

### Institutionalizing ethnicity in the Western Balkans: managing change in deeply divided societies

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**Institutionalizing Ethnicity  
in the Western Balkans  
Managing Change  
in Deeply Divided Societies**

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# **Institutionalizing Ethnicity in the Western Balkans**

## *Managing Change in Deeply Divided Societies*

Florian BIEBER\*

### **Executive Summary**

Ethnic politics continue to dominate political discourse and institutions in the post-conflict regions of former Yugoslavia (Bosnia-Herzegovina, Kosovo, Macedonia). This has rendered these regions dependent on external intervention and blocked or delayed political and economic development, including the process of integration into European and Euroatlantic structures. Some of the post-conflict arrangements have rightfully come under criticism—both from within and outside the region—as obstacles in the normalization of ethnic relations. While the status quo needs revision and a different approach to institutional design is required, this paper argues against abandoning group-based institutions altogether. Instead, it argues for a more dynamic and process-oriented approach to accommodate ever-changing interethnic relations.

### **1. Introduction**

More than a decade has passed since the wars in former Yugoslavia began. Nearly from the first day of the conflict, international mediators began proposing peace plans seeking to end the war and establish a post-conflict system of government, which would prevent the reoccurrence of the conflict. There has since been considerable experience with the post-conflict arrangements. The key focus of these arrangements has been the areas most affected by the wars and conflicts. The Dayton Peace Accords for Bosnia-Herzegovina have been in place since early 1996, the Constitutional Framework for Kosovo<sup>1</sup> and the Ohrid Framework Agreement for Macedonia since 2001. Beyond these three cases, Croatia concluded the temporary Erdut agreement in 1995 with Yugoslavia to allow for the re-integration of Eastern Slavonia, while Serbia and Montenegro have redefined their relations through the internationally brokered

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<sup>1</sup> The UN Security Council Resolution 1244 from 1999 provides for the international administration in post-war Kosovo, but does not spell out the details of governance in the region.



Belgrade Agreement of March 2002. In addition Croatia and Serbia have sought to improve their treatment of minorities since then end of the authoritarian Tudjman and Milošević regimes. Both the temporary measures of Croatia and the minority-related policies of Serbia and Croatia shall not be our prime focus of attention, as they lack one or several key features of the arrangements in Bosnia-Herzegovina, Kosovo and Macedonia: (a) substantial international involvement; (b) a medium- or long-term institutional arrangement, and (c) a post-conflict setting.

The record of the post-conflict institutional (re-) design in Macedonia, Kosovo and Bosnia-Herzegovina today is mixed at best. While peace is now the norm in former Yugoslavia, the countries and regions which emerged are marred by weak institutions which are often unable to undertake the reforms necessary to bring the region closer to the European Union. Furthermore, ethnicity continues to be the primary political identity in most former conflict regions. Especially in the more diverse parts of former Yugoslavia, such as Bosnia-Herzegovina or Macedonia, ethnic affiliation often matters more than economic or social platforms. More troubling than the prevalence of ethnic identity is the conflictual relationship between the different identities, which often appears to preclude constructive engagement and overcome the politics of the zero-sum-game.

One of the features of the post-conflict agreements in Bosnia-Herzegovina, Kosovo and Macedonia is the institutionalization of ethnicity. This expression denotes the representation of ethnic groups *as ethnic groups* in state institutions, including legislature, executive, judiciary and public administration. This representation might be cascading to lower levels of governance, as in Bosnia-Herzegovina, or might be limited to the state level, as in Macedonia. Alternatively, a term frequently used to describe the system of governance in the three cases is 'power-sharing'. While Bosnia-Herzegovina, its entities, Kosovo and Macedonia possess features of power-sharing systems, all three lack crucial features. Generally speaking, the majority of power-sharing systems follow the consociational approach proposed by Arend Lijphart, which primarily identifies four mechanisms (grand coalition, minority vetoes, proportional representation, segmental autonomy). A smaller number takes the integrative approach<sup>2</sup> of Donald Horowitz as foundation for power sharing, which

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<sup>2</sup> This approach can be best described as a strategy, as it is less focused on particular institutional arrangement, as consociationalisms, but rather at integrative policies. Unlike consociationalism, it is also primarily concerned with conflict-reduction.

focuses on incentives for cross-ethnic cooperation (Sisk 1996: 34-45). Clearly, all three cases have few, if any of the features of the latter system. Even the consociational approach is only partly an adequate description of the post-conflict arrangement in the region. Macedonia lacks, for example, segmental autonomy for the communities, be it territorial or personal. While the enhanced local self-government might evolve to a de-facto territorial autonomy, it lacks formal structure and the competences delegated to municipalities are less than in established autonomies. Furthermore, there is not requirement for grand coalition and whether the emerging tradition of grand coalition since the country's independence in 1992 is sufficient can be disputed. In Kosovo, again, formal territorial autonomy is absent, as is a firm minority veto. In Bosnia-Herzegovina finally, at first all criteria are fulfilled, but with the constitutional amendments to the two entities in 2002, these no longer constitute (formally) territorial autonomies of the three communities.<sup>3</sup> In other areas Bosnia-Herzegovina would qualify as a consociation plus<sup>4</sup>: the veto rights are excessively rigid, group representation permeates to all levels of parliament, government and public administration. A key aspect of governance in both Bosnia-Herzegovina and Kosovo is the substantial role of international actors, being able to override decisions of institutions and intervene in the decision-making processes themselves.

This cursory glance suggests that all three cases display key elements of consociational arrangements, but differ in a number of aspects from conventional understanding of power-sharing. This is not to argue that the analytical lens of power-sharing is not useful in understanding governance in Bosnia-Herzegovina, Macedonia or Kosovo.<sup>5</sup> Institutionalized ethnicity is conceptually broader and allows for the inclusion of cases where power-sharing takes place only to some degree. Furthermore, it places the emphasis on institutional representation of ethnicity, where governments exercise only limited powers—be it due to weak states or strong international intervention—and little of it is shared, but mostly divided.

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<sup>3</sup> Similarly some of the cantons have been losing the exclusivity to one group due to the constitutional changes and refugee returns.

