

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2) (b), Article 59 (1) and (2) and Article 61(2) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised Text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Miodrag Simović, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Helen Keller, Vice-President

Ms. Seada Palavrić,

Ms. Angelika Nußberger and

Mr. Ledi Bianku

Having deliberated on the request of the **six Delegates of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina** in the case **U-10/22**, at its session held on 22 September 2022, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request of **six Delegates of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina** is hereby granted.

It is hereby established that the Republika Srpska lacks constitutional jurisdiction to regulate legal matters that are subject matter of the Law on Immovable Property Used for the Functioning of the Public Authority (*Official Gazette of the Republika Srpska*, 29/22) as that, in accordance with Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of Bosnia and Herzegovina, falls within the jurisdiction of Bosnia and Herzegovina.

Pursuant to Article 61(2) of the Constitution of Bosnia and Herzegovina, the Law on Immovable Property Used for the Functioning of the Public Authority (*Official Gazette of the Republika Srpska*, 29/22) shall be rendered ineffective.

In accordance with Article 61(3) of the Rules of the Constitutional Court, the Law on Immovable Property Used for the Functioning of the Public Authority (*Official Gazette of the Republika Srpska*, 29/22), shall be rendered ineffective the day following the date of the publication of the Decision of the Constitutional Court in *the Official Gazette of Bosnia and Herzegovina*.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska*

and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

REASONING

I. Introduction

1. On 13 April 2022, Bakir Izetbegović, Asim Sarajlić, Amir Fazlić, Munib Jusufović, Denis Bećirović i Zlatko Miletić, six Delegates of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina (“the applicants”) filed with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) a request for review of compatibility of the Law on Immovable Property Used for the Functioning of the Public Authority (*Official Gazette of the Republika Srpska*, 29/22) (“the impugned Law”) with Article I(1) of the Constitution of Bosnia and Herzegovina, Article III(3)(b) of the Constitution of Bosnia and Herzegovina, Article IV(4)(e) of the Constitution of Bosnia and Herzegovina and Article 2 of Annex II to the Constitution of Bosnia and Herzegovina. At the same time, the applicants requested the Constitutional Court to adopt an interim measure by which it would prohibit the application of the impugned Law pending the final decision of the Constitutional Court on the present request.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, on 18 April 2022 the Constitutional Court requested the National Assembly of the Republika Srpska (“the National Assembly”) to submit its reply to the request.

3. The National Assembly submitted its response on 20 May 2022.

III. Facts

4. On 10 February 2022, the National Assembly passed the impugned Law no. 02/1-021-122/22, and its content is described in more detail in the part of the present decision – Relevant Law (paragraph 20).

5. The Committee for the Protection of Vital National Interests within the Constitutional Court of Republika Srpska adopted the Ruling no. UV-1/22 of 23 March (published in the *Official Gazette of Republika Srpska*, 26/22 of 28 March 2022). It is decided by this ruling that the request

of the Bosniac People Caucus in the Council of Peoples of the Republika Srpska to establish the violation of the vital national interest of Bosniac people due to the enactment of the relevant Law is inadmissible.

6. On 30 March 2022, the President of the Republika Srpska (Željka Cvijanović) issued an Ordinance on the promulgation of the impugned Law. The Ordinance was published on 5 April 2022 in the *Official Gazette of Republika Srpska*, 29/22.

7. On 12 April 2022, the High Representative issued an Order Suspending the Application of the impugned Law no. 01/22 (published in the *Official Gazette of Bosnia and Herzegovina*, 22/22 of 15 April 2022, which Order consists of three Articles). Article 1 of the Order indicates that the application of the impugned Law is hereby suspended until a final decision of the Constitutional Court of Bosnia and Herzegovina on said Law enters into force. It is stated in Article 2 of the Order that it is issued pursuant to the international mandate of the High Representative and is not issued by way of substitution for any domestic authority. It shall have precedence over any inconsistent provisions of any law, regulation or act, existing or future. Article 2 of the Order states that it shall be directly applicable and no further act is required to ensure its legal effect. Finally, Article 3 of the Order points out that the Order shall enter into force forthwith and shall be published on the official website of the Office of the High Representative and that it shall be published immediately in the *Official Gazette of Bosnia and Herzegovina*.

