„The Court of Bosnia and Herzegovina and Justice Reform – Survival or Perishment“

- Speech delivered by Court of BiH President, Meddžida Kreso, in the framework of ”Talks on the Subject” at the final FCJP gathering for the year 2015 -

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First of all, I would like to thank the founder of the Public Law Center Foundation, Professor Edin Šarčević, for inviting me to this gathering today to mark another successful year of Center's operation. I would also like to note that the contribution Prof. Šarčević and his Center have given to the development of law is of immeasurable significance, considering the methodology of work and its focus on current public law topics. I wish to start by saying that the reform of the BiH judiciary or the justice reform in BiH has been in the continuous focus of the national and international public. Media coverage has been replete with news of the process, which is of immense importance for the rule of law in Bosnia and Herzegovina. Since the reform of the Court of Bosnia and Herzegovina is an integral part of the overall justice reform, tonight I will speak about the Court’s position in the process. I believe that the Court of Bosnia and Herzegovina has found itself before the greatest challenge in its history, which is why I ask the question, will it survive or perish?

What prompted me to put this topic on the agenda is the growing impression created in the BiH public, caused by the continual spinning of the empty phrase “we are not happy with the work of the judiciary in Bosnia and Herzegovina,” accompanied by the media exposure of the Court of BiH building and the continuous linking of the entire judiciary with the Court of BiH. Thus the media have been suggesting that the main problem of the entire judiciary lies in the reform of the Court of BiH, whereas the reform of the remaining judicial system in the country is mentioned only perfunctorily. This is exactly where the first error is being made – not even at the state level does the justice reform envision the reform of the Court only, but also the reform of the High Judicial and Prosecutorial Council and the Prosecutor’s Office. Such an approach taken by the media, which is visible in the media appearances of numerous public officials, is rather detrimental in terms of proper understanding of these processes, especially among the general public. However, it also reveals something else, that the Court of BiH is actually the main target of their interest. Although the media messages stand in contrast to the proclaimed commitment to pursue integrations and reform, they still tally with the specific political practice that has been led in the form of negative political campaign since 2011. That is when the attack on the Court began, and when the attempts were first made to discredit the court through the Structured Dialogue.

In fact, the Court has been exposed to continued pressures, which I believe is a reflection of the ruling political trends that send out contradictory messages: while claiming before representatives of the international community that they are committed to integrations and reforms, they keep saying to the domestic public that they are “unhappy with the work of the Court” and in their political practice bring into question its further existence.

Welcoming the positive contribution of a part of the involved stakeholders and their commitment to strengthen the Court through reform, it is necessary to bear in mind a different scenario: the disappearance of the Court as we know it. I cannot provide an answer to this dilemma today, but its topicality is supported by the reasons I am about to present. Before I point to the relevant aspects, I wish to cite the Recommendation issued by the Council of Europe’s Committee of Ministers issued in 2010, addressed to the member countries:

"18. If commenting on judges' decisions, the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in the judiciary. They should also avoid actions which may call into question their willingness to abide by judges' decisions, other than stating their intention to appeal."

1. Reform of the Court of Bosnia and Herzegovina: discrepancy between the proclaimed goals and specific measures

I wish to remind you that the Court of Bosnia and Herzegovina is the only regular court at the state level, with criminal, administrative and civil jurisdictions prescribed by the Law on the Court. Its characteristic is that apart from the first-instance jurisdiction it also has second-instance jurisdiction, which is exercised through the Appellate Division. In the beginning of the Structured Dialogue and in line with the Venice Commission's recommendation on the need to separate the second-instance jurisdiction of the Court of BiH into a special court in terms of its organization, certain public officials from the executive and legislative authorities took the foregoing facts as a basis to challenge the existence of the Court, ordering an urgent transformation and separation of the Appellate Division from the Court. Continued meetings in the framework of the Structured Dialogue since 2011, at which the Court actively defended the dignity of the Court and provided solid arguments in response to incessant challenges, have resulted in two fundamental conclusions:

1. moving the Appellate Division of the Court of BiH to form a separate second-instance court, i.e. the establishment of the Appellate Court of Bosnia and Herzegovina, and

2. objectivization of the parameters set forth in Article 7 of the current Law on the Court of BiH, i.e. the improvement of nomotechnical aspects of the provisions on criminal jurisdiction.

