United Nations Mission
In
Bosnia and Herzegovina

Judicial System Assessment Programme
(JSAP)

REPORT FOR THE PERIOD

NOVEMBER 1998 TO JANUARY 1999

UNITED NATIONS

PREFACE

Bosnia and Herzegovina is a country experiencing transition both from war to peace and from an authoritarian to a democratic regime - a complex transition which is made even more arduous within the context of a devastated economy. Such an environment necessarily makes building the rule of law a difficult task.

The objective of the United Nations Mission in Bosnia and Herzegovina (UNMIBH) is to contribute to the overall efforts of the international community to establish conditions for sustainable peace in Bosnia and Herzegovina. Within this framework, UNMIBH's own strategic focus is to help lay the foundation for the establishment of the rule of law.

To achieve this objective, it has become clear to UNMIBH that its efforts undertaken under Annex 11 of the General Framework Agreement for Peace (GFAP) to restructure, reform and democratise the local police have to be matched with efforts to reform the judicial system[1]. The Peace Implementation Council, in Luxembourg and Madrid, echoed this view believing that as the institutions of the police and judiciary mature, they will be able to effectively ensure the rights of all citizens, thus increasing the prospects of sustainable peace in Bosnia and Herzegovina.

On 16 July 1998, the Security Council through Resolution 1184 (1998) called on UNMIBH to establish a programme to monitor and assess the judicial system in Bosnia and Herzegovina (BiH). That programme was designated the Judicial System Assessment Programme (JSAP) and has been fully operational in each of the seven UNMIBH regions since early November 1998. With the creation of JSAP, UNMIBH's efforts undertaken by IPTF vis-a-vis the police are complemented with parallel efforts in the court system within an overall framework coordinated by the High Representative. The ambit of JSAP's activity encompasses not only criminal justice, but all types of civil litigation.

[1] Article III(1)(a) of Annex 11 of the GFAP includes judicial organisations, structures and proceedings in the law enforcement activities and facilities which the International Police Task Force (IPTF) has the power to monitor, observe and inspect. Although the IPTF has been active in all parts of the mandate assigned to it under Annex 11, it is not organisationally geared to carrying out the tasks of monitoring and assessing assigned to JSAP.

JSAP adopted a conceptual framework to monitor and assess the judicial system in Bosnia and Herzegovina in three main aspects: technical, covering legislation and other legal norms and standards; institutional, relating to the capacity of the system in terms of physical resources, personnel and their organisation; and political, concerning the political framework and factors determining the operation of the judicial system and the level of independence of the judiciary. The overall objective of JSAP was to assess the "quality of justice" in Bosnia and Herzegovina as it compares to international standards of justice. In particular, the European Convention on Human Rights has been rigorously applied by JSAP as a standard of measurement [2].

The following is the method of work used by the JSAP to monitor and assess the judicial system in Bosnia and Herzegovina.

JSAP consists of seven Regional Teams and a Headquarters staff. The Regional Teams are each made up of two international legally qualified Judicial System Officers (JSOs), one National Professional Officer (NPO), who has Bosnian legal qualifications and experience, and two language assistants. Each Team covers one of the seven UNMIBH Regions and each Region straddles the Inter-Entity Boundary Line. The areas covered by the Teams are as follows:-

Banja Luka Region: Central Bosnia Canton and an area in the Northern RS around Banja Luka, including Prnjavor, Bosanska Gradiska and Kotor Varos.

Bihac Region: Una Sana Canton and Canton 10 and an area of the Northern RS covering Novi Grad and Prijedor, as well as the so-called “anvil” which includes Mrkonjic Grad

Brcko Region: Brcko, Bijeljina and the Eastern part of the Posavina Canton around Orasje.

Doboj Region: Zenica-Doboj Canton and the Western part of Posavina Canton and a part of the RS around Doboj, which includes Derventa, Teslic and Modrica.

Mostar Region: The Herzegovina-Neretva and Western Herzegovina Cantons and the lower part of the Eastern Republika Srpska.

Sarajevo Region: Sarajevo and Gorazde Cantons and an area of the mid-Eastern RS including Foca, Pale, Rogatica and Visegrad.

Tuzla Region: Tuzla Canton and an area of the Eastern RS containing Zvornik, Vlasenica, Bratunac and Srebrenica.

The Headquarters staff consist of the Head of the Programme, three international legally qualified JSOs, one NPO with Bosnian legal qualifications and experience, two language

[2] Under the Constitution of Bosnia and Herzegovina in Annex 4 of the GFAP, the ECHR is directly applicable and takes priority over all other law.

assistants and an international administrative assistant. The function of the Headquarters staff is to provide overall direction for the programme and to work with the other international agencies and the Bosnian authorities in the reform of the judicial system, coordinated by the Office of the High Representative.

During the three month period from their deployment at the end of October 1998, all seven Teams have looked in particular at the institutional aspect of the judicial system. Certain specific issues have been looked at in depth by only some of the teams.
The core of the work on the institutional aspect has been the collection of data for every court on staffing, material resources, caseload and judicial background. These data are now held on a computerised data-base. All Teams have also investigated court financing and inter-Entity judicial cooperation.

The issues looked at in depth by some of the JSAP Teams have been as follows:-.

Property and housing cases: Brcko, Bihac, Tuzla and Sarajevo Teams

Registries of land and property: Mostar Team

The administration of criminal justice: Banja Luka, Doboj and Tuzla Teams

Administrative litigation in commercial cases: Mostar Team

Family cases: Bihac Team

Employment cases: Bihac Team

Minor offences: Sarajevo Team

Civil disputes: Mostar Team

These topics were selected for a number of reasons, such as their importance for the peace-process and their relevance to a large number of people. The detailed rationale is given later.

The Regional Teams have carried out their assessments by holding discussions with participants in the judicial system, most frequently with judges, but also with Ministers of Justice, lawyers, prosecutors, court staff and others; by monitoring court proceedings and reviewing related documentation; and by analysing court registers and case-files. JSAP has, so far as possible, adopted a collaborative approach in its dealings with individuals in the judicial system and for the most part they have responded very positively. The work of JSAP has depended on liaison with other units within UNMIBH. Civil Affairs has provided guidance on the political context and work has been jointly undertaken with the IPTF and HRO on matters of mutual concern. The report covers only the first three months of JSAP's existence and many of the international JSOs have been new to Bosnia and the judgments made should be viewed in that light.

Despite these limitations, the work of JSAP so far has been the most concentrated and comprehensive assessment of the court system of Bosnia and Herzegovina since the end of

the war. Almost every court in the country has been visited and courts throughout the country have been viewed from several perspectives. A basis has now been established for an initial evaluation of the judicial system in its institutional aspect and there has been some progress towards an assessment from the technical and political standpoints. In these ways it is hoped that the programme will contribute to future reform efforts.

THE INSTITUTIONAL DIMENSION

Introduction

The issue to be addressed in this section is whether the need for judicial processes is satisfied effectively, efficiently, in a timely fashion and with the least avoidable inconvenience. This depends not only on the quality and quantity of the resources within the system, but also on the manner of their organisation.

Organisation of the court system

Judicial systems within Bosnia and Herzegovina

Bosnia and Herzegovina, with its population of less than four million, has thirteen Constitutions: one at state level; two at Entity level; and one for each of the ten Cantons. It has essentially thirteen legislative bodies and thirteen legal systems and, at the present time, twelve Ministries of Justice. These arrangements, though complicated and inefficient, arose in the course of maintaining the delicate balance between the former warring factions in the peace-process.

The court structure in Bosnia and Herzegovina

There are critical differences between the court systems in the two Entities. All the courts in the RS are managed by its Ministry of Justice. In the Federation, on the other hand, each Cantonal Ministry of Justice has responsibility for financing and administering a Cantonal Court, Municipal Courts and sometimes Courts for Minor Offences.

In the Republika Srpska there are 26 Basic Courts which service one or more municipality. They are the first-instance courts in most types of civil case and in criminal cases for which the maximum possible punishment is less than 15 years' imprisonment. Five District Courts serve as second-instance courts for a number of Basic Courts and as first-instance courts for cases not within the jurisdiction of the Basic Courts. There is a Constitutional Court and a Supreme Court[3], which hears appeals from the District Courts. Minor offences, such as

[3] The Supreme Courts of the Federation and the RS are the highest appellate courts within the judicial system of each Entity. They determine the legality of decisions of lower courts. Constitutional Courts which are at both Entity and BiH level lie somewhat outside the regular court structure and principally determine the constitutionality of acts of the executive and the legislature.

traffic violations and breaches of public order, fall under the competence of 41 Courts for Minor Offences.