<sup>4</sup> This term (together with complex consociation) has been introduced by Brendan O'Leary to denote consociational arrangements which include additional features (self-determination dispute-resolution, peace agreement, external intervention and other distinct ethnic governance strategies such as integration, territorial autonomy or arbitration) to Lijphart's four basic aspects (O'Leary 2004).

<sup>5</sup> Indeed, the following discussion will refer to definitions and experiences in power-sharing beyond the region.

## 2. The Legacy and Features of Institutionalized Ethnicity

### *a) Historical Legacies*

Today, ethnic belonging matters when applying for civil service, running for parliament or joining government in Kosovo, Macedonia and Bosnia-Herzegovina. Both public perception and the legal framework elevate national identity to one of the primary, if not the only, criteria in political life.

The origins of institutionalizing the primacy of national identity has two main sources:

1. The pre-war Yugoslav legacy
2. The conflict and war

While often neglected, the late Yugoslav system contained elaborate mechanisms for minority protection and ethnic representation (Pupavac 2000: 3-8). A key difference, however, was the governance by a unified political elite, rather than by antagonistic ethnically fragmented elites (Andjelić 2003: 39-40). As such, the Yugoslav system and its permutation in Bosnia-Herzegovina were thus not consociational arrangements based on elite compromise, but rather systems of control, where Communist officials of the different nations were primarily charged with monopolizing the only legitimate expression of national identity and opposing real and supposed nationalism within the own community.<sup>6</sup> In Macedonia and Kosovo, guaranteed group representation had not been a prominent feature of the Communist system, as they were not defined in the same multinational terms as Bosnia-Herzegovina. In fact, dominance by one nation has been a strong feature of institutional representation during socialism in Macedonia and Kosovo. As such, the institutionalization of ethnicity might appear to be a 'hangover' from Communist Yugoslavia (USIP 2000: 6), but fulfill different functions in post-conflict Kosovo, Bosnia-Herzegovina and Macedonia

The second source of institutionalized ethnicity has been the conflicts themselves and attempts at resolving them. Both the demands voiced by parties during the conflict, in particular in Macedonia and Bosnia-Herzegovina gave rise to increased group-based representation. In Bosnia-Herzegovina, the demands focused largely on the territorialization of ethnicity, which is why the structure of power-sharing institutions

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<sup>6</sup> As Brendan O'Leary points out, there are also authoritarian consociations. Whether this category applies to Communist-era Bosnia-Herzegovina is doubtful, as it the republic was governed essentially by the same elite who 'happened' to belong to different ethnic groups.

received considerably less attention than the drawing of boundaries and the delegation of power to lower levels and more homogenous levels of governance. In the case of Kosovo, the focus of the conflict was also on territory, with the main actor Serbia not formally partaking in the institutional set-up of the region. As a result, the post-war institutionalization of ethnicity focused less on group inclusion as on the creation of institutional legitimacy. In Macedonia, although a territorialized conflict, the main demands were over inclusion at the state level, reflected in the Ohrid Framework Agreement. Thus both the demands of the parties to the conflict and a clearly identifiable learning curve of international organizations involved in the brokering of peace agreements impacted the post-conflict institutional arrangements. While in Bosnia-Herzegovina ethnicity has been largely territorialized (Bieber 2002: 236-7), the Ohrid Framework Agreement in Macedonia rejects territorial solutions and seeks to maintain some of the civic features of the state (Daftary 2001: 304-305).

Viewing institutionalized ethnicity solely as a Communist legacy or a consequence of the violent conflict itself would suggest the abandonment of group-based political representation. The larger context of institutional design in deeply divided societies, however, suggests otherwise. In a large number of countries around the world, which have neither experienced conflict, nor had a legacy of authoritarian group-based policies, ethnicity is institutionalized and group-based institutions function with varying degrees of success.

#### *b) Features of Institutionalized Ethnicity*

It would extend beyond the scope of this working paper to detail the institutional mechanisms of group representation, but a short overview will highlighted key aspects and problems.<sup>7</sup>

All three cases have included groups at the level of *government*. In Bosnia-Herzegovina and in Kosovo this is a constitutional requirement, while in Macedonia this has been a 'tradition' since the country's independence. The Bosnian government at state-level is based on strict parity of the three nations, while in the entities and in Kosovo, governments have strict numerical requirements for the inclusion of all groups. Participation in government is a key instrument at overcoming group exclusion and often the only mechanism which can help give governments in deeply

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<sup>7</sup> For a schematic overview of the different institutional arrangements, see Annex and Bieber 2004.

divided societies the necessary legitimacy in the eyes of all major communities. A problem of the arrangement in Kosovo and Bosnia-Herzegovina is its rigid nature, which limits the possibilities of bargaining and coalition building. A general problem is that government fail to work as cohesive cabinets, but rather either divide power without sufficient cross-group coordination and cooperation between ministers or exclude less significant groups from substantial decision-making through parallel institutions or other tools.

*Parliamentary* inclusion also varies throughout the cases. All three use a proportional electoral system, similar to most other countries in the region. Macedonia has no specific mechanism to ensure the inclusion of non-dominant groups. The reform of local self-government and the redistricting is, however, an indirect tool to at least secure adequate representation of the Albanian community. In Kosovo reserved seats for Serbs and other small communities ensured additional seats to the ones all inhabitants could vote for, resulting in a strong over-representation of non-dominant groups. In Bosnia-Herzegovina, the principal instrument of group inclusion are two-chamber parliaments, where the upper chambers at state and entity levels have numerically defined numbers of seats reserved for all groups<sup>8</sup>: parity at the state-level and based on the 1991 population distribution in the entities. The lower houses of parliament have minimum seats requirements in the entities and an entity-specific seat division at the state level. The main area of controversy here has emerged in Kosovo with the overrepresentation of non-dominant communities, especially Serb, deputies due to the additional set-aside seats (Malazogu, Dugolli 2003: 15-17). While generally set-aside seats have been less controversial than other aspects of institutionalized ethnicity, the mechanisms used to ensure representation of all main groups are often rather crude and emphasize ethnic belonging over alternative approaches to ensure the representation of all main groups (Harris, Reilly 1998: 2000).

