



Justice Not Implemented = Justice Denied Optimizing the Enforcement of the Constitutional Court of Bosnia & Herzegovina's Decisions¹

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Non-enforcement of constitutional court decisions cannot be ignored

Seven per cent of the decisions of the Constitutional Court of B&H have officially been qualified as non-executed. In reality, this percentage is even higher

From January 1st 2003 to December 31st 2010, the Constitutional Court has adopted 778 decisions upon citizens' complaints, establishing that human rights had been violated². Out of these, 56³ or 7,2 % had been officially qualified as non-executed. In reality, these statistics are less optimistic. On the one hand, a considerable part of the 778 decisions just establishes a human rights violation without requiring any further execution action by the responsible authority, which reduces the number of executable decisions. On the other hand, there seem to be some decisions, which, even if not (fully) enforced, have not (yet) been qualified by the Court as such, which again raises the number of de facto non-enforced decisions.

The multilayered importance of this Court's jurisdiction makes unacceptable any cases of non-compliance. Quality case-law requires quality implementation.

When analyzing this percentage, it is important to bear in mind the larger context of B&H being a transitional and post-war democracy. It needs to be highly praised that the Constitutional Court, even if operating under these difficult circumstances, has nevertheless succeeded through its well-reasoned and consistent case-law to impose its authority over local stakeholders. But it is also exactly this outstanding achievement which makes even more unacceptable the remaining negative practices of non-compliance with its decisions. Having in mind the importance of the CCBH as the judicial instance being on top of the country's judicial system and its important role in safeguarding basic constitutional values, this practice has a negative impact on the rule of law, human rights protection, on the oversight function of the Court, being a check on all three branches of government, and thus on

the accountability of the stakeholders responsible for the implementation of decisions.

The European Union and important UN bodies have identified non-compliance as a problem to be solved - a reason for B&H to take a serious approach to this issue

The non-enforcement of the state Constitutional Court's decisions has been so far identified as a problem by various domestic (Human Rights Ombudsman of BiH, 2010; UNDP BiH, 2009; legal articles; media) as well as international institutions (Commissioner for Human Rights of the Council of Europe, 2011; European Commission, 2010; UN Committee against Torture, 2011; UN Human Rights Council, 2010; OSCE, n.d.; U.S. Department of State, 2011).

The execution of a final and binding judgment is also seen as an international obligation; non-execution violates a human right - the right to fair trial guaranteed by Article 6 of the European Convention of Human Rights.

The delayed enforcement or lack of enforcement of judicial decisions amounts to a breach of the right to fair trial, as guaranteed by Article 6 of the European Convention on Human Rights. This is the main reason why the citizens affected by this situation seek help from international bodies such as the United Nations Human Rights Committee and the European Court of Human Rights, which puts Bosnia-Herzegovina under additional pressure to solve this problem, while simultaneously exposing it to significant representation expenses and costs related to damages to be paid to the victims.

Out of 15 judgments of the European Court of Human Rights against B&H, 7 are related to non-enforcement of domestic court's decisions. Until now B&H had to pay human rights violation victims around 3 million KM based on decisions adopted by the ECtHR on different grounds - expenses to be avoided

Summary

Seven per cent of the decisions of the Constitutional Court of B&H establishing a violation of the Constitution, adopted from 2003 to 2010, have been qualified as non-executed. The reasons for the decisions not being promptly and properly enforced are of financial, practical and political nature, as well as general accountability deficits of stakeholders, combined with inadequacies of existent enforcement mechanisms. Under these circumstances, the citizens, who have obtained decisions in their favour but do not see them being properly implemented become victims of a prolonged human rights violation, without adequate redress. They seek help from international bodies, which in turn creates avoidable costs to the state of Bosnia-Herzegovina. Based on theoretical, comparative law and case-law research, as well as interviews with the leading stakeholders, this brief identifies a series of feasible and reasonable steps to be taken as part of a systematic approach to the optimization of these decisions' implementation. The presented effective enforcement strategy includes a set of small, primary preventive steps, as a direct response to the specific enforcement problems while not requiring outstanding reforms, which implemented all together, will ensure an improved execution of the Constitutional Court's decisions and other positive effects on affected citizens and the state of B&H.

¹ This policy brief is based on research conducted by the author. The complete policy study "Small steps, big effects: Optimizing the Execution of Bosnia-Herzegovina's Constitutional Court's decisions" is available at www.soros.org.ba.