Although the structure of the Cantonal and Municipal Courts, which is defined in the Federation Constitution, inherits features from the arrangement which it replaced, it has come into existence since the war. In the Federation the Municipal Courts cover one or more municipality and handle most first-instance cases. Cantonal Courts hear appeals from the Municipal Courts and are first-instance courts for a limited range of cases. The Courts for Minor Offences at Municipal level are managed by municipalities in some Cantons.

At Federation level there is a Constitutional Court and a Supreme Court with appellate jurisdiction over cases decided by Cantonal Courts. At the BiH level there is a Human Rights Chamber and a Constitutional Court. The Human Rights Chamber receives applications in connection with alleged or apparent human rights abuses. It decides whether there has been such an abuse and what steps should be taken to remedy it. There is no Supreme Court at BiH level.

The court structure in the two "mixed" Cantons

Both Herzegovina-Neretva and Central Bosnia Cantons have large proportions of Bosniaks and Croats. There was bitter fighting between these ethnic groups during the war and the antagonism has continued. As a consequence, the institutional structure of the Cantons as set forth in the Federation Constitution has not been fully established.

In the Herzegovina-Neretva Canton, Bosniak-Croat conflict has so far prevented the establishment of a unified court system. Some of the territory of the Canton fell within the area of so-called Herceg-Bosna, which had, and, to some extent, still has its own laws and institutions. There are two Higher Courts - in East and West Mostar. The former is the second instance court for the municipal courts of East Mostar and Konjic (and has first instance jurisdiction in appropriate cases for those municipalities plus Jablanica) and the latter is the second-instance court for the municipal courts of West Mostar, Prozor, Capljina, Stolac and Citluk with corresponding first-instance jurisdiction including Ravno and Neum. The system of courts for minor offences largely parallels that of the regular courts, with two Minor Offence Appeal Courts one in East Mostar for the Bosniak Municipalities and one in West Mostar for the Croat Municipalities. A Law on Courts was imposed by the High Representative in August 1998 and published in the Official Gazette of the Canton on 23 October 1998. Under that law the court system should be unified, but so far progress has been slow. At present the budgets are still separate.

In the Central Bosnia Canton, the other mixed Canton, although the regular courts have been unified, they are still not functioning properly because of political conflict. This has produced paralysis in certain parts of the system. In the Jajce Municipal Court the lack of judges, lay-judges[4] or prosecutors has almost brought the criminal justice process to a standstill. Not all the lay-judges have been appointed for the Travnik Municipal Court.

[4] "Lay-judges" are members of the public without legal qualifications who together with legally qualified judges form panels which decide certain types of case.

Consequently only criminal cases with a possible sentence of less than one year are being tried. Municipal Courts in Novi Travnik, Vitez and Fojnica were, according to several judges, created for purely political reasons. Some Courts for Minor Offences have still not been unified, perhaps reflecting the reluctance of the relevant ethnic authorities to lose income from fines. Courts for Minor Offences generate a considerable amount of money which is used for all governmental purposes and not just the court system.

Inter-Entity judicial cooperation

A further limitation on the functioning of the judicial system is the ineffectiveness of inter-Entity judicial cooperation. This is a reflection of a much wider political problem of failure to establish institutional structures at BiH level.

There appears to be a considerable need throughout Bosnia and Herzegovina for inter-Entity judicial cooperation with regard to the Land Registry, the Cadastre [5] and inheritance cases and the resolution of cases which have remained in suspension since the war because of the inaccessibility of the parties. Where a part of the jurisdiction of a court in one Entity is covered by a Land Registry and a Cadastre in the other, the need for inter-Entity cooperation is increased. The importance of cooperation in criminal matters has already been recognised: offenders should not be able to avoid justice by going to the other Entity and, where appropriate, evidence from both Entities should be available.

The level of cooperation between courts in the two Entities is varied. Some have routine communication with their counterparts in the other Entity, but others have almost none at all.

On 20 May 1998 the Ministers of Justice of the two Entities signed a Memorandum of Understanding on the Regulation of Legal Assistance between the Institutions of the Federation of Bosnia and Herzegovina and the Republika Srpska (MOU). It sets forth a procedure for inter-Entity judicial cooperation and provides the most detail in the criminal field. Some judges are apparently unaware of the existence of the MOU and others have questioned its legal status, in particular its constitutionality. It is not a law and it has been argued that legislative acts at BiH level are required, though in the opinion of the Venice Commission the MOU is consistent with the BiH Constitution. Where it has been applied, the procedure of routing communications through the Entity Ministries of Justice has been found to be cumbersome. The MOU depends upon the good faith of all those who follow its procedures. It has, of course, no enforcement-mechanism. Apart from the MOU there is an institutional void.

Since the entry into force of the MOU, some courts have communicated with each other directly without following its procedure. The Presidents of courts around Brcko have reached an agreement to start an exchange of cases and handover of documents by the courts

[5] The Cadastre (or in Bosnian “Katastar”) is a system of registration of property occupancy.

themselves. There has been some informal inter-Entity collaboration which, however desirable from the perspective of the peace-process, is dubious because of the absence of a specific basis under the law.

At the Madrid Peace Implementation Conference a deadline was set of 31 December 1999 for the adoption and implementation of formal legislation on inter-Entity judicial cooperation. This legislation is urgently needed to remove the persistent uncertainty and create clear legal obligations. It should address explicitly those situations in which inter-Entity judicial cooperation is most often necessary.

Statistical information on the activity of courts

All courts make annual returns which show the number of cases registered during the year, the number of undecided cases from the previous year and the number of cases decided during the year. The figures for 1998 were collected for most (68%) of the first-instance regular courts and the courts for minor offences in both Entities. They provide a very rough indicator of the extent to which the court system is meeting the demand for its services.

In general, the figures reveal that at some courts there is a serious problem of backlog. For example, at the end of 1998 the Municipal Courts I and II in Sarajevo Canton had respectively 20,584 and 16,574 undecided cases. (It should be noted that a significant number of these are court orders awaiting decisions on execution or execution.) At least 6 RS Basic Courts (27% of those for which information is available) and 6 Federation Municipal Courts (15%) had more cases undecided at the end of 1998 than they had decided during that year. However, if backlog is set on one side, courts are almost capable of keeping pace with the cases which are registered with them. The number decided in 1998 was expressed as a proportion of the number of cases registered. It was found that it exceeded 90% for most of the RS Basic Courts, the RS Courts for Minor Offences and the Federation Cantonal and Municipal Courts and roughly half of the Federation Courts for Minor Offences. This does, at least, show that in most of the country the court system is functional in the sense of processing a large volume of the cases which come before it.

The registry and case management

The Registry plays a key role in the operation of a court. A case is given a unique identification and details are then entered in a register-book. There is a separate register-book for each type of case. The system of allocation varies from court to court. Sometimes it is made by the Court President according to the subject-matter and the expertise of the judge. Alternatively, it may be done by a registry clerk in rotation: one case to one judge, the next case to the next judge and so on. The register-books list what has happened to each case and where the file is at any given time. There is no heading or category which mandates any deadlines or time-periods for action on the cases. Since the supervising judge (usually the President of the court in question) does not have a master list of cases according to the length of time they have been open, there is no systematic way to check on which cases have been open the longest and why. There is no built-in mechanism in the registration system of deadlines or time-periods for checking on the progress of cases. The work of the clerks in the

Registry Offices appears not to include case-management which is the responsibility of the relevant judge. When asked how he could ensure that cases are not subject to undue delays and postponements, a Cantonal Court President replied that if any of the parties complains he will look at the file. This relies on individual initiative of the parties and individual access to the Court President, rather than an overall system of checks and controls. So the judges themselves have to be relied upon to make sure that cases are not delayed. This is significant because, as will emerge later, judicial inaction is one of the main ways in which there is a failure of justice in politically sensitive cases.