The implementation of these conclusions has been secured by the Draft Law on the Courts of Bosnia and Herzegovina. It was prepared in December 2013 by the state-level Ministry of Justice, based on the hitherto agreed positions of the participants in the Structured Dialogue and the Venice Commission's recommendations. The Court of BiH has prepared an expert analysis of the Draft, commenting on all relevant provisions. The conclusion resulted in the position that the Draft is rather unsuitable and inadequate, it does not comply with international standards and reverses the achieved degree of development. Such a result came as no surprise given the increasing requests of some of the participants in the Structured Dialogue aimed at undermining the institutional independence and integrity of the Court, only to culminate in poor legal solutions. Those solutions are rather weak from the aspects of profession, science and international standards, but on the other hand they suit the authors and their policies just fine.

That is where we for the first time saw the initial positions on the reform of the Court materializing. Their negativity is best reflected in the attempts to move the seat of the second-instance court to Banja Luka or Mostar, in order to change and ultimately narrow the criminal jurisdiction of the Court, and annul the internal structure of the Court – by abolishing The Registry, and by having an overlapping areas of responsibility and generally an overburdened system. Yet the most perilous of all is the attempt to subject the courts to the increased role of the Justice Ministry, which is now given broad authority with regard to the internal organization of courts. This would significantly jeopardize the courts' institutional independence, although the most recent opinion of the Venice Commission repeatedly noted that such an approach stands in contravention of the established standards, especially the international ones.

The previous concept set forth in the current Law on the Court of BiH has been fully abandoned, its being a succinct and fundamental legal text, as it is supposed to be. It leaves regulating

relevant issues to other laws, while leaving the regulation of internal judicial issues to internal acts of the Court, all of which is in line with the principle of judicial independence. One need not compare the current Law and the Draft Law in great detail in order to realize that the Draft to a large extent suits the entity laws on courts. They, unlike the Law on the Court of BiH, follow the concept adopted from the previous legal system – that of the Socialist Republic of Bosnia and Herzegovina – where the position of justice minister was markedly pronounced, with the significant role being played by the executive authorities, and any adjudication process was subjected to political office holders.

The situation is additionally complicated by the October Protocol that followed the ministerial meeting in Brussels, which also completely uncovers the intention of the politicians. Incumbent justice ministers, at the state, entity and Brčko District levels, signed the Protocol, and the European Commission approved it as a basis for the justice reform implementation. The Protocol introduced the Draft Law on State-Level Courts, prepared by the Republika Srpska Ministry of Justice, as a genuine and relevant legal text, together with the Draft Law prepared by the state-level Ministry of Justice in 2013. This decision was actually a concession to the political option that insists on doing away with the law that is binding, since it has been taking intensive steps to call for an entity referendum on state-level judiciary. This is a rigid political autocracy and complete lack of the rule of law.

The next concession to the destructively oriented policy is the elimination of representatives of the Court of BiH from the membership of the subgroup for the judiciary within the Structured Dialogue, which was a completely inappropriate move, for it is the right of the judges to be consulted about the rules that regulate the organization of courts and the judicial status. That right has been guaranteed by the Magna Carta of Judges and the European Charter on the Statute for Judges. Naturally, the political authorities have turned a deaf ear to the high standards established therein, despite constantly proclaiming they wanted to secure the highest level of guaranteed human rights and the rule of law.

The first identified discrepancy between the proclaimed commitments of political representatives and their practical manifestations with regard to the reform of the Court of Bosnia and Herzegovina is that they officially advocate independent and functional courts at the state level, but implement a policy that attempts quite the opposite – to exclude the Court of BiH from further participation in the reform of the Court itself, to narrow the scope of Court's criminal jurisdiction, reverse the achieved degree of Court's development and subject the courts to an increased role of the justice minister. The politics has proclaimed one thing, while a completely different objective was actually pursued by their own practice, which they have been implementing as a law.