² Information obtained, upon request, from the Constitutional Court of B&H.

³ The 56 adopted Rulings on failure to enforce (6 in 2005, 13 in 2006, 3 in 2007, 3 in 2008, 19 in 2009, 8 in 2010, 4 in 2011) are available at the Court's website <http://www.ccbh.ba/eng/odluke/>.

„For 18 years, Kozljak has been patiently waiting for the day when she will find out what had happened to her husband Ramiz...She, together with other families of missing people from the Vogosca area, appealed to the court in 2005. Judges ordered the governments and the Council of Ministers to provide information about the disappearance of their loved ones within six months. Four years later, Kozljak and the others are still waiting...In April 2010, with the help of lawyers from the Swiss organization TRIAL, Kozljak filed a complaint before the United Nations Committee for Human Rights hoping that it would accelerate the process of obtaining information on the disappearance of her husband.“ (Alić, 2010)

Reasons for non-enforcement?

Most of the non-enforced decisions relate to ordinary court's failure to expedite/end pending proceedings by clearly given deadlines.

Out of the 56 non-enforced decisions, the majority (43 %) refers to decisions establishing a violation of citizens' rights to a trial within a reasonable time and ordering ordinary courts to accelerate pending judicial proceedings.

32 % concern non-executed orders directed towards different governments bound to pay compensation for non-pecuniary damages awarded mostly to the victims of excessively lengthy proceedings. Nine per cent of these cases are related to family members of persons gone missing during the war, for which different governments, even following clear constitutional decisions' orders, failed to set up institutions previewed by the Law on missing persons or also to conduct investigations and provide relevant information on their loved ones.⁴

The Cantons of the B&H Federation fail to execute decisions timely because of budgetary constraints

The reasons forwarded for this kind of passivity are of different nature:

→As a reason for not paying compensation sums timely the cantonal level governments usually put forward the explanation of not having at its disposal financial means necessary for the execution of the decision under the current budget, sometimes also indicating that they will pay the money after the adoption of a new budget or the rebalancing of the existent one.

→ When it comes to the inactivity of ordinary courts in executing the CCBH's decisions, their main justification advanced is the overburdening of the Court, or loss of time because of the sick leave of the responsible judge.⁵

→ According to Monika Mijić, Representative of the Council of Ministers of B&H before the ECtHR (*personal interview, December 28, 2010*), some decisions are not being enforced because they pose problems in terms of the understanding on the required manner of their execution.

Some of the non-enforced decisions seem simply to be the result of the lack of political will for their

implementation combined with accountability deficits of stakeholders. However, it is the inadequacies in the existing enforcement mechanisms that are at the heart of the issue, since they alone, if effective, are able to minimize the space for appearance of objective reasons as well as unjustifiable non-enforcement excuses.

Existing enforcement mechanisms – sufficient for B&H?

It is in fact the sole force of the judgments of the Constitutional Court, being final, binding and directly enforceable acts, as it is foreseen under the Constitution and the Rules of the Constitutional Court of B&H, which is to be treated as a mean of enforcement (*N. Ademović, Chief of the Cabinet of the president of the Constitutional Court of B&H, personal interview, December 7, 2010*).

A supervising function of the Constitutional Court

The CCBH thereby only *supervises* the execution of its decisions; it does not implement them as ordinary courts do. It sets a time-limit in its decision, by which the authority bound by the decisions is obliged to submit information about measures taken to implement it. According to the Rules of the Constitutional Court, in the event of a failure to enforce a decision, or a delay in enforcement, or in the sole event of failure to give information to the Court about the measures taken, it adopts Rulings on failure to enforce a decision, having thereby also the possibility to determine the manner of enforcement of the decision.

The disrespect of constitutional decisions amounts to a criminal act! „Prosecutors, however, have yet to act“ (CIN, 2009).

The Constitutional Court publishes these Rulings in the Official Gazettes and forwards them to the Prosecutorial Office of B&H, who is then supposed to treat them as criminal complaints and, consequently, order investigations and undertake other steps necessary for the criminal sanctioning of such behavior, based on Article 239 of the Criminal Code of B&H. The practice has, however, shown that the Prosecutorial Office has not had an active approach to prosecuting stakeholders allegedly responsible for this criminal offence. Prosecutors argue to have difficulties in individualizing responsibility for non-execution, especially in collective bodies. Until now, there was just one case where the Prosecutorial Office raised an indictment, which resulted in the conviction by the Court of Bosnia and Herzegovina for not honoring a decision of the Constitutional Court. However, it has to be emphasized that this proceeding was initiated by the affected citizen himself.