In general, the Books of Rules on Court Organisation require documents to be attached to case-files and numbered chronologically. These standards were often not met. In some courts, the documents in each file were numbered and a list was accurately maintained of each document and the date on which it was received. In others this was not the case. Often documents are loose, not fixed in any way and can easily be lost. Without a list of documents contained in the file folder and a consistent practice of affixing the documents in the file-folder, one can never be sure whether it contains all the relevant documents. The absence of a single document can cause delays and have a critical effect on the way that a case is conducted.

Appointment and standards of the judiciary

Under the Constitution of the Federation, the legislature and executive have a direct involvement in the appointment of judges (Articles IV.C.6, V.11(2) and VI.7(3)). In the Republika Srpska judges are elected or appointed and recalled by the National Assembly (RS Constitution Article 130). These procedures have been heavily criticised by judges and lawyers throughout the country. There is considerable support for the concept of a Judicial Service Commission, in which the appointment and dismissal of judges would be the responsibility of a body composed of judges and other legal professionals. People within the judicial system themselves feel that a Judicial Service Commission would ensure that selection would depend more on professional competence than political acceptability. Teams have been set up in both Entities to draw up proposals for such a Commission. They are being assisted in their work by Council of Europe experts and the Office of the High Representative.

The Madrid Peace Implementation Conference set a deadline of 30 June 1999 for the adoption of judicial and prosecutorial codes of ethics as well as the establishment of a disciplinary and dismissal system based on these standards. These Codes are most important. Lawyers in Tuzla Canton were of the view that the orientation of judges and prosecutors was such that they would not properly enforce the critical new provisions in the Law on Criminal Procedure of the Federation designed to protect human rights unless they were subject to sanction for not doing so. In fact, the failure to apply the law has also been found in property and employment cases and no sanctions have been applied. The need for effective codes of conduct was highlighted by the discovery by JSAP in Sarajevo that Judges and Prosecutors were assisting at legal advice centres and receiving remuneration for their work. The centres in question did not have rules on the possible conflict of interest that might arise in these circumstances. The intervention of JSAP has contributed to a resolution of the problem.

Financing of the court system

Because there are twelve different Ministries of Justice, there are twelve separate methods of funding the court system. In both the Federation and the RS the main criterion for deciding upon the quantity of allocations appears to be the number of employees at the court. In general, the budget for the court system is decided upon by the executive with input from the Ministry of Justice and voted on by the legislature. Allocations of moneys for salaries and revenue expenditure are made to courts on a monthly basis.

Systems of financial audit for courts exist, but in Una-Sana Canton and Canton 10 some important shortcomings were observed. Auditing of accounts of judicial institutions, while a regular occurrence in the past is now rarely carried out. The Presidents of some courts in Canton 10 revealed a surprising lack of insight into their accounts, which was explained by the fact that there are no public records on the distribution of funds from the Cantonal budget to the individual judicial institutions. In one court not even the court accountant could provide detailed information on transfers to the court during 1998. In Una-Sana Canton, however, the budget clearly indicates the amounts allocated to each judicial institution. Proper accounting procedures not only decrease the risk of financial impropriety, but also facilitate rational allocation of resources.

A crucial point about this process is that the allocations to many courts throughout Bosnia are insufficient for them to function properly. This leads them to have to make special requests for extra-budgetary funding or to seek assistance from the private sector as well as being unable to purchase essential supplies and services for their operation.

Courts were frequently compelled to request from the appropriate Ministry finances or resources in addition to what had been received in the budget. As a result they have to depend on the goodwill of the executive. As one Court President put it, if you do not have a computer, you have to beg for it and then you become dependent.

In the Republika Srpska a number of courts (the Basic Courts of Srpsko Sarajevo, Brcko and Bijeljina) had received equipment or funding from non-governmental sources. The phenomenon of private funding for courts was also found at the Ljubuski and Zepce Municipal Courts in the Federation. This practice poses an obvious threat to judicial independence. Some courts in the RS retained and spent on their material needs money from court taxes, which should have been transferred to the Government.

Increased financial independence of the judiciary is extremely important. JSAP is participating in the preparation of conferences on this theme and has submitted through the OHR to potential donors proposals for funding a close examination of the budgeting system for the judicial system in both Entities.

Overall levels of resources

In general, courts in the Republika Srpska are less well-equipped, housed in less appropriate buildings and less adequately financed than those in the Federation.

In the Federation, there was substantial variation between the Cantons in funding-levels. The budget for the court system in the Posavina Canton was 2,019,135 KM, which is approximately 10% of the Cantonal budget whereas the budget for the court system in Canton 10 was 903,530 KM, which is approximately 4 % of the total Cantonal budget. The budget for the court system in Republika Srpska, which does not support the same range of functions as the Cantonal budgets, is 9,357,333 KM, or 2% of the total budget.

It appeared that some courts were less well-resourced than others in the same Canton for essentially political reasons. The Municipal Court in Maoca which has jurisdiction over the part of the pre-war Brcko Municipality within the Federation is in small rented accommodation. The Cantonal Ministry has been reluctant to obtain anything better until the arbitral decision. The Zenica-Doboj Canton is apparently not providing the Municipal Court in Zepce with funding. The court is in a mixed area and Bosniak-Croat antagonism seems to be the reason for the lack of funding. The building is in a poor state of repair and is unheated. One of the judges said that they are only able to spend one or two hours a day there. The court seems to be barely functioning.

Human resources

The Cantons and the Republika Srpska have laws on the number of judges required by each court. The prescribed figures appear largely to be based on caseload (which may discourage judges from increasing their work-rate). In the RS all five District Courts, at least 19 of the 26 Basic Courts and at least 14 of the 41 Courts for Minor Offences were found to have fewer judges than they should according to the law. Similarly in the Federation both the generally well-off and the less well-off Cantons have a large proportion of courts with fewer judges than the law requires. For example, in Central Bosnia Canton 5 out of 7 Municipal Courts and in Tuzla Canton 6 out of 10 Municipal Courts have fewer judges than they should according to the law. For Courts for Minor Offences the figures were 6 out of 8 for Una-Sana Canton and 7 of the 11 for Zenica-Doboj Canton. These are only rough indicators, but significant nonetheless.

Again and again, judges and others in both the Federation and the Republika Srpska pointed out that because much higher incomes can be earned in private legal practice, there has been a brain-drain from the judiciary. There are not enough judges and too many of them lack experience. In the Federation salaries vary from Canton to Canton with some judges being paid as much as 1400 DM per month and others as little as 600 DM. In the RS salaries were even lower, with some judges being paid less than 400 DM. Several JSAP Teams found that payments in the RS were often delayed. Until very recently staff in the Herzegovina Region of the RS have not been receiving their salaries, nor courts their expenses, in cash but in what they refer to as “cheques”. These documents cannot be exchanged for cash at a bank. Local businesses will accept them as payment but obviously they cannot be used outside the RS. Raising the salaries of judges should substantially increase the number and quality of those seeking judicial posts. It would also contribute to raising their status and increasing their independence.

Judges at the regular courts in Bosnia and Herzegovina are required not only to have a law

degree, but also to have passed the judicial examination. In addition, a certain number of years of relevant experience is necessary for some judicial posts. There was no evidence that any judges at RS Basic Courts or Municipal Courts in the Federation did not have the necessary academic qualifications. However, with so many people entering the profession after the war there were judges who did not have the required experience. Judges at Courts for Minor Offences should either have passed the judicial examination or the examination for judges of courts for minor offences. In the Tuzlanski Canton and the Zenica-Doboj Canton people could exceptionally be appointed as judges of courts for minor offences without having passed either of these examinations on condition that they passed one of them within a year of entering service as a judge. Again there was a tendency for judges to lack experience.

In some parts of Bosnia special conditions have exacerbated the problem of deficiencies in human resources. Some Cantons have given Municipal Courts very extensive competence so as to minimise the possibility of appeal to the Federation level. As a result some inexperienced judges in Municipal Courts have had to handle some important and difficult cases. This tendency was found in Central Bosnia Canton as well as Croat-dominated Cantons, such as Posavina. In Central Bosnia Canton several new courts have been created and this has resulted in young and inexperienced judges being appointed to them. Both the Municipal Court in Maoca (Tuzla Canton) and Orasje (Posavina Canton) are functioning without their full allocation of judges, since some of them have been seconded to the Brcko Basic Court for the purposes of creating the multi-ethnic judiciary.