2. Retrograde policies: debunking public policy in the function of personal interests

I would also like to address the issue of a rather negative political approach taken by certain political subjects. It is manifested through the decade-old denial of the constitutional basis of the Court of Bosnia and Herzegovina and the Prosecutor's Office, and Court's decisions, raising pointless accusations concerning the political instrumentalization of the Court, while constantly threatening to call for a referendum on the Court in one part of the country and the break of any cooperation with the Court and so on and so forth.

One need not specifically identify the centers where such assaults on the existence, integrity and independence of the Court of Bosnia and Herzegovina come from. Not to speak about them and not to give an expert evaluation of their attempts means to do a favor to the continued and well-orchestrated political practice, which has long lost any meaning, moving from the sphere of real politics into the sphere of petty politics, deprived of civil taste and culture of communication, in

an obvious conflict with the principle of the rule of law. Insisting on the referendum, on the abolishment of the Court and the Prosecutor's Office of BiH, which a bloc of politicians from Republika Srpska brings forth every so often, and in recent attempts also institutionally carries out, is a manifestation of political barbarism. They try to achieve their goals at any cost, regardless of whether they stand in contravention of the Constitution and law. The persistence with which they pursue their objectives and the process itself beg the question: what is the purpose of such actions? Why attacking the Court, if the Court has already been politicized and possibly under influence!? Why attacking the Court if the Court is inefficient and dysfunctional!? Why challenging the Court if the Court is a weak and disorganized institution!?

The opposite is true: exactly because the Court is independent and rejecting any influences, exactly because the Court is efficient and functional, exactly because the Court is a strong and well-organized institution, it is, to put it in plain language, a thorn in the side of all those who have something to hide. The Court is not a problem for ordinary citizens, but it serves to them as a hope and guarantee that the crimes that were committed both against them and in their name, will be adequately prosecuted. The Court stands as a guarantee that justice will be served.

It is clear that one part of the country should not be deciding on an issue that concerns the entire country, so the results of such a referendum would be practically useless – therefore, the legal force of such a referendum is non-existent, but political points and stoking a crisis by such moves are of great use to those who make them. Without any exaggeration, a proper reading of the story about the referendum is but a distraction from the important things, a cover screen that in the eyes of the citizens elevates what is essentially petty politics, in order to hide some other issues. The attempts to cheapen the institution that is able to prosecute the most complex forms of crimes, while advocating the rule of law and the state governed by the rule of law, represents but a public manifestation of lies and political deceptions. However, such a method is an impetus for us to identify such tendencies and bring them into a proper context, which is what we are doing tonight.

This is not just about their being unhappy with the way the Court operates, but about their own helplessness and inability to influence the decisions of the Court and to steer them according to the needs of a particular political and petty political option. This has been confirmed in the aftermath of the decision made by the Constitutional Court of Bosnia and Herzegovina which found the Republika Srpska Day unconstitutional. We are witnessing an orchestrated public reactions from politicians of all levels. They clearly and conspicuously loudly say and claim not to comply with or implement the decision of the highest legal authority in the country. The masks, therefore, are off, the judicial – legal – authority stands in the way of the mentioned political option. That suits the wish of politicians to put their own will, at any cost, above the democratic principles, legal standards and standards of civilized nations. Attempts to challenge judicial authority lead to retrograde options, and to the extent they are apparent and overt they are fully deprived of any justifiability. This is the kind of policy that counts on the decline of own reputation and respectability. At meetings with international representatives they always push for an independent judiciary, only to renege on their own positions on the judiciary by bringing into question the very existence of the Court.

A good illustration thereof is the decision by the Government and the National Assembly of Republika Srpska made last week to have the institutions of that Entity cease any cooperation with the Court, the Prosecutor's Office and SIPA. As if the actions of Entity authorities at the order of state-level institutions were a matter of good will and cooperation. The silence on referendum, whose goal was to score political points, had to result in showing off political muscles and ominous rattling of arms. There is no need to reiterate the arguments used to justify such a decision. The are unusable. Perhaps the best illustration is the fact that after the meeting between the State Security Minister and the RS Minister of Interior that decision became ineffective. One is, however, left to wonder how come that the level of police cooperation may

override the implementation of a decision issued by the Government and the Parliament, as the highest legislative authority!?

