



Accelerating reforms in BiH with overrides and defaults across different levels of government

Jasmina Ivanović

Context and importance of the problem: What's wrong with BiH parliaments?

Many key reform processes in Bosnia and Herzegovina involve cumbersome processes of harmonizing lower-level legislation (Entity or Cantonal) with higher-level (e.g. State or Entity) laws. Frequently, the deadlines are not respected and the reform processes tend to be delayed with the final result being a lower level of implementation effectiveness. There are currently no mechanisms that can be employed to remedy such violations of deadlines or call to responsibility those who are responsible. Similarly, decisions of the State and the Entity constitutional courts, which rule legal provisions unconstitutional and ask for alterations in the current legislation, are seldom implemented in the stipulated time frame. Again, there is no formal mechanism for penalizing those responsible for the breaches.

As reported by OSCE: "Efficient and effective parliamentary government is essential for Bosnia and Herzegovina's transition from peace implementation to full integration into Euro-Atlantic structures. The Parliamentary Assembly of BiH plays a central role in leading the country toward successful fulfillment of accession requirements, particularly in harmonizing legislation. As state-level responsibilities increase during this process, one of the Mission's primary goals is increasing the Assembly's capacity in order to fulfill the requirements for Euro-Atlantic integration processes."

Another important problem for the reform processes in BiH is that many laws are not implemented even on the same level because they depend on bylaws and appointments by the executive, but which fail to happen within the

mandated period of time. As a consequence, institutions are not formed on time, the activities get stuck due to legal voids, and in many cases this additionally slows down the EU-accession process for the country.

At the heart of the problem lies the lack of accountability by parliaments for the legislative process. Legislatures on all levels are systematically depleted of capacities necessary for analysis of policies, as well as for legal framing and technical preparation of bills. This applies to committees as well as to political party groups and individual members. Besides, the reporting form the executive is scarce and does not include a systematic overview of outstanding harmonization and implementation issues. Legislatures depend almost exclusively on the executive branch for framing new legislation, and, in return, the executive usually enjoys a high degree of control over the legislative agenda, up to the point of indefinitely stalling consideration of bills it does not feel comfortable with. Yet, the executive does not bear the responsibility for the legislation it effectively controls, and is driven by other considerations that maximize benefits and political control compared to utilization of its own scarce resources. In the current situation, neither the legislative, nor the executive accepts to be held primarily accountable for the outcomes legislative process.

If BiH is to become a functioning parliamentary democracy, the accountability of parliaments for harmonization and implementation of laws must be (re)established. That can be achieved only if the system is changed to provide (currently lacking) incentives to legislatures to:

- Play a more active and responsible role in harmonization of laws, and

Summary

Many key reform processes in Bosnia and Herzegovina (BiH) suffer from inconsistent harmonization of legislation across different levels of government (the State, the Entities, the Cantons in the Federation). Similarly, the constitutional courts have no mechanisms to enforce their decisions. Executives are frequently late in implementation critical bylaws and making appointments. This comes from the lack of accountability of the parliaments on different levels for the legislative process and supervision of the executive. Authorizing higher levels of government to override lower level legislation in case of delays and inconsistencies would dramatically improve implementation of reforms. Empowering legislatures to override executives in case of delays in appointments and adopting bylaws would greatly strengthen reform implementation.

- actively supervise, and, when necessary, override the executive to ensure timely implementation of laws through bylaws and appointments.

That can be done by replacing the existing ineffective systems and solutions that regulate:

- Institutional setup, policy making capacity, and autonomy of legislatures, and
- Statutory overrides and defaults across levels of government.

Bosnia and Herzegovina (The State Parliament)

In the context of the Parliamentary Assembly of BiH in the period 2008-10, the most notable problems can be exemplified with the following case:

- Implementation of the "Sejdić-Finci" ruling by the European Court of Human Rights. The Parliament is in charge of amending the Constitution in line with the ruling, but more than one year on, nothing has been done on this issue, except delegating the task to the Council of Ministers.
- Failure of cooperation with the Council of Ministers and Entity parliaments
- Failure to implement bylaws and appointments.