The shortage of judges makes itself felt in a whole host of ways. Under the new Federation Law on Civil Procedure, panels of three judges have replaced ones consisting of one judge and two lay-judges. This new requirement has been found difficult to meet in several Cantons. For example, the Municipal Court in Drvar (Canton 10) has only two judges. So parties in civil procedure are asked to accept the old arrangement of a panel of one judge and two lay-judges (for which the legal basis is questionable) and, if they refuse, a judge from another court would be asked to come. In the RS panels of three judges are required in certain cases. The Basic Court in Nevesinje is not able to arrange this and so the cases concerned are now referred to the court in Trebinje.

Judges frequently complained that they were sometimes unable to afford the expertise they needed. The President of the Teslic Basic Court (RS) said that he was unable to afford a single expert. Consequently his court is sometimes unable to finish trials when they reach the stage of expert testimony. The cost of a single ballistics expert is 4,000 dinars [about 530-550 KM] which represents the court's monthly bill for heating, electricity, water and supplies. In the Posavina and Tuzla Cantons judges with whom the matter was discussed said that they could afford experts. The Presidents of Srebrenik and Gradacac Municipal Courts said that they had never failed to provide expert evidence necessary or the legal assistance required under the law because of a lack of finance. If need be, they would overspend.

It should, at the same time, be pointed out that several JSAP Teams considered that expert witnesses were used more than was necessary. The use of experts increases costs and delays proceedings as the court has to approve their appointment from a list of registered experts. There also appeared to be too much deference to experts. For example, often the

Investigating Judge has to decide whether an injury is grievous or not. This is a question of law for the court, but often the opinion of a medical expert is taken as determinative.

Physical resources

The majority of municipal courts in the Federation were housed in reasonably well-kept buildings with adequate space for their requirements. However there were exceptions, for example, the Municipal Courts in Jajce, Kiseljak and Fojnica. RS Basic Courts mainly had less satisfactory accommodation, often needing repair. Many courts throughout both Entities lack rooms designated specially for court-hearings. So cases are usually dealt with in the judges' rooms, some of which are very small. For example, the succession judge of the West Mostar Municipal Court, whose cases often involve many family members, has an office which barely holds two desks and a few chairs. This would not allow separation of parties, desks to take notes, or confidential discussions, nor does it encourage public access. In both Entities there were Courts for Minor Offences operating from single rooms and so unable to provide a proper environment for a hearing. Poor heating in some RS courts was reported by several JSAP Teams.

Office equipment was found to be lacking in many of the regular courts. Only 15% of the RS Basic Courts were found to have copying machines and 15% also were found to have computers. A larger proportion (54%) were found to have fax machines. The Federation Municipal Courts were better provided: the corresponding percentages were 48%, 76% and 80%, respectively. The Courts for Minor Offences in both Entities tended to be worse equipped in these respects: only 2% of those in the RS and 13% of those in the Federation had copying machines; 10% in the RS and 34% in the Federation had computers; and 22% in the RS and 21% in the Federation had fax machines.

Many RS courts lack electric typewriters and have only one manual typewriter. Some have to manage with a single telephone line and the Ljubinje Minor Offence Court (RS) does not have a telephone and has to rely on the pension fund office next door. The President of the Jablanica Court for Minor Offences (Herzegovina-Neretva Canton) acts as the telephone-receptionist as the court's one telephone is in his office. The telephone line was disconnected at Brcko Basic Court (RS), because the bill had not been paid. The Trebinje Basic Court (RS) reported difficulties in paying the telephone-bill. This problem was also observed in the Federation. The Court for Minor Offences in Siroki Brijeg (West Herzegovina Canton) had its telephone-line cut for non-payment of its account. It had accumulated 4-5,000 DM worth of unpaid postal and telephone-bills over two or three years. Several courts mentioned difficulties in paying for postage. When official notices have to be sent by mail, the lack of a budget for postage causes late delivery. Some courts even complained of a lack of stationery.

Computers can give courts and Prosecutor's Offices modern case management systems, direct links to other courts and Prosecutor's Offices and the possibility of research on the Internet, to say nothing of word-processing. JSAP assisted OHR by giving it information on current computing arrangements in almost all courts in BiH so that it could make proposals to potential donors for funding the computerisation of courts and Prosecutor's Offices in both Entities to meet the obvious need.

Legal materials

Many courts were without copies of the Dayton Agreement and international human rights conventions. Often there was no access to the ECHR despite its special status under Bosnian law.

New legislation is published in the Official Gazettes of BiH, the Entities and the Cantons. The majority of courts in the Federation have access to Official Gazettes of the Federation and the Cantons. Zepce Municipal Court, however, is unable to afford a subscription. In the RS receipt of the Official Gazette has sometimes been haphazard. Judges in the South-Eastern RS reported that they only had the RS Official Gazettes from 1992.

Judges also complained about the lack of up-to-date commentaries on legislation. As a rule, they use commentaries produced before the war. RS judges in particular lacked information on current appeal court practice. In civil law jurisdictions commentaries are an essential part of a judge's tool-box. Very recently the Federation Ministry of Justice has produced commentaries on criminal legislation with the assistance of the Council of Europe. This should meet a need which was raised by a number of persons working within the judicial system of the Federation.

Lack of access to the laws of the other Entity is an obstacle to inter-Entity judicial cooperation. A collection of the laws of *both* Entities has been printed by a Swedish publisher. Following liaison with JSAP, OSCE will be providing copies to judges and prosecutors in both Entities.

All courts in Bosnia should have up-to-date legal materials, including international instruments, legislation and court practice. That they do not is an important limitation on their effectiveness.

Land Register and Cadastre

As the country makes the transition to a market economy and as privatisation becomes a reality, land registration can be expected to increase in importance. In Bosnia and Herzegovina it takes two forms: registration of *ownership* at Land Registers which are attached to RS Basic or Federation Municipal Courts and registration of *occupation* at the "Cadastre" which is generally under the administration of the Municipality.

Resolutions on the creation or changes of interests in land are made by judges of the Municipal Courts of the Federation and the RS Basic Courts on the basis of information already in the Land Register. The resolutions are forwarded by the Court Registry for inclusion in the Land Register. Under the law legal and natural persons may visit the Land Register to get information from it or to ask for certification of interests. A number of Registers were visited by the Mostar JSAP Team. The books in all of them were found to be in a poor condition, with broken spines, binding string failure and torn pages. The archives are suffering from deterioration of paper. Apparently a new book costs around 2,000 DM and the Land Register at Ljubuski (West Herzegovina Canton) is in need of new books. No

register appeared to keep a back-up record in any form. Land Registers were destroyed during the Second World War at Prozor (Herzegovina-Neretva Canton), Posusje (West Herzegovina) and Ljubinje (RS). Although some attempt was made to reconstruct the Register at Prozor, it remains incomplete. The absence of a Land Register is regarded by the President of the Municipal Court there as the most serious obstacle to his work and has created a huge backlog of cases. There are procedures by which interests over land can be registered without the Land Registers, but they are obviously more awkward and less effective as a public record.
JSAP has submitted a proposal for a pilot programme to establish a functioning property and land register in the Mostar area. A plan for the modernisation of the land registration system would be created using available computer and information technology. This pilot program could then be used as the basis for developing and improving property and land registers in other parts of Bosnia.

Conclusions

The institutional capacity of the judicial system is multi-faceted. At the level of processing cases, the situation is fair. There are serious backlogs, but in most courts these are not growing rapidly. There are, however, a few parts of Bosnia and Herzegovina in which the court system is barely functioning.

The overall organisation has features which reduce its efficiency and effectiveness. At the macro-level the complicated arrangements resulting from ethnic conflict - for example, the proliferation of court systems and sources of funding - lead to inefficiency. The lack of an adequate inter-Entity legal framework reduces the capacity of the court system to deal with an important group of cases.

The many deficiencies in resources - in the quantity and quality of personnel and the lack of equipment - slow down the processing of cases, increase the inconvenience associated with litigation and even lower the quality of justice. The quality of justice is also reduced by the absence of safeguards for the standards of the judiciary and prosecutors. The effect of the legislative and political aspects of the judicial system on the quality of justice will be outlined in the next Sections.

