



50TH ANNIVERSARY OF THE CONSTITUTIONAL JUSTICE IN BOSNIA AND HERZEGOVINA

**Sarajevo, Bosnia and Herzegovina
27-28 March 2014**

Ceremonial Session on the occasion of the 50th anniversary of Constitutional Justice in Bosnia and Herzegovina

Opening speech

**Gianni Buquicchio
President of the Venice Commission**

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Madam President of the Constitutional Court,
Your Excellencies, Honourable judges,
Ladies and Gentlemen,

It is with great pleasure that I am here today in Sarajevo, to represent the Venice Commission of the Council of Europe at the Ceremonial Session on the occasion of the 50th anniversary of Constitutional Justice in Bosnia and Herzegovina.

For the conference celebrating this anniversary, you have chosen a highly topical theme - where to place the Constitutional Courts between the negative legislator and positive activism.

Since its creation, the Venice Commission has promoted specialized constitutional review and the establishment of Constitutional Courts in the countries it worked with.

Consistently, the Commission insisted that these Courts be not only independent but that they also have a wide jurisdiction and that they should be open for access by individuals in order to provide an effective remedy against human rights violations.

According to the Venice Commission, in order to fulfil their important tasks, the Constitutional Courts need wide powers.

The Courts are often confronted with vague provisions or even evident legal gaps.

In order to be able to ensure the smooth functioning of state institutions, the Courts are sometimes required to overcome these problems by providing interpretations, which do not only relate to the letter of the Constitutions but which are based on the underlying principles, which are inherent in the Constitutions.

When the Courts hand down such judgments, they are sometimes accused of “judicial activism”.

However, as long as they follow constitutional principles – based on democracy, the protection of human rights and the rule of law - the Courts only fulfil their essential tasks of ensuring the supremacy of the Constitution.

We should call this not “judicial activism” or the “government of judges”, but we should refer to “active constitutionalism”, which helps ensuring democracy and the protection of human rights.

Madam President

Let me congratulate you on the long history of your Court. Your first Constitutional Court, which was established under the 1963 and 1974 Constitutions, was limited to abstract constitutional control.

Your current Constitutional Court, which provides for a much wider access for the individual, was established in 1997 under the Dayton Constitution.

Since then, you have developed an impressive body of case law in a number of important areas such as equality, fair trial or property rights.

The fact that the European Convention on Human Rights is part of your Constitution allowed your Court to directly apply this Convention in your constitutional case-law.

In addition to these topics, which are common to all constitutional courts, you also had to deal with a number of issues, which are rooted in the peculiarities of your Constitution:

these include the issues of national symbols of the entities, the discrimination in the use of names of municipalities and the position of the Office of the High Representative and of the former Human Rights Chamber in the constitutional system.

Your judgments often had to overcome the incoherencies in your Constitution and indeed Bosnia and Herzegovina probably has the most complex constitutional situation in the world.

Without expressly saying so, the Dayton Constitution established a *de facto* federal State with two entities and the special Brčko district and one of the entities is a federal state itself.

This makes for a complex system that is not easy to navigate, even on a calm day. Nevertheless, the Constitutional Court of Bosnia and Herzegovina has managed to carry out its work and do an excellent job within this restrictive framework!

Madam President,

Please let me address also the authorities of Bosnia and Herzegovina present.

Even if the Constitutional Court were as activist as it could be, it would not be able to fill the numerous gaps in the constitutional system.

In several opinions, the Venice Commission too has tried decipher the unclear provisions and inconsistencies in the constitutional framework of Bosnia and Herzegovina and its entities.

However, already back in 2005 the Venice Commission said, in its opinion on the constitutional situation of Bosnia and Herzegovina and the powers of the High Representative, that the time was ripe to reconsider the constitutional arrangement in this country and to introduce a constitutional reform.

Bosnia and Herzegovina is heavily penalised by the possibility of the constituent peoples to mutually block each other. A reform is therefore indispensable for the country and has now become an absolute necessity.

This urgency has not only come as a result of the European Court of Human Rights Sedić and Finci decision, but also because the current constitutional arrangements are “are neither efficient nor rational and lack democratic content.”

We have seen the discontent of the people in your country who wish to benefit from functioning and efficient state institutions.

While constitutional reform will be difficult to achieve and cannot be imposed from the outside, this aim should now be persistently pursued in your country.

Since the end of the Bonn powers, your authorities hold full responsibility towards this people and they should work towards reform rather than prevent it.

The Venice Commission has consistently said so – your Constitution should change the emphasis from a state based on *the equality of the three constituent peoples* to a state based on *the equality of its citizens*.

I would therefore like to use this opportunity to repeat the Venice Commission’s call to Bosnia and Herzegovina to decide to replace the present Constitution that was negotiated as part of a peace treaty and replace this “imposed” constitution with a new one, which would enjoy full democratic legitimacy.

Ladies and Gentlemen,

I would like to end by wishing us all a very fruitful discussion at the international conference and let us celebrate the 50th anniversary of constitutional justice in Bosnia and Herzegovina.

Thank you for your attention.