IV. Request

a) Statements of the Request

8. The applicants point out that the issuance of the impugned Law is inconsistent with Article I(1), Article III(3)(b), Article IV(4)(e) of the Constitution of Bosnia and Herzegovina and Article 2 of Annex II to the Constitution of Bosnia and Herzegovina. In that connection, it is stated that National Assembly, despite clear prohibitions to resolve the issue of “state property” unilaterally, and a clear position of the Constitutional Court of Bosnia and Herzegovina (*U 1/11; U 8 /19 and U 9/19*), that the issue lies within the exclusive jurisdiction of Bosnia and Herzegovina, passed the impugned Law. This unilaterally resolves the issue of the part of the “state property”. It is further stated that the passing of the impugned Law is contrary to the applicable Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 18/05 and 29/06, 85/06, 32/07, 41/07, 74/07, 99/07, 58/08), and two Entity’s laws prohibiting the disposal of “state property” in the territory of the Federation of Bosnia

and Herzegovina and the Republika Srpska, as well as a number of decisions of the Constitutional Court. According to them the issue of “state property” (*U 1/11; U 8/19; U 9/19; U 16/20 and U 4/21*) is in the exclusive jurisdiction of the State of Bosnia and Herzegovina and its authorities. In addition, it is pointed out that Article 3 of the impugned Law regulates that “the property, which is considered ownership of the subjects of public authority referred to in Article 3 of this Law, which is used by the said subjects to execute their activities and the functioning thereof, shall be *ex lege* the ownership of the said subjects”. Given that, under the provisions of the impugned Law, the “subjects of public authority”, which are to become the holders of the ownership right of the “state property” are considered to be the Republika Srpska, local self-government units, public companies, public institutions and other public services whose founder is the Republika Srpska, it is clear that this is a large interference in the matters of the acquisition of ownership right over the “state property”. Such right of ownership on the parts of the state property unconstitutionally allocated to the Entity of the Republika Srpska, as alleged by the applicants, would be the basis for further definition of disposal and management of this property, which would be governed by a special law.

9. In addition, the applicants point out that the impugned Law makes it possible for the part of “state property”, which is the ownership of Bosnia and Herzegovina, to be transformed into an Entity’s property, i.e. the property of the local self-government units, public companies, public institutions and other public services which were founded by the Republika Srpska. This is contrary to Article I(1) of the Constitution of Bosnia and Herzegovina. The applicants then refer to Article III(3)(b) of the Constitution of Bosnia and Herzegovina. They state that the Constitution of Bosnia and Herzegovina bestows the responsibility on the State of Bosnia and Herzegovina and its institutions (and not on the Entities or some other administrative levels) to regulate the issue of “state property”, which has been done by virtue of the impugned Law. They also point out that the provisions of the impugned Law violate the provisions of Article IV(4)(e) of the Constitution of Bosnia and Herzegovina, which bestows on the Parliamentary Assembly of Bosnia and Herzegovina the responsibility in such other matters as are necessary to perform its duties of the State.

10. Specifying that the “state property” is an issue being entirely within the responsibility of Bosnia and Herzegovina and its institutions, in the part titled as “Relevant Facts Pertaining to State Property in Bosnia and Herzegovina”, the applicants refer to the 1994 Law on the Transformation of Socially-Owned Property (*Official Gazette of SRBiH, 33/94*), which is in force at present in conformity with paragraph 2 of Annex II to the Constitution of Bosnia and Herzegovina (Continuity