On the positive side it should be pointed out that the pre-war infrastructure and legal professions, though both have been damaged, have provided the foundation for the reconstruction of the court system which has taken place since 1995. In addition, tribute should be paid to the many judges and others who have continued to administer justice despite the inadequacy of the resources at their disposal. Legal professionals throughout Bosnia and Herzegovina have shown a real interest in new legislation and a willingness to learn. As far as possible they should be able to participate in the legislative drafting on the many matters within their experience.

The detrimental effects of low salaries have been stressed, but this is part of a wider problem of the salaries of professionals in the public sector. The range in the proportion of the overall budget allocated to the judicial system among the various governmental bodies responsible suggests that a higher priority could be given to the rule of law in resource allocation and that

if it were, the institutional capacity of the court system would be significantly strengthened in many parts of Bosnia and Herzegovina.

THE TECHNICAL DIMENSION

Introduction

The purpose of this section is to look at the application of some important legislation and to identify some of the areas in which legislative reform is needed. The emphasis will be on legislative reform emerging from the application of the laws.

Despite the fragmentation of legislative sources in post-war Bosnia and Herzegovina, the ECHR and its Protocols are paramount. Not only do they take precedence over all other law (BiH Constitution Art. II(2)), but also no constitutional amendment will eliminate or diminish the rights and freedoms protected under them (BiH Constitution Art. X(2)). The BiH Constitution has priority over the legislation of Bosnia and Herzegovina, the Entity Constitutions and the Entity law (BiH Constitution Art. III(3)(b)). The Entity Constitutions take priority over the Entity laws.

During the three month reporting period it has only been possible to look at a few areas. Housing, property and employment legislation have been selected because of their importance for the creation of a sustainable multi-ethnic society. Criminal legislation is a cornerstone of the rule of law. Very recently it was also significantly amended in the Federation. An assessment of the judicial system with as broad a scope as JSAP needs to give attention to those parts which the citizen is most likely to encounter. For this reason family law, administrative procedure and minor offences have been examined. It was also anticipated that the procedure in minor offences would contain breaches of the ECHR. Commercial legislation is of interest because of the transition to a market economy which Bosnia and Herzegovina is undergoing.

Implementation of the ECHR

It was generally believed before the establishment of JSAP that the ECHR was almost never raised in court proceedings. This has been largely confirmed by JSAP's enquiries. The investigating judge at Doboj District Court said that defence lawyers never brought the ECHR to his attention and that he had no access to it or its case-law. There were courts in all parts of the country without copies of the ECHR. However, there have been some heartening examples of its application. On 10 November 1997 the RS Supreme Court struck down a decision of a lower court to impose the death penalty, on the grounds that it would contravene the ECHR, which is applicable under Article II(2) of the BiH Constitution.

Some legal professionals have been trained in the ECHR by the Council of Europe, the International Human Rights Law Group and others, but they are still not yet as alert as they might be to the possibilities which there are for its application. For example, under Article VI(3) of the BiH Constitution, a court may apply to the BiH Constitutional Court to determine whether a law on whose validity one of its decisions depends is compatible with the ECHR. So far this has hardly happened. A programme of assessing the

compatibility of legislation with the ECHR under the guidance of the Council of Europe is underway, but it may be some time before its findings are translated into reform.

In view of the status of the ECHR and its Protocols under the BiH Constitution, their current neglect within the judicial system is highly unsatisfactory. Further training will only provide a partial solution. What is needed is a basic change in orientation.

Housing and property cases

Relevant legislation

Under Article 1(1) of Annex 7 of the GFAP, all refugees and displaced persons have the right to return freely to their homes of origin. This provision which is fundamental to the creation of a lasting peace has proven one of the most difficult in the GFAP to implement. During the war a vast amount of property was designated as abandoned and allocated to refugees and displaced persons under legislation which damaged the rights of those who had originally been the legal occupants. Following intense pressure from the international community, laws were adopted by the Federation in April 1998 and by the RS in December 1998, setting forth an administrative procedure whereby these original occupants may seek to recover their apartments and houses. The intention of the legislation now in force in both Entities is to enable applications to be processed quickly by administrative organs outside the court system.

Overview

The failure of municipal administrative organs to apply this legislation is already well-known. JSAP's findings confirm those of other agencies.

Officials of municipal housing departments in the Tuzla Canton were often quite open about their unwillingness to apply the new laws and painted a negative picture of those seeking repossession. In both the Tuzla and Posavina Cantons authorities were not meeting deadlines for processing claims and indicated that they routinely set up unnecessary obstacles to repossession, such as oral hearings and the finding of alternative accommodation for current occupants even where this was expressly not required by the legislation. In Canton 10 the administrative procedure for repossession was in a similar state of disarray. According to the Ombudsman's Office in Livno, the Head of the Property Department there has not been appointed, no appellate authority has been established, no evictions have been carried out in the Canton and claimants are left with nowhere to appeal their cases. Claims are being registered but they are not being processed.

The new RS legislation has been in effect for too short a period for JSAP to assess the extent to which it is being applied. Housing department officials in municipalities in the Eastern RS containing huge numbers of Serb Displaced Persons strongly opposed it. The earlier legislation allowed wide-ranging latitude in granting temporary occupancy rights and, as a result, large numbers of decisions were made without sufficient legal basis. The new legislation does not adequately address these decisions. Moreover it keeps the responsibility

with administrative bodies which are subject to limited effective judicial control. The parties, especially claimants of temporary occupancy rights, tend not to exhaust the remedies available in administrative procedure. They prefer personal or oral interventions to appeals to higher administrative organs. The fact that so few appeals were submitted to the Ministry in Bijeljina and Brcko indicates that administrative bodies do not follow the procedures and deadlines for decision-making.

An application to the Commission for Real Property Claims (CRPC) constitutes a possible route of appeal against a decision of a municipal housing department. It is widely seen by judges and others in the judicial system as separate from the Bosnian legal process and of limited effectiveness. Despite their status under Annex 7 of the GFAP, the decisions of the CRPC are not yet expressly enforceable under domestic law. At the Madrid Conference on 16 December 1998 the Peace Implementation Council urged the adoption of implementing legislation for these decisions. Such legislation is plainly urgently needed but has yet to be adopted.

The vast majority of cases in the Federation in which legal occupants seek repossession of accommodation abandoned during the conflict are being dealt with outside the court system in administrative procedure. In both Entities courts have jurisdiction if *either* a party initiates administrative litigation after the exhaustion of the administrative appeal procedure *or* if the accommodation has not been declared abandoned and repossession is sought under civil procedure.

In the Tuzla Canton there were only a handful of cases of administrative litigation as a result of applications for repossession following the April 1998 legislation. A lawyer working in the field considered the procedure to be a waste of time for clients seeking repossession because any favourable decision would still need to be enforced by the relevant municipal housing authorities. In Una-Sana Canton and Canton 10 there was no administrative litigation in housing cases.

Discussions with international and local personnel indicate that attempts to recover property which had not been declared abandoned through the courts under civil procedure in the Federation were often thwarted by unnecessary delays and the failure of the decisions of the courts to be enforced. As a consequence, many people do not initiate court procedure. According to the OSCE and the Presidents of the Municipal Courts I and II in Sarajevo Canton, execution of court orders remains a huge problem in Sarajevo. Police refuse to execute eviction orders and often challenge the legality and propriety of the decision of the court. According to sources within the judicial system and the international community, eviction cases have been the subject of attempts by the Cantonal authorities to influence the execution by the court of its orders. Courts have even been instructed in official correspondence from Cantonal Ministers as to how they should decide such cases.

An overview of the manner in which the RS Courts handle property disputes is not possible at this stage. The legal framework for housing/property issues in the RS is vague. Some of the case-files in the Brcko Region showed that the approach was not consistent and it appeared that the vagueness of the legal framework gave the courts the opportunity to fail to decide cases. The RS Basic Courts sometimes inappropriately declare themselves incompetent, on the grounds that the property has been registered as abandoned and the

matter falls under administrative procedure, when in fact the matter falls outside the scope of abandoned property legislation. It should also be mentioned that even before the stage of making a decision on a case has been reached significant delay is caused by the need to find out whether the property in question has been registered as abandoned.

Conclusion

Despite the vagueness of the legislative framework and the need for implementing legislation for decisions of the CRPC, the fundamental difficulty in housing/property litigation lies with the application of the laws, rather than the laws themselves. The political context in which they are applied is critical. This point will be returned to in the third section.