All three cases have some type of *veto mechanism* that ensures that non-dominant groups cannot be outvoted. In Macedonia, this mechanism is limited to particular key areas, such as major changes to the nature of the state (constitution, territorial organization) and issues which affect non-dominant groups (education). A similar list exists in Bosnia-Herzegovina at the entity level; however, the veto-wielding

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<sup>8</sup> This always includes all constituent nations (Bosniacs, Serbs and Croats) and in some cases also the less well-defined group of 'others'.

communities themselves can extend it. At the state level any group can veto any decision without a specific limitation—probably the most problematic employment of veto rights. In Kosovo, the smaller communities essentially only have the right to challenge and delay legislation without being able to explicitly veto any decision. Veto rights are possibly the most controversial mechanism of institutionalized ethnicity, as it has the largest impact on decision-making processes and is—especially in Bosnia-Herzegovina—widely viewed as being responsible for the ungovernability of the region. At the same time, some veto rights are necessary in deeply divided societies to prevent permanent outvoting of one or several groups. Specific veto rights, as in Macedonia, and constructive mediation processes after a veto has been invoked is one of the directions in which the negative effects of vetoes can be minimized, as will be discussed later on.

If the representation of all groups at the governmental and parliamentary level do not translate into *equitable representation* in the public administration, as was the case in Macedonia during the 1990s, the state might still not receive the necessary support from all key groups and be discriminatory at the level where most citizens are effected. Thus, emphasis has been put in the arrangements of establishing a more representative public administration. A particular focus, both in Bosnia-Herzegovina and in Macedonia has been the police force. The creation of a representative civil service has been more challenging in all the cases than creating representative governments or parliaments, as hiring processes are considerably slower than elections or government formation. Additionally, the public administrations of the states and regions emerging from the former Yugoslavia are marred by the legacy of a bloated bureaucracy which required a reduction of numbers, often apparently in conflict with creating a more representative civil service, i.e. hiring new civil servants from underrepresented groups. While reserved seats and other mechanism to incorporate groups in parliament have to be reconciled with core democratic principles, the equitable representation in the public administration has to be made compatible with its professionalization, in particularly in the judiciary (Pajić 2001: 30-43)

Finally, *territorial autonomy* has been one key demand of nationalist forces in the region, but has been met with increasing reluctance by international mediators and states. While Bosnia-Herzegovina was divided into two entities (and again into ten cantons in one of the entities), both Kosovo and Macedonia lack formal territorial

autonomy.<sup>9</sup> Instead, the reform and empowerment of local self-government has been the preferred strategy in recent years. One of the principles of the Ohrid Framework Agreement thus suggests that “[t]here are no territorial solutions to ethnic issues” (Framework Agreement: Art. 1.2). Obviously does not reflect reality, considering (successful) territorial autonomies in Belgium, Italy (South Tyrol) and Canada, just to name a few examples, but rather suggests a reluctance to consider such an approach in former Yugoslavia. Both the negative experience of Bosnia-Herzegovina’s entities and the fear of secession and homogenization within territorial autonomies through massive human violations (i.e. ‘ethnic cleansing’) have taken this approach off the agenda. Even the Bosnian entities (and cantons in the Federation) have been losing some their powers and are now considerably less mono- or bi-national in their structure of governance than they were a few years ago.

This brief overview demonstrates that institutionalized ethnicity in Bosnia-Herzegovina, Kosovo and Macedonia encompasses a multitude of institutional and constitutional arrangements that vary greatly in their performance and the problems they cause. The challenges emanating from these institutions, as well as the limited economic progress of the region have given rise to a number of critiques of the current policies and arrangements, as shall be discussed in the subsequent chapter.

### **3. Alternatives and Challenges to the Status Quo**

The current arrangements in Bosnia-Herzegovina, Kosovo and Macedonia have been under criticism from various sides. A recurrent feature of criticism of existing post-conflict arrangements has been the discrepancy between international and local evaluations. (Belloni 2003). This is not surprising considering that international and domestic critique follow different agendas, i.e. elections in the region or the extension of the international security presence.

Criticism of existing arrangements and proposed alternatives can be distinguished on three levels: conceptual, procedural, and institutional.

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<sup>9</sup> In Kosovo the Serb enclaves and the Northern part of the region under Serb control constitute de-facto autonomies.

*a) Conceptual and Procedural Critique*

*Conceptual* criticism focuses particular on the weight given to ethnicity in the existing arrangements. In particular, some international think tanks and analysts, such as the European Stability Initiative, have placed emphasis on economic weakness of the post-conflict societies in former Yugoslavia. Consequently, the demand has been a stronger focus of international actors on the economic viability of the post-conflict regions, while ethnic issues are seen as being less significant and mostly contingent on social and economic development (ESI 2002). Other studies of post-war South-eastern Europe have emphasised other factors, such as the pervasive nature of organized crime in the region (Mappes-Niedek 2003). These conceptual approaches have largely been reactions to the dominance of an ethnicity-centered discourse, which reduced both the causes to conflict and the post-conflict reality to ethnic identity. While ethnicity is certainly neither a wholly independent variable, which invariably appears by itself and ceases to exist autonomously, in conflicts nor in the post-war periods, nevertheless ethnic belonging has mattered and continues to matter. While ethnopolitical mobilization has to be also met with strategies addressing other dimensions of development, identity has to be taken seriously.

The *procedural* criticism of the status quo in post-conflict settings focuses particularly on the role of the international community in post-war reconstruction. While the security function and the contribution to the physical reconstruction of the region has come under less substantial criticism, the civilian role has been the key focus. In the domestic discourse of the region we can detect the view that the international intervention has been legitimizing ethnic divisions and cooperating too willingly with nationalist parties. This view, largely advocated by liberal intellectuals, supports a stronger role in 'engineering' society to allow for the development of a civic-oriented political system. From the other side, nationalist forces have criticized international intervention for favoring allegedly moderate forces and extending their intervention beyond the original ambitions. The domestic debates are largely mirrored, although argued differently, in international policy debates. Some observers have criticized the extensive international intervention on a number of grounds. While some have argued that the intervention is essentially undemocratic (Chandler 1999), others have suggested that the undemocratic nature is less problematic than the long-term effect in undermining democratization of the region and creating dependencies (Knaus, Martin



2003: 60-74). The policy debate is shaped by the alternative view, which calls for more forceful intervention and stronger pressure on the nationalist forces (ICG 2001).<sup>10</sup> Here, the argument is based a) on the injustice of both post-war arrangements and the legitimacy it bestows on some unsavory local parties and b) on the observation of the undemocratic practices of these actors.

