

Conference „Enforcement of Decisions of the Constitutional Court of Bosnia and Herzegovina”

Jahorina, 13 and 14 June 2023

CONCLUSIONS AND RECOMMENDATIONS

The starting point for the Conference is that under the Constitution of Bosnia and Herzegovina and the Rules of the Constitutional Court:

- decisions of the Constitutional Court of BiH are final and binding;
- every natural and legal person is obliged to respect the decisions of the Constitutional Court;
- all public authorities are obliged, within their responsibilities determined by the Constitution and law, to comply with the decisions of the Constitutional Court;
- and that the Criminal Code of Bosnia and Herzegovina prescribes that the non-enforcement of a decision of the Constitutional Court or the prevention of enforcement of a decision in some other way, constitutes criminal offence.

Thus, the participants concluded that the Conference in which representatives of the legislative, judicial and executive branch took part, represented a very significant initial step in opening a discussion in which they had the opportunity to highlight what was important from their point of view and the problems they encountered or are encountering in this segment. The Conference contributed to better understanding of the importance of the enforcement of the decisions of the Constitutional Court of Bosnia and Herzegovina. Based on the presentation of the panellists and the questions asked by the participants, the following conclusions can be drawn:

1. The Conference is the first in a series of planned events on the topic of enforcement of decisions of the Constitutional Court. Bearing in mind the complexity of this issue and

- the variety of actors that have a role in the enforcement of the decisions of the Constitutional Court, it is necessary after the Conference to continue further activities that can contribute to solving this very important issue for the rule of law;
2. The enforcement of the decisions of the Constitutional Court and ordinary courts and legally binding and enforceable acts of other authorities constitutes the compliance with the principles of the rule of law;
 3. In principle, it can be said that a decision of the Constitutional Court is enforced if a law or other act is declared unconstitutional or if it is removed from the legal system. However, this does not mean that the decision is actually implemented or in fact complied with. There are situations in which the authorities disregard the legal reasons for the decisions of the Constitutional Court and constantly (as a form of disagreement and with the intention of not enforcing the decisions of the Constitutional Court) adopt substantially the same regulations and decisions when compared to those that are declared unconstitutional in the decisions of the Constitutional Court. In particular, they adopt the same that are removed from the legal system. In this way, the decisions are not substantially complied with and enforced. Rather, an intention is specifically and consciously being expressed and an appearance is created that is not difficult to recognize.
 4. The executive and legislative branch has a special responsibility to, by timely proposing and adopting constitutional solutions replacing the laws or some of their provisions that the Constitutional Court declared unconstitutional and quashed, prevent the creation and duration of legal gaps. Due to these legal gaps, the rights and interests of citizens, the functioning of institutions and especially the work of ordinary courts may be jeopardized;
 5. Due to a complex legislative procedure (which includes drafting, determining proposals and parliamentary debates, etc.), it seems that the 6-month period given by the Constitutional Court of BiH for harmonizing laws with the Constitution, although possible, is usually not sufficient. The Constitutional Court is expected to review the Rules of the Constitutional Court of Bosnia and Herzegovina on this issue and, where there are grounds and needs, set a longer time limit in the future.

6. The relevant ministries are obliged to, immediately after the publication of the decision in the Official Gazette of Bosnia and Herzegovina, take actions within their responsibilities to prepare drafts of amendments to the legal provisions in order to enforce the decisions of the Constitutional Court. However, the lack of action by legislative branch in the cases of a long-term failure to enforce the decisions of the Constitutional Court is primarily characterized by the lack of political will to enforce and comply with some decisions of the Constitutional Court of Bosnia and Herzegovina.
7. In the view of the Prosecutor's Office of BiH, it is very difficult to establish criminal liability in cases of non-enforcement of the Constitutional Court's decisions in which the legislative or executive branch is ordered to amend general legal acts. The problem in these cases is the individualization of responsibility and the fact that the Criminal Code of Bosnia and Herzegovina has limited the responsibility to official persons. It was concluded that there was no sufficient judicial case law based on which these difficulties in prosecution would be eliminated, which would facilitate the Prosecutor's Office of BiH to prosecute this criminal offence more efficiently.
8. The adoption of new laws with regard to the length of the proceedings should enable speedier judicial proceedings and more effective enforcement of court decisions. The efficiency of these new laws may be questionable if the jurisdiction of decision-making is not clearly regulated, and if the Constitutional Court of Bosnia and Herzegovina is once again put in a position to determine a violation of the right to a fair trial.
9. In preventing the aforementioned problems, the legislative and executive authorities play a key role, as does the HJPC, the competence of which is the efficient organization of the work of ordinary courts in Bosnia and Herzegovina.
10. When it comes to the so-called military apartments, the lack of an adequate legal solution should not discourage the ordinary courts from dealing with such cases. In these cases, the ordinary courts should take into account the standards of the European Court of Human Rights and the case law of the Constitutional Court of BiH when it comes to the amount of compensation. The opposite approach would raise the issue of respect for the right to property. The stated obligation of ordinary courts stems from the constitutional obligation of direct application of the European Convention.