Employment cases

Legislation

Substantive legislation in the field of employment (the Law on Basic Labour Rights and the Employment Law) is largely pre-war and retains some out-dated elements from the previous regime. New phenomena have arisen, notably unprecedented unemployment and insecurity of tenure. The Constitutions of Bosnia and Herzegovina and the Entities include anti-discrimination provisions, which are absent from current labour laws in the Federation and the RS. Drafts of new legislation are currently under consideration

Overview

Dismissal of employees from their jobs was an important part of the discrimination which took place during the war. In Bihac Region the most abundant and contentious employment cases were claims for reinstatement in former employment and for compensation for lost income. In Sarajevo Municipal Courts I and II there was a similar mix of cases.

During the war there was bitter fighting in what is now the Una-Sana Canton between the mainly Bosniak Army of the Republic of Bosnia and Herzegovina and the Bosniak "autonomists". There are strong indications that a large number of employment cases relate to that conflict, with discrimination being based on political allegiance rather than ethnicity. In Canton 10 (an almost entirely Croat Canton), on the other hand, the vast majority of cases are initiated by Bosniaks and are clearly ethnically based.

Discrimination within the judicial process in Una-Sana Canton and Canton 10 takes the form of denied access to justice, deliberate delays in the processing of cases, and virtually complete lack of execution of court orders in favour of the claimants.

Some of the judges who were interviewed appeared biased against the claims of minorities. This was particularly the case in Canton 10, but was also detectable in Una-Sana Canton. From interviews with judges at two Municipal Courts in Canton 10 objective reasoning regarding the merits of a case has been replaced by a search for "the easy way out". Arguments aim at explaining why a favourable decision cannot be made, or why a political

decision needs to precede any decision by the judiciary.

In Canton 10 out of approximately 340 employment cases opened during 1998, court hearings had only been scheduled in two by the end of January of this year. Procedural delays are common throughout the entire court process. The case of a teacher from an ethnic minority who was verbally dismissed in 1992 was opened in 1997, a first hearing was held on 31 March, and a second hearing in July 1998. No decision has been communicated yet. In July 1997 51 claims for compensation were filed at the Tomislavgrad (Canton 10) against Livno Bus Company. The collectively lodged complaints were rejected by the Municipal Court. The claimants then submitted their claims individually. No decisions have been made, and no hearing has been scheduled. Under the law once a court has made a decision in a specific case, it must notify the parties of it within 8 days. In spite of this, it is not unusual for notification to take place after this period. In at least one case in the Region there was a one-year delay in notifying the parties of a decision. There have even been reports of systematic obstruction of procedure by a judge in Canton 10.

Numerous judges in Una-Sana Canton acknowledge the problem of enforcement. An important current case there is the collective dismissal of the local Social Democratic Party (SDP) leader, Mr Ibraga Topic and 17 of his supporters from the 25 May Brick Plant in Cazin. The Court ordered their reinstatement as well as the payment of damages. The manager of the enterprise has refused to execute the court order. Under the new Criminal Code, this constitutes the crime of disobedience of a court decision, but the manager has not been indicted. Although this case is an all too common example of someone flouting the orders of a court with apparent impunity, it also illustrates the fact that courts are prepared to make decisions which will be unpopular with powerful elements in the local community.

Both the President of the Association of Independent Trade Unions and the Representative of the Confederation of Free Trade Unions stated that workers believe that courts are not independent, impartial or accessible. Union leaders reported that workers tended not to assert their legal rights in the court process, because they do not know that they are able to, they will have to wait too long for a decision and litigation will cause personal disadvantages to them and their family. The unions also stated that they lacked the funds to hire lawyers for their members.

Conclusion

The failure of justice in employment litigation, much like litigation in the housing/property field, lies principally in the fact that the law is not applied. That it is not applied can only be understood and *properly tackled* against the background of the political context in which this litigation takes place.

The administration of criminal justice

Legislation

The entry into force of the new Criminal Code (CC) and Law on Criminal Procedure (LCP) in the Federation on 28 November 1998 marked the biggest change in criminal law in Bosnia

and Herzegovina for at least a generation. The protection of individuals coming into contact with the criminal justice system has been extended. For example, there are important new rights in connection with legal assistance (Articles 4, 66, 67 and 70(1)); detention (Article 187); the collection of evidence by the police (Articles 199(1), 203, 205-212); and the fairness of court proceedings (Articles 13(2) and 143(6)). Before November of last year the two Entities had almost identical legislation, which had very largely been drafted during the 1970s.

Overview

During this reporting period legal professionals in Tuzla Canton have still been familiarising themselves with the new provisions, many of which they have not needed to apply. Some judges were not aware of some of the more radical innovations; however some had closely scrutinised the legislation and all appeared to wish to apply it. Enquiries in the Zenica-Doboj Canton also revealed that some judges needed further training.

Practical problems in the application of the new laws came to light. For example, in several Cantons it emerged that the new requirement that a person should be brought before an investigating judge within 24 hours of his arrest (Article 187 of the LCP) would be difficult to implement without changes in organisation and practice.

The reform of criminal legislation which has now been completed in the Federation and which should soon be finished in the RS has only been conceived of as a first step in which blatant deficiencies are to be removed. It has always been intended that there should be a further longer-term, more fundamental reform (cf. paragraph 37 of the Luxembourg Declaration of the Ministerial Meeting of the Steering Board of the Peace Implementation Council, 9 June 1998).

JSAP has identified a number of areas in which further amendments would be desirable, for example, the process of taking testimony, the collection of background information on an Accused (Article 213(1) LCP FBH; Article 218(1) LCP RS) and confrontation (Article 227(3) LCP FBH; Article 232(3) LCP RS).

Of particular concern is the fact that a Public Prosecutor is only under an obligation to prosecute an assault and indeed only has the power to do so if it causes serious bodily injury (Article 177 CC FBH; Article 42 CC RS). In several parts of the country it has been observed that members of the public can be intimidated almost with impunity. There have been notorious cases in which alleged participants in politically motivated riots have been charged only with minor offences and so have not been handled by the criminal justice system as they should be.

Serious consideration should also be given to the role of the prosecutor. A number of investigating judges and prosecutors in both Entities have advocated that prosecutors, rather than judges, should conduct the criminal investigation. Some Judges have said that their active role in investigations compromises their impartiality. Under the present arrangements in pretrial procedure in both Entities separate but similar functions are assigned to the police, the prosecutor and the investigating judge. Those within the criminal justice system have indicated that this fragmentation of responsibilities gives rise to delay, inefficiency and lack

of accountability. Although some prosecutors were very positive about their collaboration with the police, others were dissatisfied on the grounds that the police often failed to inform them, seek their advice or act on their requests. The position of the public prosecutor has been strengthened slightly in the new Federation LCP (Articles 42(1)(2), 145(1), 146(1), 146(2), 148(1) and 199(1)). There is scope for taking this further, but it needs to be done in such a way that the Prosecutor is subject to proper control and the rights of the Accused are not damaged.

Political influence in criminal cases is often not explicit taking the form of fear of consequences of decisions [6]. It made itself felt either in the failure to proceed or to complete a procedure. This occurred both in an apparent case of organised crime and in a case involving municipal officials. The fragmentation of responsibility among the police, the investigating judge and the Public Prosecutor makes it hard to determine who is responsible for the inaction.

Sentencing has been looked at in detail by the Banja Luka Team. In both Entities it was found that offenders are overwhelmingly male and they have an average age of over 30. In both the Banja Luka Basic Court and the Bugojno Municipal Court offences against property were the most common. There is no obvious disproportion between the seriousness of the offence and the sentence, but courts seem not to impose immediate imprisonment even in the more serious cases. In the great majority of cases the penalty is a suspended prison sentence. All sentences reviewed were grounded on reasons and judges decide on the penalty in the light of aggravating and mitigating circumstances. However the prescribed range of sentences is often too wide. For example, the penalty for serious bodily injury causing death is imprisonment for a period of between one and twelve years (Art. 42(3) CC RS and Art. 177(5) CC Fed). Both Criminal Codes allow courts to reduce a sentence below the limit prescribed by law for the offence in question, if there is particular mitigation (Art. 42-43 CC RS and Art. 41-44 CC Fed.)