*b) The Institutional Alternatives*

The final—and probably the most neglected—dimension of the debate is focused on the design of the post-war *institutional* systems. As the post-war agreements helped to end the conflict in Bosnia-Herzegovina and in Macedonia, they are largely presented as unchangeable and taboo by international actors. The words ‘Dayton’ or ‘Ohrid’ have become talismans for political reform often extending beyond the substance of the original agreements. The reluctance to reconsider the peace agreements appears at first justifiable in the light of the alternatives suggested by political actors in the region. In Bosnia-Herzegovina most alternatives actually advocated the strengthening of one groups’ ethno-territorial autonomy or dominance, such as the establishment of a Croat entity, the ‘cantonization’ of the entire country, or the abolition of the entities. In Macedonia, similarly, the main alternative has been the proposed ethnic partition of the country (Georgievski 2003).

Although mostly rejected by Western policy makers and observers, some observers have repeatedly suggested partitioning as a solution for Bosnia-Herzegovina, Kosovo and Macedonia (Mearsheimer, Van Evera 1999; Friedman 2001). International practices and law, reality in the three regions, particularly in Bosnia-Herzegovina and Macedonia, and human rights standards should exclude this ‘alternative’ to the Status Quo. Considering that in all three cases communities are either mixed again (Bosnia-Herzegovina) or still mixed (Macedonia) or not located in such a way that border can be drawn (Kosovo), any partition would have to encompass the involuntary displacement of people, which is not only unacceptable from a human rights perspective, but also holds little promise for either stability or a reduction of nationalist sentiment. A partitionist approach essentially rests on the premises of the impossibility of co-existence between several nations or ethnic groups in one state. As

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<sup>10</sup> The International Crisis Group has somewhat modified its position more recently, describing the nationalist parties as “a natural and legitimate phenomenon in BiH”, while recommending to the International Community “that there is no need to fear pushing them to the limit, especially by attacking their illicit sources of financial power and powers of patronage” (ICG 2003: iii).

such, it does not only dismiss all international efforts in the region during the past decade, but also neglects both the global experience of co-existence and the regional experience (Bose 2003; Liotta, Jebb 2002: 96-111). Many arguments associated with the partitionist approach are firmly grounded in the nationalist mindset of parts of the regional intellectual and political elite, which is not only responsible for the conflicts which gave rise to the partitionist argument, but which is also based on a) resentment and b) fear of the others. Resentment is based on political, economic or social status of one group, which is perceived as having been accomplished unfairly by other groups. Often resentment is closely linked to status-reversals, such as the shift from Serb to Albanian political dominance in Kosovo during the late 1960s and 1970s. Fear is often linked to resentment, but is based on different dynamics. Fear of being (or becoming) a minority (Jović 2001) is linked either to status changes, as with resentment or the fear of demographic shifts to the disadvantage of the own group (see for example Georgievski 2003; Krstić 1994).<sup>11</sup> Separation or partition are thus advocated in cases where the joint polity can either no longer be dominated or at least controlled. The aspiration of nationalist mobilization can and should be confronted than being fulfilled. Despite these problems with the partitionist logic, proponents of this approach have identified two key weaknesses with existing arrangements. First, the complexities of the post-conflict institutions appear too burdensome for effective governance of these three societies. Secondly, governance and often sovereignty remain contested, suggesting that the current arrangements do not constitute a permanent settlement.

The civic critique of the institutional arrangements shares some of these concerns, but draws diametrically opposite conclusions. This position emanates primarily from moderate intellectuals and human rights activists in the regions (e.g. Lovrenović 2003), not from political parties.<sup>12</sup> Here the main alternative proposals or considerations, in most cases, have focused on lessening the emphasis of ethnicity in the institutional system to the degree of entirely abolishing group-based representation (Woker 2003). While the critique of the overemphasis of ethnicity in a number of institutional arrangements in the region is appropriate, the alternative proposed

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<sup>11</sup> The arguments and their function in the mobilization for ethnic conflict are discussed in detail in: Petersen 2002; Kaufman 2001; Horowitz 1985: 141-181.

<sup>12</sup> This view can be heard in Bosnia-Herzegovina and in Macedonia, while in Kosovo the severity of the divisions has made such a position more rare.

appears not only unrealistic, but potentially dangerous. The concept of an ethnically neutral state appears attractive where ethnicity has not only dominated political life for more than a decade, but also where it has been a justification for crimes and corruption. Currently, politics in Macedonia, Kosovo and in Bosnia-Herzegovina are anything but ethnically blind and abolishing power-sharing mechanism and other instruments of group representation will not necessarily benefit citizens who seek to move away from a political discourse dominated by ethnicity. This is case for two key reasons:

First, the ‘injustice of procedural democracy’ (Simon 2001: 11-28) implies that in political systems where political choice is (co-) determined by ethnic, national or religious identity, subject to considerable less change<sup>13</sup> than other forms of identity, the result is frequently the political exclusion of some relevant groups. Although there might be a considerable degree of political fragmentation among the dominant group(s) mitigating the numerical subordination of the minority—considering majority-minority relations in the region during the past decade—the fragmented majority might still be guided by a consensus of exclusion and/or control. *Republika Srpska*, for example, had no formal mechanisms in the system of governance that would have explicitly favoured Serbs or excluded Bosniacs and Croats between 1996 and 2002.<sup>14</sup> In stead the overwhelming post-war Serb majority meant that a ‘civic’ and mostly neutral system of governance could result in discrimination against Bosniacs and Croats. While less extreme, the civic institutional arrangement in Macedonia during the 1990s was not explicitly excluding Albanians from its institutions, but at the same time Albanians lacked sufficient access to government and administration. In fact, most ethnic democracies and governmental systems that discriminate against minorities do not do so on a formal level<sup>15</sup>, but through informal means of exclusion.<sup>16</sup>

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<sup>13</sup> Here I mean not necessarily the salience of this identity, which can change rather rapidly, but the relationship *between* group identities, e.g. while it might be possible for individual Serbs to become Bosniacs, such a change *en masse* is highly unlikely.

