pressure from above is a different kind of phenomenon, more intimately linked to structural issues of judicial independence than is personal corruption, and therefore requires different remedies. Nevertheless, personal and political judicial corruption can be closely related, and the lines between them are not always clear. Although it is possible to imagine a judicial system rife with political corruption but free from personal corruption, many of the tactics for fighting personal corruption will in fact encumber political corruption as well. Finally, judges who, in their private time, engage in questionable personal behavior may undermine the prestige of judiciary. There is a general understanding that there is a kind of

behavior that might not be illegal or unacceptable for other people, including those holding other public offices, but which can be unethical for a judge.

Poorly trained judges in an overburdened legal system are also susceptible to corrupting influences, and therefore create an environment where the rule of law cannot be guaranteed. The use of *ex parte* communication is one aspect of legal practice that especially contributes to this perception, and there are accusations that cases are decided in *ex parte* meetings. All these problems also add cost and risk to business transactions and thus reduce the potential size of key markets. At the same time, access to justice is blocked for those that cannot afford the expense of waiting through the court delays.

### **3.5. Culture of Justice**

Clearly, Bosnia-Herzegovina is not an exception and hardly makes a special case among countries in transition. As in many other countries, there is a need for change in legal culture, as well as a systematic change in the delivery of justice. Although the entire reform process may take generations to run its course, the effects of judicial reform will be felt by everyone – the private sector, the public, the legal community, and members of the judiciary. Ultimately, the private sector and the public should be able to rely on an efficient and equitable system that is respected and valued.

Corruption is an intrinsic part of the way the state operates in many countries, and it is impossible to remodel the state while it persists. Fighting corruption is therefore central to the process of stability and institution building, while failure to confront it will obstruct the reform initiatives and prolong the high social and economic costs it brings.

Corruption can be found across all regions and cultures. It can be said that corruption is the product of weak institutions and human nature. It affects the social responsibility and integrity of individuals as well as institutions, both of the public and private sectors. It is used to circumvent legal systems and is prevalent in areas such as money laundering and organized crime. Corruption is likely to be costly in terms of economic efficiency, political legitimacy and basic fairness. Evidence shows that corruption lowers investor confidence and retards economic growth. Other effects include the misallocation of human resources, reduced effectiveness of the flow of aid, loss of tax revenues, and the patronage and nepotism that lead to a lower quality of public services.

One of the biggest challenges to strengthening a public institution lies in changing the prevailing culture and value system of the organization. Where roles and relationships prevail over rules and regulations, it is essential to change the culture. In many countries, informal relationships can be more important than formal rules and regulations. Where this is true, there is a need to strengthen institutions to shift the emphasis from corrupt informal practices to observance of formal rules. The sources of informality must be addressed and the causes of corruption identified so that measures to prevent and control corrupt behavior may be taken. Identifying the sources or causes of corruption allows countries to develop a prevention plan, which should include changing the organizational features that allow corruption to occur. A corruption prevention plan should address the issues of administrative accountability, efficiency and effectiveness, which should in turn improve staff attitudes and raise overall integrity and performance of an institution by minimizing the opportunities for fraud and corruption.

The judiciary is supposed to provide an essential check on other public institutions. A fair and efficient judiciary is the key to an anticorruption plan, and corruption in the judiciary should therefore be dealt with from the start.

All parties involved – the executive, the judiciary and the legal profession – should recognize that the problem is a genuine one. As is often the case, recognition that a problem exists is, in itself, a major step towards solving it. In particular, the executive branch leading politicians and political establishment should recognize the root of the problem, namely, an assault upon the judiciary, which has been part of the political culture in the country. The executive branch should recognize the independent, constitutional position of the judiciary and have a proper understanding of what this involves.

The executive branch should conduct its business so as not to interfere with the independence of the judiciary in any way. Also, it should be careful to perform its activities in such a way as not to be seen to be interfering in the independence of the judiciary. Perception of reality is as important as reality in a matter of this kind. The judicial branch should act, and should be seen to act, with complete independence from the executive branch.