Conclusions

The new criminal legislation in the Federation is largely being applied within the judicial system. This is encouraging. There is scope for further reform in a number of fundamental respects. However special priority should be given to the following:

(1) Reform aimed at removing obstacles in the way of implementation of key elements of the new laws, such as changes in practice and organisation needed to support the 24-hour detention rule.

(2) Reform enhancing protection of human rights and furthering the peace process, such as widening the range of circumstances in which a Prosecutor is under an obligation to prosecute assault.

[6] This emerged from work in the Doboj part of the RS.

Family law cases

Legislation

In both Entities the substantive family law is in essence the Family Law Code of the Socialist Republic of Bosnia and Herzegovina, originally published in 1979 and amended in 1989. The procedure is defined in the Law on Civil Procedure and the Law on Out-of-court Procedure. In the RS the old pre-war legislation is used and in the Federation new procedural codes were adopted in 1998.

Overview

The Bihac JSAP Team investigated family cases in court procedure. The Team found that it was very difficult to enforce court decisions and that children and women were particularly vulnerable. The majority of the population is unemployed and without a stable income. Therefore it is very difficult to enforce court orders in support cases. Where the father of a child is employed, a deduction can be made from the income paid by the enterprise where he works. Currently it is rarely possible to apply this since so many people are not registered as employed. Seizure of a debtor's property is seldom applied, because the debtor avoids fulfilment of his obligation by selling all the suitable property.

In many cases divorce is completed very quickly. However the division of property takes much longer to be decided. Often it takes years. The wife and children often suffer in such cases, since it is usually the husband who controls the marital assets until the final division. Judges in both the Una-Sana Canton and Canton 10, as well as in the RS, were of the opinion that divorce and division of property ought to be processed together.

Some categories of family cases are decided in administrative procedure by Social Welfare Centres (SWCs). These include adoption of children, guardianship, the conciliation process in the divorce procedure and child custody. Some judges felt very strongly that the ultimate decision on child visitation rights should be transferred from the SWCs to the courts. They pointed out that a decision of a court will be taken more seriously than one made by a SWC.

Conclusion

JSAP's brief overview of family law practice has revealed that non-execution of court orders and effective discrimination - in this area, gender discrimination - may occur in cases which are unconnected with ethnic politics. Some legislative change would be of benefit, but the problem of enforcement is a further indicator of the need to raise the effective authority of judicial bodies.

Civil Disputes

Legislation

In the Republika Srpska the Law on Civil Procedure, which is the procedure to be followed in contentious civil cases, is basically the same as the one which was produced during the former regime in the late 1970s. Last year in the Federation a new Law on Civil Procedure which was formulated with Council of Europe assistance came into force.

Overview

Each case generally proceeds by a number of separate hearings, at which some of the evidence might be taken and other matters such as arrangements for expert reports are dealt with. Thus, a hearing at which all evidence is given is not common and neither is it necessarily the final step. The interruption of proceedings and the practice of hearing different items of evidence at different times - sometimes at intervals of a month - make it more difficult for judges to give proper attention to all aspects of the case and all items of evidence. A record of the hearing is kept by a typist. This is not a verbatim account of what was said but a summary dictated by the judge. Manual typewriters are often used. These are loud and distracting and make it difficult for the witness to know whether his testimony is being accurately summarised. (The same applies in criminal hearings).

JSAP's assessment in this area raised questions about the role of lay-judges in civil proceedings. Where the RS Code requires a panel of three judges, two of them should be lay-judges. In the Federation all three have to be professional judges. The principle of members of the public participating in decisions of courts is an attractive one, but at the moment it would seem that the contribution made by lay-judges in the RS is minimal.

Conclusion

JSAP has only had a very preliminary look at civil disputes and the assessment made has to be seen in that context. There is still scope for improving procedure in regard to the recording of evidence and the role of lay-judges, but no fundamental legislative deficiencies have been uncovered.

Commercial cases

Legislation

Commercial cases are of essentially two types. They may be handled in civil procedure. Alternatively, after the exhaustion of the administrative process, they may take the form of administrative litigation. The Law on Civil Procedure applies in the first type of case and the Law on Administrative Litigation in the second.

Overview

The Mostar Team examined commercial cases in a number of courts in both Entities in Herzegovina. It was found that the majority were for the non-payment of a debt and that their volume was much less than it had been before the war for two main reasons: first, disputes are often solved out of court because court proceedings are costly and protracted; and, secondly, there is less economic activity. There did not seem to be many cases filed in

matters that might attest in part to the current state of transition to a market economy, such as mortgage enforcement, although a number of bankruptcy cases were found in the RS.

Administrative litigation does not appear to be used at the moment to enforce rights or to challenge decisions of the government on commercial matters. Cantonal Courts have jurisdiction to hear administrative cases challenging decisions of Municipal or Cantonal administrative bodies. Most of the caseload in administrative litigation at the East and West Mostar Higher Courts was in the form of challenges to decisions on invalids pensions. The East Mostar Higher Court receives only about 30 cases in administrative litigation each year. The situation was similar at Trebinje District Court in the RS, where only eight administrative cases were filed and eight decided in 1998 and almost all involved pension rights. The Ljubuski Municipal Court (West Herzegovina Canton) has no cases of administrative litigation.

Conclusion

The work of the Mostar Team suggests that few commercial cases are coming into the court system, but the number of such cases in administrative litigation reaching the Cantonal Court in the Herzegovina-Neretva Canton may increase as the Canton passes more legislation that moves decision-making power to the local authorities in fields such as housing, construction, forests and trade.

Minor Offences

Legislation

A special report on minor offences is being produced by JSAP. The legislative background is complicated. The Entities and the Cantons each have Laws on Minor Offences, which deal with procedural matters. In addition there are laws at Entity and Cantonal level in which minor offences are defined.

Overview

It appears that too much discretion is given to the police in decisions as to whether to prosecute an act as a crime or a minor offence. Some acts have characteristics of both. Such decisions have important consequences for the accused and injured party. Prosecutors have no role in minor offence proceedings which are very informal with less strict procedural guarantees and sanctions than in criminal procedure. Minor offence proceedings are summary in nature designed to punish and fine rather than establish innocence or guilt. Persons sent to Courts for Minor Offences will be prosecuted less vigorously and receive lower fines and terms of imprisonment under the laws on minor offences. IPTF has cast doubt on the knowledge which the local police have of the legal classification of acts as minor offences or crimes. The tendency for some assaults to be dealt with in courts for minor offences rather than as crimes in the regular courts has been mentioned[7]. The procedure in

[7] This was apparent in the aftermath of riots in Drvar on 24 April 1998 and the delayed response of the criminal justice system to an aggravated assault on tax collectors in

such cases has been analysed and found in some respects to fall short of the standards set in the ECHR.

Administrative law

Legislation

There is a Law on Administrative Procedure in force in both Entities. A pre-war Law is in force in the RS and a new one was enacted in the Federation in 1998, but both rest on the same principles.

Overview

The implementation of administrative procedure by administrative organs has been touched on by JSAP both in its investigation of housing/property and commercial cases and more generally.

Administrative procedure concerns the relationship between, on the one hand, society in a broad sense and, on the other, physical and legal persons. Administrative decisions have a significant impact on ordinary people. Furthermore they are crucial for those desiring to start and run a business. They are to a wide extent made by persons specialising in certain technical issues and without legal training. Some are not appealable within the administrative process. The lack of oversight and accountability and the possibilities of arbitrary decisions and discrimination are obvious. Moreover very few administrative cases are brought to the courts through litigation due to lack of awareness, high costs, long delays and also a lack of confidence in the judiciary.

JSAP submitted proposals at the OHR Information Meeting at Brussels on 2 February for an assessment of administrative procedure similar to that of the court system now being carried out by JSAP in order to identify the need for change of legislation on administrative procedure and in its application.

The Technical Dimension: Conclusion

Legislative reform is always needed, because of changing circumstances. The transformation which has been taking place in Bosnian society has required a substantial rewriting of the laws. This has taken place with assistance from the international community in such fields as housing, criminal justice and civil procedure. Further change is necessary, for example, in employment. However legislative change will not remove the major obstacles to the rule of law which have been identified. Those obstacles which take the form of failure of courts to take action and the failure of the decisions to be implemented have to be understood in the light of their political context, which will be explored in the next Section.

Stolac on 1 August 1998.