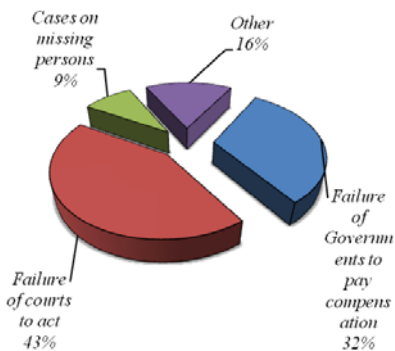


Figure 1: Rulings on Failure to Enforce 2005 - 2010

⁴ Only a group of 13 adopted decisions regarding the "missing persons" affects 1183 citizens in whose favor they had been adopted. The Institute on missing persons of B&H has been established after a long struggle and many obstructions of various kinds and the Central Registry of Missing Persons of B&H has just recently been promoted. But the families of missing persons, having lost faith in the national legal system, still have to wait for the introduction of the Fund which will provide them with financial aid, while nobody is taking any consequences for this passivity.

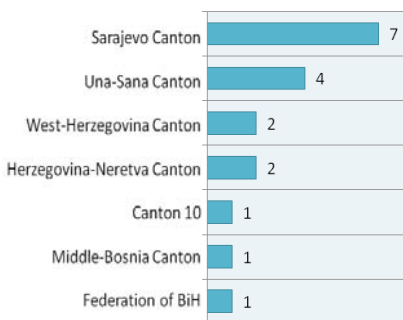


Figure 2: Governments not executing the CCBH's decisions by paying compensation sums

⁵ The CCBH, however, generally does not accept excuses for further prolonging the proceedings. It usually emphasizes, in response to these allegations that the appealation was granted precisely because of the failure to bring to an end a proceeding in a reasonable time, which required special urgency in the further proceeding.



In the past, international organizations have played an important role by pushing for implementation. Effective domestic means are needed for the future.

In the past, an important pressure factor were international community representatives (OHR, OSCE), pushing regularly for decisions' implementation. However, with the international community having now a rather passive approach as part of its exit-strategy, it is of outstanding importance to introduce effective domestic means able to ensure quality implementation of constitutional decisions.

Which steps to take?

Without a strategic domestic approach to the optimization of domestic decisions' execution, not only will the described negative practice continue to exist, but there is also a danger of deterioration of the situation. The challenging economic and socio-political conditions in the state and society of B&H, combined with the exit-strategy of the international community, do not leave much space for optimism when it comes to expectations on unexceptional timely and voluntary compliance with all of these decisions.

It is thus necessary to adopt a legal and regulatory framework, involving various actors concerned, which would minimize the existing space open for non-enforcement excuses, and ensure in this way a prompt and proper implementation of the jurisdiction of the highest judicial instance in B&H.

Thereby, a further ineffective cumulation of governance units made responsible for the supervision of the execution process has to be avoided. The idea of the attribution of such role to the Council of Ministers of B&H put forward on several occasions seems thus inappropriate. There is also no guarantee that this body will be acting more accountably in exercising this role.

Strengthening prosecuting capacities for this criminal offence in the long run

Another considerable option is strengthening the capacity of the Prosecutorial Office of B&H to prosecute individuals for not executing constitutional decisions by providing to prosecutors relevant training by experts from other countries. This option carries in it the promise of a potentially beneficial effect, a reason why any efforts in this direction are to be highly welcomed. It is, however, a long-term and expensive process, not guaranteeing that there will still be enough courage for the criminal sanctioning of occurred non-compliance, a fact depending on other, external circumstances prevailing in B&H.

Given the urgency of the issue and taking into account the need for the introduction of mechanisms which do not require big and costly reforms, but can effectively prevent non-execution and further human rights viola-

tions, it is a set of small, primary preventive steps which will lead to the improved execution of the CCBH's decisions, together with all of its positive side-effects.

Small Steps → Big Effects

Establishing a special Fund in the budget of the Federation of B&H for the need of rapid response to constitutional orders

A yearly sum of only 60.000 KM can ensure a prompt execution of compensation payment orders in the Federation of B&H!