Which brings us to the second discrepancy between the proclaimed commitments of certain political structures with regard to the reform of the Court of Bosnia and Herzegovina and the everyday practice: while on the one hand occasionally advocating independent and functional courts at the state level, on the other side they threaten with legally pointless instruments, and by rattling arms they refuse to abide by judicial decisions and paint a negative picture of the Court of BiH in the public.

3. Position of institutions of legislative and executive powers towards the Court of Bosnia and Herzegovina in the light of justice reform

After I just described the position of political proclamation and its consequential juridical reflection, I will now point to the facts less known in the public, which are rather important for the overall understanding of the attitude of political authorities towards the Court of BiH, which means the legislative and executive authorities towards the judicial branch, all seen through the lenses of institutional relations.

It is often said that the High Judicial and Prosecutorial Council of Bosnia and Herzegovina is “a roof structure of the judiciary.” This line is most often reiterated during public appearances of HJPC leaders, which implies the position that the HJPC should be regarded as a hierarchically highest judicial body. First of all, that is not true, for it is questionable whether the HJPC has the status of a judicial body at all: it should rather be seen as an independent state institution operating in the service of the judiciary, as defined in the law it has been founded by. Therefore, to remove any dilemma – the HJPC is not superior to any court or prosecutor's office in the country, but has been given authority with regard to the judiciary, the authority that was previously within the justice ministry portfolio. That is exactly in accordance with the tendency to reduce the influence of the executive authorities on the judiciary, and that a separate body, made up of judicial office holders, should carry out technical and professional activities in relation to the judiciary. It is important to stress these terminological particularities in order to comprehend material differences and properly understand the key positions. They are closely related to fundamental issues concerning the efficiency and functionality of the Court. I will now first elaborate on the HJPC’s position in relation to the Court of BiH, and will then briefly address the relations between other institutions and the Court.

Currently pressing is the issue of a continued strengthening of the State Prosecutor’s Office in terms of staffing, and the continued stagnation in terms of strengthening the Court of BiH. This issue surely affects the future development of the Court and points to a non-systematic policy of the HJPC. Over the past two years one has noticed a continuous increase of the number of prosecutors, while the number of judges has remained the same, and is even decreasing, because after the expiry of the term in office of incumbent judges the HJPC has failed to appoint their successors to the already budgeted positions. Is that just an oversight, a clumsy implementation of the policy of appointing judicial office holders by the HJPC, or a sign that we are witnessing a deliberate degradation of the Court? The answer cannot be given with absolute certainty! However, it is clear that there has been a misbalance in terms of the ratio between the number of prosecutors and criminal judges in two main judicial institutions at the state level. The misbalance is reflected in the fact that there is now one judge per three prosecutors. Such a misbalance will over a short period of time result in an inefficiency and dysfunctionality of the Court of BiH, because the judges will not be able to process the number of cases that the annual quota prescribes as the prosecutors’ obligation. I cannot, therefore, answer the question whether the policy of appointment has been carried out clumsily or if there is a clandestine attempt to undermine the Court from within, but I can say with certainty that such moves are in

contravention of the HJPC's mandate, which is to ensure an independent, functional and efficient judiciary. It is also important to stress the fact that the most recent appointment of eight new prosecutors was carried out without any supporting analyses and long-term deliberations, therefore as a rather hasty move, while at the same time, in the procedure of appointing judges to the already existing budgetary positions, the Court is required to provide analyses, explanations and elaborations. In my opinion, the HJPC has shown a neglecting attitude towards the Court, and the foregoing example best illustrates the nature of the HJPC's attitude towards the Court.

The Court of BiH is facing a series of technical problems, such as the limited archival space and adequate equipment, lack of sufficient number of courtrooms, lack of adequate accommodation capacities for documentary and physical evidence and confiscated items. It is the HJPC's responsibility to "initiate, oversee and coordinate projects related to the improvement of matters concerning the management of courts and offices of prosecutors, including the seeking of funds from national and international sources." However, the real attitude of the HJPC is reflected in the fact that nothing has been done so far and that practical aspects of work at the Court have never been properly dealt with. It is also important to note that the state-level Ministry of Justice is generally responsible for "administrative functions related to the judiciary," but the (expected) involvement of the ministry in resolving technical issues has not taken place. This situation too testifies that the key institutions that have the responsibility and the capacity to strengthen the operation and contribute to the further development of the Court basically remain indifferent and passive by-standers.