11. The problem of multiple referral of cases back to the ordinary courts is also a serious problem that contributes to the excessive length of the proceedings and decisions finding a violation of the right to a trial within a reasonable time and ordering the payment of compensation for non-pecuniary damage.
12. In accordance with Article 72 of the Rules of the Constitutional Court, the ordinary courts are obliged to respect the legal interpretations of the Constitutional Court in a situation where the Constitutional Court finds a violation, quash the contested decision and refer the case back to the ordinary court for re-examination.

The conclusions give rise to a finding that a systemic approach is needed in Bosnia and Herzegovina to solve this systemic problem with a clear concept of specific measures that should be taken in order to reduce and, if possible, eliminate the deliberate practice or practice deriving from omissions, in other words, the phenomenon of non-enforcement of court decisions. With a view to solving the problem of non-enforcement of the decisions of the Constitutional Court, it is necessary to take the following steps:

1. All public authorities, civil society organizations and society as a whole must continue to work and act to promote and affirm the general legal culture and, notably, the culture of the enforcement of court decisions.
2. The Constitutional Court, in cooperation with other authorities and institutions, should continue to play a proactive role in monitoring the enforcement and enforcing its decisions;
3. The Constitutional Court should, where it is appropriate, consider the possibility of additional specification of the enforcement order given to the competent authorities in order to contribute to the acceleration of the procedure for enforcement of the decisions of the Constitutional Court.
4. Exceptionally, when the Constitutional Court determines the unconstitutionality of a law and the public authority does not comply with the deadline for enforcement, and there is a possibility of irreparable damage or serious violations of human rights,

- the Constitutional Court should consider issuing temporary rulings as necessary transitional measures.
5. As individual measures, the relevant authorities should do an analysis of specific obstacles to the enforcement of individual decisions of the Constitutional Court and actively undertake actions with the aim of drafting proposals of regulations that lead to the enforcement of decisions of the Constitutional Court;
 6. As a general measure, it is necessary to implement more adequate mechanisms for the enforcement of the Constitutional Court's decision falling under abstract jurisdiction. This will include the responsibility for supervision and legal consequences for non-compliance with these requirements. This would significantly optimize the enforcement, prevent harmful consequences and significantly facilitate possible criminal prosecution due to non-enforcement of the decisions of the Constitutional Court. In this connection, the adoption of legal solutions that would prescribe these procedures in detail should be considered.
 7. The prosecutorial authorities should make additional efforts with the aim of clarifying the existing dilemmas about the prosecution of the criminal offence of failure to enforce the decisions of the Constitutional Court.
 8. The following measures related to ordinary courts could contribute to the enforcement of decisions of the Constitutional Court:
 - a) adoption of technical and organizational measures (e.g. increase in the number of judges, development of new case management information systems, etc.),
 - b) enactment of laws on the length of proceedings where they are not enacted. A legal solution implying a new trial, potentially raises the issue of a "trial within a trial". This may result in new violations of the right to a fair trial within a reasonable time;
 - c) reducing the burden of the ordinary courts;
 - d) all levels of public authorities should determine more precisely their obligation to pay compensations and, in connection with this, increase their

budgets for these purposes (including the amendment to procedural laws to speed up trials).