In order to tackle the problem of cantonal budgetary constraints resulting in unacceptable delays in paying ordered compensation, a Fund (or budgetary line) needs to be introduced for this purpose in the Federation of B&H. This Fund could provide a possibility for lower administrative units; the Cantons and Municipalities, to withdraw from it means necessary for the prompt enforcement of constitutional decisions, with an obligation of eventual reimbursement of the relevant sums and possibly also default interests (N. Ademović, personal interview, December 7, 2010). The amount of money available in this Fund should be around 60.000 KM, which is the average yearly sum ordered to be paid by the cantonal and federal governments⁶. This sum should stay open to revisions, based on a follow-up on upcoming changes of yearly ordered amounts.

Introducing an obligation to pay adequate default interest in case of delay in payment in the constitutional decisions

An effective additional pressure ensuring a prompt execution of payment orders is the introduction of the obligation to pay default interests per day if the deadline given by the constitutional decision is not met. This possibility was extensively used by the former Human Rights Chamber and Human Rights Commission within the CCBH, and it also significantly improved the execution of the decisions of the ECtHR after its introduction in 1996.

Introducing an obligation of ordinary courts to give priority to proceedings in execution of state Constitutional Court's orders and adequate evaluation of judges' and courts' performance in this regard

Departing from the premise that ordinary courts cannot justify their passivity by the lack of capacities/resources/time, they shall be, in their internal rules or the Rules of Procedure, obliged to give proceedings led in execution of the constitutional decisions a priority over other pending cases. The courts' and individual judges' performance in this regard should be adequately evaluated by competent authorities.

⁶ Information resulting from the authors statistical analysis of all CCBH' decisions establishing human rights violation adopted in 2008, 2009 and 2010.



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As a French Government scholarship holder, in 2009 she obtained a master's degree with high honors in International Law from the Faculty of Law of the University in Strasbourg. Her master's thesis entitled "International Law and the Electoral Regime of Bosnia and Herzegovina" was published at the Libraries of the European Court of Human Rights and the Venice Commission of the Council of Europe, where she had undertaken the main part of her scientific research. In 2008, as a visiting student she attended a summer semester at the Faculty of Law of the Humboldt University of Berlin. She graduated in 2007 at the Faculty of Law of the University of Sarajevo. As one of the best students, she was acknowledged for excellence by the Faculty of Law, University of Sarajevo, and obtained many other awards and scholarships. She has participated in various domestic and international conferences, seminars and educative programs, amongst which the Council of Europe School of Political Studies. She has published articles on international law, human rights protection and the constitutional law of B&H. She is an active member of different vocational and other civil society associations. During her studies, she was active as a volunteer-researcher at the Tuzla Human Rights Office. She gained her first work experience at the Venice Commission of the Council of Europe and the German Bundestag, as an International Parliamentary Scholar. She is currently working at a Law firm in Tuzla.

The CCBH shall give upon request authoritative interpretation of its decisions' orders

In order to respond to the cases of non-execution resulting from doubts arising around the issues of how to implement a judgment order most adequately, the Constitutional Court shall have the possibility to give upon request an authoritative interpretation of its own decisions (*N. Ademović, personal interview, December 7, 2010*). It shall thereby have the possibility to refuse acting in this way where it finds that the orders are precise enough and that there objectively is no need for further clarification.

Introducing an effective legal remedy for non-execution at the disposal of claimants

If a decision fails to be timely enforced despite all other preventive means supporting its prompt and proper implementation, the affected citizens shall have the possibility to turn to an ordinary court and claim pecuniary and non-pecuniary damages (as well as interests⁷, in case they have not already been stipulated under the decision) from the authorities bound by the constitutional orders (*N. Ademović, personal interview, December 7, 2010*). This possibility can be introduced through a new legislative provision (for example in the Law on Courts, like in Croatia and the FYRM), or a special law, like the Law on the protection of the rights to fair trial within reasonable time adopted in Slovenia and Montenegro, providing for a more general protection of citizens.

These are all small steps expected to generate big effects in the long run; namely, strengthen the authority of the CCBH, allow the improvement of the rule of law, improve functioning of the domestic judicial control aspect of the Checks-and-Balances system and, as a final result, improve accountability of the stakeholders. Since the decisions mostly concern citizens' human rights protection, it will also positively affect the general implementation of human rights standards in B&H and diminish the need for citizens to seek help by international human rights protection institutions, saving thus the country considerable avoidable costs.

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⁷ Possibly higher than statutory default interests.