The only guarantee of institutional dependence of the Court of BiH is the judicial budget. Under the existing regulations, the BiH Ministry of Finances and Treasury participates in the procedure of approving the budget for the coming year. Bearing in mind the hitherto practice, I have to say that the attitude of that Ministry is unsatisfactory. We often meet their lack of understanding, and find ourselves in a situation to have the slow growth of the judicial budget reflect on the Court's inability to solve technical problems. It is my opinion that a more intensive involvement of the Finance Ministry and a more careful planning of funding would go a long way in contributing to the Court's progress and development.

Also, the Court has been applying a set of laws from within its jurisdiction, mostly state-level laws, it has been discovering antinomies and legal voids, and periodically submits to the HJPC and the Ministry of Justice initiatives for launching the legislative procedure to amend relevant procedural laws, most often the Criminal Procedure Code. For the sake of efficiency and building a stable and solid jurisdiction, we need to have quality and good laws. However, to this day the situation remains unchanged, because the work of the institutions responsible for the legislative procedure does not keep up with the contemporary requirements and does not meet the actual needs. Surely the reform of the judiciary should keep its focus on a systemic revision of statutory texts, instead of merely implying amendments to an organizational law.

Also, the public is not well informed of the position taken by the BiH Public Defender's Office, which last year unilaterally abandoned the practice of good cooperation, refusing to act in enforcement cases under criminal judgments issued by the Court, or in cases of forced collection of costs of criminal proceedings and ill-gotten gain from the convicted persons. I have to say that we had had a good practice established, within which cases were realized rather efficiently, only to have a situation now, after they declared themselves lacking jurisdiction, in which the Court was literally left swamped with enforcement cases, whose realization we had to distribute among the already small number of professional judicial personnel. Such a position, bearing in mind that, according to the Law on the BiH Public Defender's Office, it is exactly this institution that is responsible for carrying out activities related to the legal safeguarding of property and property interests of BiH and its institutions, is baffling, to say the least.

In that regard, the Court filed with the Parliamentary Assembly of Bosnia and Herzegovina a request for an authentic interpretation of the relevant provisions, as the only institution authorized to provide such an interpretation, so that by its authority it could secure Public Defender's Office's participation and thus facilitate the Court's operation. The Parliament's original response was that the procedure of providing an authentic interpretation is regulated exclusively by the House of Representatives Rules of Procedure, not the House of Peoples Rules of Procedure, so in the upcoming period those rules should be harmonized. However, the harmonization was eventually carried out in such a manner that the MPs simply deleted from the House of Representatives Rules of Procedure the provisions regarding authentic interpretation, and the Court was informed that its request now cannot be addressed because there are no adequate provisions. Now we have found ourselves in a situation that the supreme legislative institution in the country does not have a defined procedure of providing authentic interpretation of laws and other general rules, and that the unclarities that appear in exercising the law can no longer be removed in a usual way, by an authentic interpretation of law.

Which brings us to the third discrepancy between the proclaimed commitments of public office holders in the legislative and executive authorities and the actual practice with regard to the reform of the Court of Bosnia and Herzegovina: on the one side they advocate independent and functional courts at the state level, and on the other they fail to address technical and legal prerequisites for an efficient functioning of the Court of Bosnia and Herzegovina, continue to negatively influence the Court's financial independence and stability with regard to approving Court budget increases and, generally, have a passive and negatively predisposed attitude towards the Court's requests and pleas.

4. Conclusion

Summing up the aforementioned, my conclusion is that the legislative and executive authorities, state- and entity-level institutions, political office holders and petty politicians with real political power, operating from within the judicial reform, including that of the Court of Bosnia and Herzegovina, bring into question the future of the Court of Bosnia and Herzegovina, in its current form. Despite all arguments and warnings issued by professional and non-governmental organizations, pointing to the fundamental imperative – judicial independence – these public office holders apparently do not take that imperative seriously. Judging by the presented facts, an opposite trend may be identified: one may conclude that retrograde policies are in operation here, their policies aimed at undermining the Court, plus there is a negative institutional attitude towards the Court. Actually, their goal is just the opposite: jeopardize the Court's independence and place it under the control of political power centers. Real political power wielders are again attempting – under the disguise of reform, after their initial initiative to completely abolish the state-level Court and Prosecutor's Office was successfully repelled – to achieve the aforementioned goal: reduce, weaken and cheapen the Court of Bosnia and Herzegovina and subject it to their own will and personal interests, with the intention to ultimately reduce it to the level of a municipal court.