<sup>14</sup> The constitution contained some discriminatory articles, such as introducing Serbian written with Cyrillic alphabet as the official language (Constitution of the Serb Republic 1992: Art. 7).

<sup>15</sup> One of the few exception is Apartheid South Africa.

<sup>16</sup> Many countries have a symbolic association of the state with the dominant nation in the preamble. Although of high symbolic importance, it does not translate into discrimination or exclusion in the governance of the country *per se*.

Second, considering that ethnic mobilization often draws on fear of exclusion/extinction and/or resentment over dominance by other groups, a civic state with pronounced ethnopolitical identities among key groups in the society might be the ideal breeding ground for ethnic mobilization. Even if the absence of group-specific protective mechanisms does not lead to discrimination by the majority, majority-minority tensions are likely to remain. The fear of the minority from discrimination can be caused either by previous episodes of discrimination (real or imagined) or by recent status reversals, which introduce the dimension of resentment towards the newly dominant group. Considering that conflicts in Kosovo, Croatia and Bosnia-Herzegovina originated partly out of a status reversal or ‘fear of becoming a minority’ (Jović 2001: 21-36), any post-conflict arrangement has to prevent the recurrence of such an opportunity for ethnonationalist mobilization.

The above overview of different critiques of the post-conflict institutional arrangement in Bosnia-Herzegovina, Kosovo and Macedonia leaves a contradictory picture. On one side, group-based protection and inclusion into the governance of these countries and regions are necessary, while at the same time the mechanisms appear to exacerbate some of the reasons for the continuing prevalence of confrontational ethnonationalist politics. This view of the status quo is well described by a recent report of the European Commission on Bosnia-Herzegovina: “Most international observers hope that BiH will eventually move from notions of *group/ethnic rights* towards a system based on individual and civic rights, but this seems unlikely in the short term” (2003: 10).

The seeming contradiction between recognizing the immediate need for group-based political arrangements and the long-term hope for a less ethnicity-based political system is widely supported, yet vague in detail. How can institutional systems evolve from rigidly enforcing group-based identity to other lines of political confrontation? As suggested earlier, this cannot occur successfully through a radical break or ‘rebooting’ a system of government,<sup>17</sup> but rather through gradual change.

Even then the ambition of transformation need not translate in gradual reform. The fact that the Lebanese constitution introduces “[a]s a transitory measure and for the

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<sup>17</sup> This metaphor was chosen by Muhamed Filipović in explaining the concept of a 3<sup>rd</sup> Bosnian republic, which would supersede the current Dayton Bosnia. Personal communication with Muhamed Filipović, Sarajevo, February 2003.

sake of even justice and concord, [that] the communities shall be equitably represented in public posts and in ministerial composition..” (Constitution of Lebanon 1926: Art. 95) which has lasted (with some changes) for more than three quarters of a century demonstrates that ill-defined transitions can last.

Furthermore, a clearly defined goal of such a transformation, such as in the Lebanese case the abolition of confessional representation, might actually present a hurdle. Firstly, this might run counter to the interests of established elites and thus be unfeasible. Secondly, the systemic difference between a consociational democracy and an individual liberal democracy are so substantial that such a commitment to change is inherently problematic. In fact, it might undermine the legitimacy of the current system and create instability rather than a transition to a more stable system. The success of a number of democratic systems recognizing and institutionalizing differences (Smootha 2002: 423-431) suggests that the goal need not be a liberal democracy, but a political system which weighs individual and group representation differently than current arrangements and eliminates some of the systemic problems of the current post-conflict institutions rather than striving for an ideal type with limited chances for success.

The subsequent two chapters seek to outline such policy approaches, which can facilitate such a development. The first set of considerations addresses processes of changes in which help reconceptualize the existing institutional arrangements as processes rather than being final. In the second part, policies are discussed which address the institutional set-up itself and introduce a higher degree of flexibility.

#### **4. Mechanisms for Change**

##### *a) Facing Change*

Institutional development and interethnic accommodation is widely viewed by domestic and international actors in South-eastern Europe as being a process with a clear and well-defined *end*. It is, however, flawed to conceptualize the institutional accommodation of ethnic groups as ever being finite or conclusive.

First, this assumption is based on a conceptual flaw. Enshrining institutions does not adequately reflect the nature of interethnic relations, which are changing over time between groups and *within* groups. The polarization of ethnicity can vary over time and has to be taken account of. Institutions and interethnic arrangements have to continue to reflect the nature of society. The case of Lebanon, as already mentioned

above, can for example illustrate this. Institutions set up in the 1940s no longer reflected reality by the 1970s through urbanization, altered distribution of groups and shifts in the social and political influence of groups. The fixed quotas, based on a pre-independence census, eventually failed to reflect the population distribution and thus contributed to the failure of the power-sharing system. This provided one of the triggers for the conflict, which ensued for 14 years (Lijphart 1977: 149-150).

Second, rigid institutional structures run the risk of ‘over-institutionalizing’ ethnicity, as they tend to be concluded at the high point of interethnic conflict. As such they frequently enshrine political representation and participation on the basis of group membership, which can ‘freeze’ ethnic confrontation and transpose most political disputes into ethnic ones.

Third, projecting the image of final institutional and constitutional arrangements renders negotiations more difficult, due to their finality. Additionally, any post-agreement demands are perceived as a threat to interethnic accommodation rather than being incorporated into an ongoing process of monitoring and review.