THE POLITICAL DIMENSION

Introduction

The political dimension pervaded all aspects of the work of the programme. Like so many institutions in Bosnia, the court system reflects the separation of ethnic groups and has a general tendency to support the goals of the dominant nationalist forces. At the same time Bosnia is undergoing a complex transition from authoritarianism to democracy, from a state-owned to a mixed economy and from economic devastation to reconstruction.

The creation of a judiciary which is not subject to political pressure will be an essential part of a sustainable civil society in Bosnia and Herzegovina. Unraveling the nature of the political influence on the judicial process is one of the most difficult and one of the most important tasks facing JSAP.

The organisation of the court system

Conflict between the different ethnic groups has been apparent in the court system in several respects: first, it has meant that there is only limited inter-Entity cooperation in judicial matters, which closely parallels a similar phenomenon in policing; secondly, a continuing struggle between Bosniaks and Croats has prevented the court structure in some Cantons from being fully implemented; and thirdly, the Republika Srpska and the Croat-dominated parts of the Federation have tended to use expertise from Croatia and FRY which is available within Bosnia and Herzegovina.

Lack of collaboration between Bosniaks and Croats within the Federation is expressed either in separate institutions or in the paralysis of attempts at unification. Attempts at unification have resulted in the Municipal Court in Zepce barely functioning and in the failure to appoint judges to the Travnik Municipal Court. The tendency of Croat-dominated parts of the Federation to press to have complete control over the judicial process is discernible in the separate organisation of the courts in the Herzegovina-Neretva Canton and, to a lesser extent, in the Central Bosnia Canton and the competence of the courts in Posavina Canton and the de facto jurisdiction of Posavina Canton over Ravne-Brcko.

Ravne-Brcko is a part of the Tuzlanski Canton which is under the de facto jurisdiction of courts in the Posavina Canton in breach of the Federation Constitution and law. Under the Final Award in the Brcko Arbitration, it will be part of the “Brcko District of Bosnia and Herzegovina”. UNMIBH is currently pursuing ways of resolving the issue of Ravne-Brcko in conjunction with OHR.

A number of organisational arrangements reinforce control by dominant political groupings over the court system. Although there is in many formal respects a constitutional separation of powers, this is undermined by the role of the legislature and executive in appointment of judges which is set forth quite expressly in the Constitutions of the Entities.

The process of resource allocation is such that the judiciary feel that they are, so to speak, "beholden" to external forces. Several judges indicated that their dependence on the executive for the disbursement of funds and on political structures, such as Assemblies, for the allocation of resources, compromised their independence. Court Presidents have said that the need to bid for additional resources made them dependent on the executive. Funding from the private sector can also create a sense of obligation which may undermine judicial independence.

Some organisational arrangements within the judicial system are unfavourable to members of ethnic minorities. The Madrid PIC advocates the promotion of a multi-ethnic judiciary. In the RS the judiciary is almost entirely Serb. In the Federation there is a constitutional requirement for the ethnic composition of the Cantonal judiciary to reflect that of the population of the Canton as a whole according to the 1991 Census (Federation Constitution, Articles V.11.(2) and IX.7). In those Cantons which are now overwhelmingly Bosniak or Croat this has not happened and the proportion of Bosniak or Croat judges mirrors the current ethnic composition of the population. A multi-ethnic judiciary would be a natural adjunct of a multi-ethnic society. It should also be pointed out that nationalist symbols abound in many courts and as a consequence members of minorities would be made to feel unwelcome. Examples include the prominent display of the Croatian flag or the old flag of the Republic of Bosnia and Herzegovina in certain courts.

The level of individual judicial decisions

The issue of judicial independence came up in the work of every JSAP Team. Some judges would raise it of their own accord and make a point of stating that they had never been subjected to political pressure. Others would say that financial circumstances prevented the judiciary from being as independent as it should be. Some went even further, mentioning direct acts of interference and their fears.

On occasion there is a danger of misunderstanding because of the tendency of some Bosnian judges to mean something slightly different by "judicial independence", from, for example, the notion of independent decision-making present in interpretations by the Strasbourg bodies of Article 6(1) of the ECHR. Often, they mean mainly the ability of the judiciary to have control over resource allocation and the selection of personnel in the judicial system coupled with a higher status. Having said that, judicial independence in decision-making is a concept with which many judges are familiar and to which many aspire.

Political influence was detectable in housing/property cases and employment cases and the prosecution of organised crime. It generally took the form of delay in the proceedings or failure to enforce court decisions. In employment cases in Canton 10, for example, there was evidence of bias against ethnic minorities, but equally fear of the consequences of certain types of decision emerged in discussions with judges. Criminal cases with an inter-ethnic aspect too often are dealt with by Courts for Minor Offences so that it seems that justice is done.

Overt pressure does occur. Written instructions to courts in housing matters have already been mentioned. Judges in the Central Bosnia Canton have been threatened, assaulted and

attacked[8]. In the Zenica-Doboj Canton two cases of direct oral threats came up. One concerned the prosecution of a major politician and the other was a civil action against a large commercial enterprise. Threats have also been made against Prosecutors in relation to apparently ethnically motivated offences. A judge in Una-Sana Canton who dealt with employment cases also reported being threatened. In a society in which the rule of law is not well-established, single incidents of threats or violence may, therefore, make themselves felt on a range of cases going far beyond the individual case which prompted them.

Judges in both Entities expressed concern about the inadequacy of the protection they had. Often the police were responsible for the failure to implement decisions of courts. In such circumstances judges would not be inclined to rely on the police to provide them with protection. In conjunction with IPTF, JSAP has been looking into ways of increasing the security of judges and witnesses.

The case of Muharem Begic and its aftermath in the Una-Sana Canton illustrates a number of points regarding political influence at the level of the individual judge. Muharem Begic is a former Police Officer in Bihac and an alleged DNZ supporter. More than three years ago the Municipal Court in Bihac ordered his reinstatement in his old job. The night following communication of the decision, the Presiding Judge, Ms Bahra Coralic was picked up at her apartment, taken to a field on the outskirts of the town and beaten unconscious. The subsequent criminal case against the suspects was referred to the Municipal Court in Cazin, where it was delayed for two years before being handed to an inexperienced judge. The verdict in the case was pronounced on 19 March 1999. Two of the accused were sentenced to one and two years of imprisonment. The third accused was pronounced unfit to stand trial due to mental disorder suffered as a result of a car accident. This case illustrates that a *single* act of overt interference such as the beating of a judge can have an impact on a related case being heard by another judge in another court and also that the system can work even in a environment in which the judiciary are being intimidated.

The reluctance of some judges to move in the direction of increased protection for the rights of the accused or suspect in the criminal system may be a vestige of authoritarianism. This, at least, was the view of some lawyers. Several of those working in the judicial system described themselves as products of the old system and expressed a desire to cut themselves loose from it. It was not so very long ago that membership of the Communist Party was a sine qua non for appointment as a judge or a prosecutor. It takes time to eradicate politicisation of this nature.

Conclusions

[8] Similarly, before JSAP was set up, a member of the RS Constitutional Court was assaulted at the time of the constitutional challenge to the dissolution of the RS Assembly and call for new elections in 1997 by Biljana Plavsic, the then RS President.

The following tentative conclusions about the political dimension of the judicial process may be drawn:

1. Judicial independence would appear to be compromised either in cases which involve powerful forces in society or in cases which impinge on ethnic politics, particularly in the fields of housing, employment and criminal cases.

2. In the many cases which lie outside these categories the initial impression is that the principle of impartiality is generally adhered to, though in other respects owing to inadequate resources, legislative weaknesses or insufficient authority vested in the courts justice may not always be well-served.

3. Overt interference with the judicial process in the form of improper instructions, intimidation and violence is in some parts of Bosnia an every-day occurrence and where it takes place, it may have an impact which may go far beyond any individual case to which it relates.

4. JSAP did encounter some judges who were openly biased, but a perhaps more substantial source of political influence is the result of the genuine fear of many judges of the consequences for their families and themselves of applying the law.

5. A significant number of judges and prosecutors at grass-roots level are prepared to make correct decisions by which they put themselves at risk. Equally many within the judicial system wish to see judicial independence enhanced by being freed from its present state of politicisation.

This final point is a basis for some optimism over the future development of the rule of law in Bosnia and Herzegovina in the midst of the immense difficulties that it faces.

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