The first of these examples is the failure of the Parliament to act on fulfilling its obligation arising from international treaties - by amending the constitution. This is not the constitutional responsibility of the Council of Ministers, although it is reasonable to expect its help and cooperation. The second example is a typical case of lack of cooperation and synchronization between the State level and the lower levels (Entities), and the result is partial or a complete lack of implementation of the key reform laws. The third example shows that the State Parliament cannot bring the State Executive (the Council of Ministers) to account for not implementing legislation.

Republic of Srpska

It should be noted that RS has enjoyed a high level of political cohesion, since it had practical-

ly one party in government since 2006, instead of a wide coalition, which is more typical of BiH. Also, the decision-making mechanisms on the State level ensure that the State laws must be practically preapproved by any politically coherent RS government. However, the same pattern of parliament's lack of capacity, accountability, as well as overdependence on the executive are there, since the rules and the institutional setup remained the same as elsewhere, which can be attested by parliamentary minorities whose mouth has been effectively shut, and, in the case of ethnic minorities, whose constitutional rights were systematically violated.

Following examples show the problems with the National Assembly of the RS:

- Failure to adopt new Entity insignia
- Failure to act according to the Entity Constitution
- Preempting State legislation on government property

Canton of Sarajevo

The Sarajevo Canton has a budget that is sizeable to that of the Federation. As a seat of government it also enjoys a special significance, and as the richest part of the country it is often a test-bed for different reforms. Some problems in the context of the Cantonal Assembly in the period 2006-2010 include:

- The Law on Higher Education
- The Law on Local Self-Government
- Failure to adopt budgets on time.

The first two examples are typical cases of failing to harmonize cantonal laws with the higher (State and Federal) law, way past the statutory deadline. The third case shows inability or unwillingness of the Cantonal Assembly to hold the executive accountable for planning and submitting budgets within the legally stipulated time frame.

Diagnosis and critique of policy alternatives: Lack of legislative accountability and capacity

Absence of progress in several indicative examples which have given and other related cases does not simply happen in an atmosphere of in-



difference. Quite contrary, our insight into minutes from the legislative sessions shows that each of these issues has been repeatedly the object of discussions, objections, questions to the executive, initiatives and resolutions. While lack of political will within the local ruling coalitions certainly explains one part of inactivity, it should be noted that these objections, resolutions and initiatives, do not come only from the opposition benches: in fact, they regularly draw support across the political spectrum. Their ineffectiveness, therefore, comes from other sources, namely:

- Inability to effectively monitor, analyze and formulate policies.
- Missing technical capacity and administrative resources
- Executive control over the legislative agenda.

These three factors in combination mean that, in spite of pressure on the legislatures to act, the low capacities and the level of executive control over agenda make any more autonomous action unlikely to succeed, and therefore the majority chooses to delegate or yield to the executive, often with some ritual, but powerless, show of rhetorical force. Considering that the membership in the legislatures is a relatively lucrative job, compared to the BiH average standard of living, and that the rewards do not depend on the legislative output, the only strong incentive for the legislature members to act more actively and responsibly would be the chance to succeed and therefore gain reputation, and for that to work, the three previously mentioned factors need to be reversed to a significant degree.

It is not the intention to paint the executives on various levels in BiH in unreasonably dark colors. Although unelected and effectively free of parliamentary oversight, the executives in fact do run the country on the daily basis, and in the course deal with the usual plethora of problems, crises and fires that need to be put out, often with very scarce organizational and financial resources. Compared to the leisurely existence of parliamentary members, many ministers consider themselves the true bearers of the burden. The point here is that the executive is necessary

a bottleneck in the legislative process, because it has to economize with its resources and assign them to its top priorities. And, in the situation where it can control the agenda and cannot be overruled or effectively called to account by the legislature, it would be unreasonable to expect the executive to offer the legislature more than what it can get away with. Therefore, the reversal of the three factors mentioned above is the only way to motivate the executive to behave differently.