The conclusion should not be the permanent redrafting of the countries’ constitutions or the other institutional foundations of interethnic accommodation. Furthermore one-sided public proclamations over the complete revision of existing agreements can create anxiety among other groups and should thus be discouraged. However, there should be means for regular domestic cross-ethnic review of the existing arrangements, which can allow for their fine-tuning and development. As a finality of any arrangement cannot exist, it should not be offered or demand by international actors. Instead, the parameters of change should be defined, i.e. the process in which change can take place (institutional vs. extra-institutional); and the rules of such changes (consensual vs. conflictual).

#### *Recommendation*

- Domestic mechanisms for review and monitoring should be established. Expert bodies composed of all relevant groups, parties and experts, leading to possible recommendation on adjusting existing institutional mechanisms, should conduct a regular review of institutions and their performance.

### *b) Local Ownership of the Negotiation Process*

All key instruments to include minorities and ethnic groups in the political process in Kosovo, Bosnia-Herzegovina and Macedonia have been negotiated and frequently drafted by international actors. While this role of international actors was necessary in the immediate post-conflict setting, a long-term stabilization will require local parties to take ownership over the institutional arrangements (Solioz, Dizdarević 2003).

Despite being the result of negotiations, many peace-agreements are seen as an 'imposition' or 'alien'. This perception can constitute a serious drawback in the emergence of political constituencies supporting interethnic accommodation and the accompanying institutional arrangements (Bieber 2003a: 12).

In addition, as detailed earlier, there is a need for institutional adjustments irrespective of this consideration in Bosnia-Herzegovina and will be in Macedonia and Kosovo. Such adjustments should not be imposed, but be the result of a local process. To create and sustain viable polities in the three cases, they have to rest on the consensus of the key political actors and the communities they represent. The reliance on domestic institutional means can help provide security to the communities, in particular groups, which might be reserved towards international intervention. Unlike external imposition, even if conducted with best intentions, domestic processes follow a clear procedure and require a consensus among the key political actors. This can reduce fears of being out-voted or having new disadvantageous mechanisms imposed. In such a process, there will be a strong role of international actors as both support during negotiations and in providing incentives for cooperation and possibly punishing obstruction.

### *Recommendations*

- There should be no 'Dayton-2' or other repetition of internationally -enforced institutional reforms.
- International organizations in the region should focus on building negotiation capacity with the community elites and guide the process of local constitutional debate be directed towards ending their own role in the region.

### *c) Building Popular Support*

Public support for both peace agreements and major constitutional changes is crucial in securing their acceptance and subsequent implementation. In the past, often

insufficient attention has been paid to build a constituency among those most affected by these agreements—the citizens of the country or region. The diplomatic setting in which the various peace agreements have been negotiated often stood in the way of recognizing the importance of support among the population (Daftary 2001: 307). Parties to constitutional and institutional reforms often consider interethnic agreements as zero-sum games that are best obscured rather than explained to their respective constituency. As a result attempts to build public support for institutional reform have been only sporadic. This approach can clearly not be sufficient in the long term. First, it opens the door to spoilers who can capitalize on the weak popular support for interethnic compromise. Second, it often stands in the way of full implementation, as political elites are uncertain about popular support for the compromises contained in any such reform package.

At times negotiators have expressed their reservations about the use of referenda to secure public support for peace agreements, as there has been a manipulation of referenda to revoke support for peace plans in Croatia and Bosnia-Herzegovina by the Serbian side during the conflict. In the aftermath of the signing of the Ohrid Framework Agreement as well, some Macedonian parties critical or opposed to the accords sought to launch a referendum on the accords. This idea, advocated briefly by the ruling VMRO-DPMNE, was abandoned as a result of international pressure (Jovanovski, Dulovi 2002: 67). Furthermore, conditions are often not permissive for the holding of a free and fair referendum. Finally, a question remains over the support necessary for a referendum to be considered a success by each community. While in a referendum each community does is not required to support separately, a positive result that rests on the support of only some parties to the conflict might be insufficient and even damage any accord.

As result none of the internationally mediated agreements (Dayton Peace Agreement, Ohrid Framework Agreement, Belgrade Agreement) or major reforms (Bosnia-Herzegovina constitutional reforms 2002, Constitutional Framework for Kosovo) were subjected to popular vote.

Peace agreements, not unlike other internationally negotiated treaties tend to be complex and not easily accessible, making it often difficult to ‘sell’ to the electorate. The experience with the Danish referendum on the Maastricht Treaty of the European Union in 1992 should be a warning here. The distribution of the Treat text to every household was been identified as one of the causes for the rejection of the treaty, as its



complex language and structure alienate many voters rather than convince it of its benefits.

On the other hand, a referendum can help build crucial support for agreements ending ethnic conflict. The referendum on the Good Friday in Northern Ireland and the Republic of Ireland in 1998 can so far seen as a positive example.

If a referendum is likely to gather the majority support from all major communities, then it can be the most powerful tool to oblige political elites to move along the with the reforms and constrains the role of spoilers.<sup>18</sup> If support is not secure and there is a significant likelihood of a negative outcome, if only among the members of one community—through either political important spoilers, polarizing media or broad popular disillusionment with the political elites involved in the agreement—a referendum is likely to be disruptive.

Other strategies to build popular support for an agreement of interethnic accommodation are considerably less risky, but also only insufficiently tried. Neither the Ohrid Framework Agreement, nor the Dayton Peace Accords were promoted or even adequately explained to the population. This has often not been the interest of the parties to the conflict who both feared pressure among their constituency against the agreements and who seek to monopolize the interpretation of the agreement towards their electorate. International actors have not adequately filled the gap. Future agreements should be communicated to the population in order to build a support base and reduce misconceptions about the agreement. It is particular important to explain transparently the substance of interethnic arrangements to avoid populist instrumentalization by possible spoilers.

#### *Recommendations*

- All major changes in the institutional arrangement have to be communicated to the population and support for it built. International organizations and the donor community should provide support and, if necessary, initiate such activities.
- If strong support from all major communities is reasonably secure, agreements and constitutional reforms can be legitimized through referenda.

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<sup>18</sup> In Northern Ireland, the referendum did not prevent the rise of spoilers, partly the result of the subsequent peace process itself and partly the result of the divided Unionist camp during the referendum.