All the indicators support and prove, in the words of criminal justice, the existence of grounded suspicion concerning the positive future of the Court of Bosnia and Herzegovina. The dilemma mentioned in the title and the introduction of this paper thus becomes a serious political option, for the positions and actions aimed at degrading the Court come from incumbent political actors, sitting in institutions that embody real political power and wield it to adopt the solutions least favorable to the Court. One should not lose sight of the fact that the basic problem that all attacks on the Court actually revolve around is Article 7 of the Law, defining its criminal jurisdiction, which first authorizes the Prosecutor's Office to criminally prosecute, and then the

Court to adjudicate cases involving any person from the territory of the entire Bosnia and Herzegovina for the actions leading up to the perpetration of criminal offenses. When one brings into connection the criminal jurisdiction, which is but a legal basis, and the actual power of the Court and its independence, then it becomes clear why the attacks are aimed specifically at the Court and its criminal jurisdiction: lurking in the background is the intention to weaken the Court, institutionally and in the eyes of the public, in an attempt to open up the possibility to exculpate those responsible for the crimes.

One of the most significant aspects of institutional independence and individual autonomy of judges is their financial independence, exercised through an adequate and effective budget of the Court. Without a strong budget and relevant financial support, exercising the Court's functions and its development are seriously brought into question. Arbitrariness and broad discretion powers of executive and legislative officials with regard to approving Court's budget proposals do not suit the democratic development of institutions. To that end we wish to refer to the position taken by the Venice Commission that *"Courts should not be financed on the basis of discretionary decisions of official bodies but in a stable way on the basis of objective and transparent criteria."* The decision of official institutions on the budget of the Court of BiH was a subject of a political agreement, not a result of detailed analyses. Such a practice is regrettable and will not lead us to achieving the preferred goals of justice reform that is declaratively embraced.

The difference between the official declaration of subjects of political power and their real institutional actions, described through the three explained discrepancies, requires a state of high alert, with no room for caving in, in our struggle to preserve the dignity and independence of the Court of BiH. I will also note, without any intention to incriminate anyone, that the mentioned positions and actions of the politicians actually constitute a violation of the Constitution of Bosnia and Herzegovina and of the oath they took on the occasion of taking their office, that they stand in harsh contrast with all democratic principles, political culture and the rule of law, and that they are on the verge of undermining the third pillar of government at the state level. After that, conditions are created for undermining the two remaining pillars of government. At the height of the continued attacks on the Court of BiH, a new front has been opened: attacks on the Constitutional Court of Bosnia and Herzegovina by a public declaration that its decisions will not be carried out. All this has shifted the focus of professional debates from the extremely important issue of the need to establish a Supreme Court of Bosnia and Herzegovina, which is an issue that had already been actively debated before. Due to the continued attacks on the judicial authorities at the state level and the continued need to react adequately, we have found ourselves on the permanent defensive, having been deprived of the space and time to continue the debate on the establishment of a Supreme Court for Bosnia and Herzegovina. If it is established, the rule of law would actually gain a solid basis and would open up the road to further harmonization of the judiciary with the principle of the state governed by the rule of law.

Finally I would like to note that the principle of the state governed by rule of law in the form of the rule of law requirement has no alternative. Beyond that lie lawlessness and autocracy. In addition, a true enjoyment of the proclaimed human rights and a rule of law system are not possible without strong state institutions to protect the legal order and create an ambiance for its full implementation. Courts are bulwarks of the state governed by the rule of law and defenders of human rights. Without courts there can be no protection of human rights, and without the protection of human rights there can be no state governed by the rule of law. The existence of the strong Court is in the interest of every person, every citizen individually, and the interest of our entire society.