Senior members of the judiciary should be so astute as to protect the more junior judges from anything that is, or appears to be, interference from the executive branch in their independence and integrity. The choice of judges for high profile cases should be carefully considered.

#### **4. The Present Constitutional Structure of B-H**

While the DPA supports political re-integration into a common State, it also enshrines principles of ethnic separation throughout local institutions. This is not providing an effective State and efficient administration that could guarantee the rule of law and human rights and freedoms to all people regardless of their ethnic background. The DPA left the B-H State without a supreme court and the power to establish a fully structured judicial system. Debate on conditions for membership in the Council of Europe has failed to open the way for the revision of constitutional structures, and both local and international decision makers have been reluctant to countenance amendment to Annex 4 of the DPA. An alternative must be found if European standards of law and politics, as well as rights and freedoms from the ECHR, are to be introduced into B-H society. It is difficult to fathom why the international community has been so insistent on its claim that the DPA cannot be revised and eventually changed. For years now, it has discouraged and tried to prevent even academic debate on changing the Dayton Agreement.

However, there is a case for opening the process of amending Annex 4, i.e. the Constitution of Bosnia-Herzegovina. The DPA falls into the international law category of peace treaties. By definition, a peace treaty cannot be revised or amended, because it encapsulates a moment in history and is based on the facts that belong to the past. But, no other peace treaty in recent history granted a constitution to a newborn or re-affirmed State after a conflict. The Peace Treaty of Versailles left it to the countries (The Kingdom of SCS, Hungary, Austria, etc.) that emerged from the Great War to adopt their own constitutions according to established procedures at the time. Bosnia-Herzegovina was treated as an exception to this practice and was given a

Constitution, which has never been reviewed and formally approved by any domestic body.

There is nothing that would, in principle, speak against initiating a debate on changing the Constitution of B-H. Its status as an annex to the General Agreement would not revise the DPA as a whole, but would deal with constitutional matters only. Furthermore, Annex 4 explicitly provides for amending the Constitution and sets out the appropriate procedure for it (Article X). At this stage of the implementation process, one can argue that the present administrative structure of the country is unsustainable in the long run. The Entities have not contributed, and cannot contribute, within the present institutional settlement, to the consolidation of the B-H State. And, in the same vein, central institutions cannot exert State prerogatives throughout the country because they lack jurisdiction over areas that are crucial for any statehood. Specifically, defense and military matters, administration of justice, the police force, and custom and tax revenues are all placed into the hands of the two Entities.

The debate about the future constitutional settlement for B-H will eventually be opened, but it should happen sooner rather than later. The experience of trying to resolve the knot of three peoples being squeezed into two Entities has been unsatisfactory. Majoritarian and discriminatory policies are still synonymous with Republika Srpska, as well as with the Federation (FB-H) Cantons with a Croat or a Bosniac majority. The Entity institutions have failed to provide for the return of refugees and displaced people, property protection and repossession, and most importantly, they have failed to contribute to the civic cohesion and reintegration of Bosnia-Herzegovina and its population. In the context of the Constitution revision debate, there are only two options: Bosnia-Herzegovina will be a country with three entities or with no entities at all. If the present definition of B-H is to be maintained, i.e. B-H as a union of Bosniacs, Croats and Serbs, then three entities are the only logical outcome. If the country opts for the future of an ethnically integrated society, then there is no place for entities whatsoever. The latter solution would imply a central government and considerable municipal self-rule. This is the basic blueprint for the debate about the future structure of B-H and its Constitution. Of course, both alternatives should be considered in the context of strict obligations in respecting international standards of human rights and the Council of Europe principles of good governance.

## **5. The Future Involvement of Outside Powers**

Peace building in B-H attracts international scrutiny and has security relevance throughout the region. The role of outside powers has been central, from stopping of war to State building. Rethinking their role is inevitable in the near future. Programs must be coherent and transparent, and require a better articulation of 'rules of engagement'. The level of international involvement is now such that domestic political structures will feel free of any responsibility for good governance. Only recently have some members of the international community begun to think about the possibility of B-H people taking 'ownership' of the country's peace and political process. OHR is the principal agency for the civilian implementation of the DPA. However, it has been handicapped by the absence of an enforcement agency and has had to rely on goodwill to achieve implementation. The goodwill of ethnically-based political parties has been maintained by the presence of international aid. There is a real possibility

that as aid decreases, co-operation with structural reform efforts will wane, and with the collapse of the donor-dependant economy the post-Dayton peace will collapse. This invites new thinking and fresh approaches by outside powers towards peace building and the reconstruction process in Bosnia-Herzegovina.