## 5. Institutional Reforms

### *a) Rigid vs. Flexible Institutional Design*

Bosnia-Herzegovina, its entities and Kosovo have seen rigid mechanisms for the inclusion of different ethnic groups. In the case of the two entities, the constitutional changes imposed 2002 by the High Representative established rigid quotas for the representation of Serbs, Croats and Bosniacs in government and the upper chamber of parliament. In addition, the lower-houses of parliaments in the entities have a minimum number of group representation requirements. Similarly the government is formed of members of all constituent people at the state and entity level by a rigid key. Comparable mechanisms are in place in Kosovo with a numerical requirement for government and reserved seats in parliament for Serbs and other national minorities.

The benefit of such a rigid mechanism at the level government is the absence of inter-group discussion over the distribution of offices and thus can accelerate government formation. The limited experience of both Kosovo post-2001 and Bosnian post-2002 several months long post-election bargaining suggests that this is not necessarily the case. Firstly, the bargaining is merely shifted into other spheres, which renders negotiations more complex and hardly more transparent.

The second argument in favor of rigid quotas suggest that stronger groups might exert pressure on smaller communities to be satisfied with inadequate representation in government. Similar, smaller groups might seek to maximize representation in excess to their population share. While this argument is of legitimate concern in political systems with low levels of trust, there are alternative means, such as minimum and maximum representation in government.

Rigid representation in parliament is supported by different arguments. Firstly, it is suggest that reserved seats and similar mechanisms ensure representation where non-group specific means would fail. In parliamentary bodies that are explicitly charged with inter-group bargaining and the main locus of group-based veto rights, there is a need to have adequate, if not equal representation of all groups.

There are three key concerns of such rigid systems in government and parliament.

First, the more elaborate the system in terms of quotas, the more likely the mechanisms is to fail and immobilize the entire political system In the Federation for example, the House of People could not be constitute for months after the 2002

elections, as the seats reserved for Serbs could not be filled according to regular constitutional procedure. While such blockages can be overcome within the framework of an international (semi-) protectorate, they can seriously diminish governance in a fully autonomous country and lead to a deterioration, not an improvement of interethnic relations.

Second, rigid systems often promote tokenism, where smaller group members in parliament or government do not represent a sizable constituency within the respective community. In extreme cases, such systems can promote abuse by “switching” of national identity for the benefit of attaining particular reserved offices.

Thirdly, the allocation of offices on the basis of ethnicity assigns legitimacy to group- rather than interest-based representation in the particular institution. Such a system raises considerable concern in parliaments and government, but is even more problematic in regard to the judiciary, where for example in both entities of Bosnia-Herzegovina leading offices are part of the entity-wide ‘ethnic key’ which limit the offices which can be held by one community.

Altogether, the numerical lock on group representation should be only the last resort, preferably temporary. Only in bodies, which are meant to represent group interest, such tools can be permanent.

#### *Recommendations*

- § Representativeness in the judiciary should be accomplished independently of ethnic quota for other high offices from other branches (executive and legislature), but rather through general requirements of equitable representation.
- § Governmental inclusion of groups should be set with minimum and flexible shares rather than strict quotas.
- § Reserved seats in parliament are only useful for smaller minorities, which might be excluded from representation. Otherwise electoral system and electoral unit boundaries should secure equitable inclusion of all mayor groups. This requires the creation of electoral commissions, which include all groups and allow for protective mechanisms to prevent gerrymandering.

#### *b) Avoiding Destructive Veto Rights*

Veto rights to communities constitute an integral part of power-sharing arrangements in general and are incorporated in the institutional structure of Bosnia-Herzegovina,

Kosovo and Macedonia to varying degrees. Veto powers are largely irreplaceable instruments in deeply divided societies and should not be eliminated in attempts to streamline decision-making processes. However, vetoes or rather the threat of using the veto have had negative effects on the function of institutions in Bosnia-Herzegovina, and to a lesser degree in Kosovo.

The effectiveness of veto rights hinge on two components: a) the definition of policy areas where veto rights apply; b) and the mediation processes that are activated once a veto is invoked.

A total veto in all policy areas is most open to abuse, as is the case at the Bosnian state level. Thus, constraints are useful, but often difficult considering that even policy decisions that seemingly do not have an ethnic bias can adversely affect groups. As consequence, the restrictive definition of the veto rights as in Macedonia contains the danger of neglecting other possible sources of exclusion. Veto rights should thus be restricted, but allow for the inclusion of other issues. In order to include these issues, however, there should be a high threshold than for listed veto areas, making abuse less likely.

Additionally, some policy areas could be administered by supermajorities, which de-facto requires the consent of all major groups, but does not explicitly institute vetoes. Such a practice has for example been in use in the District of Brčko. However, such a mechanism is only useful in cases where there are sizable communities. In Kosovo, due to the relatively small number of minorities, a supermajority would have to require 4/5 or more support and would thus be impractical.

The second areas of possible reform are the mediation processes. In Kosovo, the mediation is strongly dependent on the Special Representative of the UN Secretary General, while in Bosnia-Herzegovina and Macedonia domestic institutions engage in mediation. While the mediation procedure remains largely in parliament (i.e. either with a special committee as in Macedonia or the presidency in Kosovo), but has to have an external final arbiter in case of a blockage (i.e. the Constitutional Court in Bosnia-Herzegovina).

### *Recommendations*

§ Veto rights should be clearly defined and include all areas affected areas of classic minority rights (identity, culture, education) and policy areas related to the organization of the state and thus of the interethnic arrangement (constitution,

territorial organization, electoral laws). Possibly, some other sensitive areas, such as policing and security-related legislation can be included.

- § There should be the possibility of extending the veto rights to other areas that might adversely affect the minority. Such an extension should be handled restrictively, requiring a supermajority *within* the community and an external arbitration process, such as through either constitutional court or an inter-parliamentary mediating board.

*c) Representation cannot Replace Minority Rights*

Political representation and group rights are closely intertwined. Often minority rights without adequate representation of minorities or communities in political institutions is inadequate, as the groups are not able to influence and partake in decision-making processes. This is recognized in recent minority rights instruments such as the Framework Convention for the Protection of National Minorities (Art. 15) or the Lund Recommendations of the OSCE High Commissioner on National Minorities.