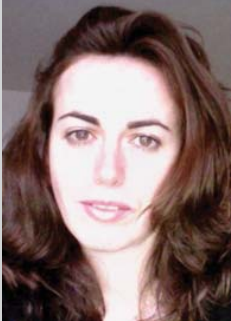
It should be noted that besides increasing the policy making and administrative capacities by the legislatures and decreasing its dependence on the executive, two additional factors need to be considered:

- There are typically many more bylaws and action points than laws, the legislature needs to keep regular track on what needs to be done and when, and this has to be supported by regular reporting from the executive.
- The information about the prospects of successful implementation of laws must be shared between the executive and the legislative branches for the appropriate corrective actions to take place.

Policy recommendations

Compared to the current situation, we propose two variants for strengthening the legislative branch, one based on overrides and failsafe mechanisms, which is more ambitious but harder to implement, and a weaker one based on statutory defaults, which may be easier to put in place, possibly as an evolutionary step. Both variants call for:

- Strengthening policy analysis and policy making capacities of the legislatures on all levels in BiH, including an adequate level of technical capacities and legal services, to enable their committees, political parliamentary groups and individual members to scrutinize the existing and develop new policies without the exclusive resort to the executive. This should be accompanied by adequate strengthening of legal and technical services to the committees, groups



Jasmina Ivanović has received a university degree in economy. Her interests lie in the public and corporate policy analysis. As a municipal councilor, she had an in-depth, first-hand experience in functioning and problems of the local governments. She has coordinated several policy research projects and participated in development of the studies and recommendations. Her hobbies include photography, sports and cooking.

and legislature members, necessary for framing legislative proposals and initiatives.

- More frequent and systematic reporting from an executive to the respective legislative on the status of implementation of laws, as well as from the lower levels to the higher levels of government on harmonization of laws.
- Systematic revision of legislative rulebooks to remove at least the most rigid mechanisms that allow the executive to control the legislative agenda and block framing, consideration, and supervision of laws.

Furthermore, the override and failsafe variant calls for establishment of mechanisms that can be activated in the event of non-compliance with terms of higher laws, such as:

- Giving implicit authority to higher levels of government to enact ordinances applicable to lower level units that fail to harmonize their legislation and bring about bylaws and appointments within the required time frame.
- Implicitly authorizing legislatures should be given to override the executive by adopting bylaws and making appointments if the executive fails to do so within the statutory period of time.
- Authorizing the constitutional courts to rule ex officio on just compensations to those affected by failure of the legislature to implement constitutional court decisions, especially when time frame for implementation has been significantly violated.

The softer statutory defaults variant may require, as a matter of good practice and legislative standards, all new laws to include default provisions that enter into effect if the executive or the lower level governments fail to comply with the provisions of the law, or when the statutory deadlines for harmonization or implementation expire.

Sources consulted or recommended

European Commission. (2009) Bosnia and Herzegovina Progress Report 2009 (EC publication No. SEC(2009-1338). Retrieved on 15 October

from www.delbih.ec.europa.eu/docs/Progress-Report20092.pdf

European Commission. (2010) Bosnia and Herzegovina Progress Report 2010. Retrieved on 15 January 2010 from www.delbih.ec.europa.eu/files/docs/2010progresst2.pdf

G. Drewry. *The Executive: Towards Accountable Government and Elective Governance* (2004), Jowell and D Oliver edition

M.Flinders. *The politics of accountability in the modern state* (2001)

Organization for Security and Co-operation in Europe, (2009), OSCE in Sarajevo, Annual Report 2008, 2009, 2010



A "Policy Development Fellowship Program" has been launched by the Open Society Fund BiH in early 2004 with the aim to improve BiH policy research and dialogue and to contribute to the development of a sound policy-making culture based on informative and empirically grounded policy options.

The program provides an opportunity for selected fellows to collaborate with the Open Society Fund in conducting policy research and writing a policy study with the support of mentors and trainers during the whole process. Seventy three fellowships have been granted in three cycles since the starting of the Program.

All policy studies are available at www.soros.org.ba