Bosnia-Herzegovina is a test case for all players in the post-conflict era to apply their political skills and diplomacy, and to achieve long-term results. The role of institutions is crucial in influencing the constituencies in the country and moving it towards one solution or the other. The main challenge for this effort lies in the interplay of international and domestic factors in determining the future of the region. Common institutions of Bosnia-Herzegovina are dependent on the international community as a whole and the day-to-day work of the Office of the High Representative in particular. The more successful common institutions appear to be, the less space is left for disintegrative tendencies within the local political establishment of all parties. Re-integration of B-H thus could be supported and influenced in many ways from 'abroad'. But all such initiatives must have credible local partners in political parties, government institutions, civil society groups, and non-governmental organizations in order to guarantee the domestic "ownership" of the peace process.

One of the most characteristic features of the international agencies present in the country was keeping local professionals and experts at arms length. More often than not, well-educated but poorly briefed and inexperienced international officials would scorn the "locals" and refuse to involve them or equal colleagues as members of teams or working groups on relevant issues. This resulted in many cases where lecturing and arrogance prevailed over partnership and collegiality. With the notable exceptions of the Ombudsmen Office of the Federation and a few international NGO local offices, this policy put the international community at risk of undermining its own credibility and high esteem that initially held in the region.

## **6. Bridging the Obstacles in the Way of Transition**

The ultimate importance of the rule of law principle and its institutions does not mean that the judiciary can be seen as an ivory tower. It should be seen and protected in the context of an overall reconstruction and development of the country. The following are of particular significance for understanding the functioning of institutions in Bosnia-Herzegovina.

6.1. *The political system:* has been characterized by inertia and constant tension among three leading ethnic/political establishments. This has made the entire institutional structure inefficient and often locked in a tug-of-war on "protecting national interests". Consequently, the decision-making process has been blocked, leading to a strong externally set agenda driven by the need to implement Dayton, not just for the backers of Dayton, but also for the people of B-H who need peace and confidence before they can begin to think of development.

6.2. *The legal system:* is too complicated and inflexible, with legislation divided among too many levels of power in the country. The laws of the country are often inconsistent and contradict each other. It undermines the principle of equality before

the law for people and juridical persons throughout the country, and makes them insecure in their personal and professional activities.

6.3. *The court system and the web of public administration organs:* are daunting and oppressive to all those who come in contact with “the State” at any level. Political parties in power are still exercising crucial influence on the financing of the judiciary and public administration bodies and appointing of public officials. The concept of a “civil servant” or “public service” is virtually unknown in Bosnia.

6.4. *The process of return of refugees and displaced people:* has been a source of frustration since the Dayton Agreement was signed. Slow and inconsistent implementation of Annex 7 encourages politics of ethnic exclusivity and isolation on the one hand and compromises the role of the international community on the other. Yet in the context of development, the demographic change that occurred during the war turned certain life-style traditions upside down, and while not condoning violent upheaval, it is now time to look for positive ways out of this situation.

6.5. *A National Blueprint:* Bosnia-Herzegovina has found it difficult to agree on any common national interest that would serve as a blueprint for development. The failure to define a vision and transform it into a common policy paper on at least crucial areas for the future of the country is often concealed behind rhetoric about “European integration and accepting European standards”.

6.6. These obstacles can be understood in two possible ways. They can paralyze any discussion and activity leading to the sustainable development of the country. At the same time, they can be taken as an incentive and a call for a vigorous development process. Development projects, provided they are selected carefully, implemented successfully and made seen to be workable, can have a soothing effect and recovering influence on the failures of the current socio-political structures in B-H. All this has to be supported and guaranteed by an independent judiciary, as well as a broader institutional structure for the application of relevant laws and regulations.