In recent arrangements in Bosnia-Herzegovina, Kosovo and Macedonia, representation has been seen as a panacea for group inclusion. However, power sharing, including veto rights, and other forms of political representation cannot replace firm protections of group members from discrimination and other group based rights in fields of culture and education.

Political representation without minority or group rights can reduce the protection of individuals and group to interethnic bargaining—often to the detriment of individuals. These rights should be firmly set and include mandatory obligations of the state or the relevant authority, such as clear numerical thresholds for creating minority language classes.

If rights and anti-discrimination mechanisms are not adequately legally defined, there is greater room for nationalist parties to warn of the supposed or real threat to their nation within the existing political arrangement. Such claims should be discredited as far as possible through legal protection, as political participation cannot provide such a sense of security (Bieber 2003b: 37-44)

Legal mechanisms have to be combined with effective remedies to individuals in the case of breaches and substantial international supervision and monitoring of the authorities performance.

### *Recommendations*

- Strengthening minority rights and anti-discrimination legislation in Bosnia-Herzegovina, Kosovo and Macedonia.
- Setting up a regional monitoring of group rights violations by international organizations in cooperation with NGOs. Including firm standards of minority rights protection (and monitoring) in the SAP process.

### *d) Bringing in the Local Level*

Central level institutions are unable to significantly advance interethnic relations without matching processes of cooperation at the local level. As experience in Croatia and Bosnia-Herzegovina exemplifies this fact. Refugees of locally non-dominant groups usually return upon a change in the local, not the national political climate. Groups that are not dominant at the local level, thus have to be involved in the decision-making process to advance such a process. This is not to suggest that power-sharing arrangement should be instituted at the local level based on the example of state-level institutional arrangements.

Municipal governments should be required to include locally non-dominant groups on the basis of clearly set thresholds, matched by mediation committees, as have been instituted in Kosovo. Finally, some key decisions, such as budget or the urban plan can be subject to supermajorities, as has been practiced in Brčko since the establishment of the district in 1999. Adequate mechanisms at the local level can take of the pressure at the center of resolving conflicts in interethnic relations. Furthermore, such mechanism can help alleviate the anxieties of local minorities, even if they are state or entity-wide majorities. As most minority rights instruments fail to adequately protect these groups and central power-sharing institution provide little articulation of their interests, these groups are often vulnerable and can be instrumentalized by nationalist political entrepreneurs.

### *Recommendations*

- § Institute mechanisms to include non-dominant groups in the co-governance of local government on the basis of clear and transparent thresholds.
- § Introduce supermajorities for key local government decisions.
- § Establish mediation committees in communes with substantially mixed population.

## **6. Conclusions**

Ethnopolitical identities, once mobilized, cannot be banned or abolished, they can only wither away. The above-mentioned suggestions are not intended to once and for all reduce the salience of ethnic identity in political life. Rather, they suggest a dynamic, process-oriented approach to institutional design in ethnically divided states. Such a process can help transform the post-conflict region discussed here into political systems with less rigid levels of institutionalized ethnicity. Less ambitiously, they can also assist at fine-tuning and improving institutional arrangements that have failed to work self-sustainably over recent years. There can be little doubt that institutional arrangements cannot work without their larger social context. Institutions do not only shape political and social reality, they are also their product. The transition from the war to the post-war period has been all too smooth in large parts of the region with some of the same political elites holding office and little social dialogue over responsibility and causes of the war. As long as there is not a strong break with the past and processes of re-examining the wartime period are not initiated on a broad level, institutions cannot provide the stability sought after.

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## Annex: Group-Based Representation in Bosnia-Herzegovina, Kosovo and Macedonia

	Parliamentary Representation	Grand Coalition	Veto Rights	Administration	Autonomy/ Decentralization
Bosnia-Herzegovina (1996)	PR, Bi-cameralism House of People (15): reserved seats (5 B, C, S)	Quota 2/3 from Federation, 1/3 from RS, 2 deputy min. of other ethnicity to each min.	Yes. "Vital National Interest of Constituent People", (1/3 from each entity, 1/2 in HoP) mediation procedure, constitutional court	"generally reflect the ethnic structure"	Two Entities, one district
- Federation (2002)	PR, Bi-cameralism House of Representatives (98): reserved seats (min. 4 C, B, S) House of Peoples (58): 17 C, B, S, 7 O	Presidency: 1 pres, 2 vice-pres of other group Government: deputy min of other ethnicity to each min., 8 B, 5 C, 3 S.	Yes. "Vital National Interest of Constituent People" (2/3 HoP comm. MPs), mediation procedure, constitutional court	Proportional representation of constituent people and others (1991 census)	Ten cantons
- Republika Srpska (2002)	PR, National Assembly (83): reserved seats (min. 4 C, B, S) Council of Peoples (28): reserved seats (8 C, B, S, 4 O)	Presidency: 2 vice-pres of other group Government: Reserved seats (5 for B, 3 for C)	Yes. "Vital National Interest of Constituent People", mediations procedure, constitutional court	Proportional representation of constituent people and others (1991 census)	No
Macedonia (2001)	PR, no reserved seats Committee for rel. between communities (7 M, A, 1 T, V, B, R, S)	Informal Practice of Grand Coalitions, deputy ministers of different ethnic group as minister	Yes. Decisions on language, symbols, culture, local administration (majority of non-dominant communities)	"Appropriate and fair representation"	Enhanced Local Self-government
Kosovo (2001)	PR, reserved seats (10 S, 10 O)	Reserved seats (1 S, 1 O)	No. Possibility to delay legislation, mediation procedure	Yes	Cultural Autonomy

Mechanisms of Power-Sharing in Bosnia-Herzegovina, Macedonia and Kosovo<sup>19</sup>

<sup>19</sup> PR=Proportional Representation, S=Serbs, B=Bosniacs, C=Croats, A=Albanians, M=Macedonians, T=Turks, V=Vlachs, O=Others.