of Laws). It is further pointed out that the continuity of ownership over the property of the Republic of Bosnia and Herzegovina, i.e., of the former Socialist Republic of Bosnia and Herzegovina, was confirmed also by the Verdict of the Court of Bosnia and Herzegovina no. P-254/06 of 3 October 2008. Further on, the applicants indicate that an Agreement on Succession Issues was concluded between Bosnia and Herzegovina, the Republic of Croatia, the Republic of Macedonia, the Republic of Slovenia and the Federal Republic of Yugoslavia, (which was ratified on 28 November 2001 by the decision of the Presidency of Bosnia and Herzegovina; *Official Gazette of Bosnia and Herzegovina – International Treaties*, 10/2001, “the Succession Agreement”) shows that the State of Bosnia and Herzegovina is the title holder of the immovable property of the former SFRY, which was located in the territory of Bosnia and Herzegovina following the dissolution of the former SFRY. The Constitutional Court also reached this conclusion in its Decision *U 1/11* (Decision on Admissibility and Merits *U 1/11* of 13 July 2012, available at www.ustavnisud.ba). It is further pointed out that, in order to better understand the issue of state property and the right to regulate thereof, it is important to keep in mind also the passing of the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina and two Entities’ laws prohibiting the disposal of state property in the territory of the Federation of Bosnia and Herzegovina and Republika Srpska respectively, which were promulgated by the decision of the High Representative in Bosnia and Herzegovina. These laws, as stated, are still in force given that no law on state property at the level of Bosnia and Herzegovina has been passed.

11. In the part of the request titled as “Arguments in Favour of the Review of Constitutionality”, the applicants point out that by the impugned Law the State of Bosnia and Herzegovina has been deprived of the right to perform its international obligations prescribed by Article III(3)(b) of the Constitution of Bosnia and Herzegovina in the context of the Succession Agreement which shows that the State of Bosnia and Herzegovina is the title holder of the state property. Then, in terms of Article VI(5) of the Constitution of Bosnia and Herzegovina (final and binding nature of the decisions of the Constitutional Court: *U-1/11*; *U-8/19*; *U-9/19*; *U-16/20* and *U-4/21*), it is clearly and unambiguously confirmed that the Entity of the Republika Srpska has no responsibility to regulate the status of “state property”. In that, the applicants also point out to the relevant paragraphs/conclusions of the said decisions of the Constitutional Court (paragraphs 62 and 82 of the Decision *U-1/11* and paragraph 37 of the Decision *U-10/16*).

12. In view of the above, the applicants ask the Constitutional Court to grant the request, to establish that the impugned Law is not in conformity with Articles I(1), III(3)(b), IV(4)(e) and

VI(5) of the Constitution of Bosnia and Herzegovina, and that it ceases to be in effect as of the day following the publication of the decision of the Constitutional Court in the *Official Gazette of Bosnia and Herzegovina*, as well as that the decision on the request be published in other official gazettes in Bosnia and Herzegovina.

b) Response to the Request

13. In response to the request (entitled as part I. - General Notes), the RS National Assembly pointed out that the regulation of the property relations and property located on the territory of the Entity, in the particular case on the territory of the Republika Srpska, is within the jurisdiction of the Entity, irrespective of the status of the holder of the ownership right, as the ownership right is the same and equal for everyone. In this regard, it is pointed out that property owned by the Republika Srpska, the Federation of Bosnia and Herzegovina or one of the cantons cannot be registered to Bosnia and Herzegovina, because there are no constitutional grounds for that. Therefore, as stated, under the Constitution of Bosnia and Herzegovina, “state property” falls under the jurisdiction of Entities and not under the jurisdiction of “joint institutions” on the level of Bosnia and Herzegovina. At the same time, the National Assembly of the Republika Srpska also pointed out that, if there were a legal basis for institutions of Bosnia and Herzegovina to manage, possess or own the “state property”, that basis must necessarily be found in the delegation of authority to the level of Bosnia and Herzegovina, in accordance with Articles III(3) and III(5) of the Constitution of Bosnia and Herzegovina. Therefore, as stated, the institutions of Bosnia and Herzegovina could own property that is used primarily for the functions and powers that the Constitution expressly conferred to the level of Bosnia and Herzegovina, with the prior consent of the Entities as its state-forming elements.

14. In addition, it is stated that, under the provisions of Article 2 of Annex II to the Constitution of Bosnia and Herzegovina and Article I(1) of the Constitution of Bosnia and Herzegovina, all regulations that were in force on the territory of Bosnia and Herzegovina at the time of entry into force of the Constitution of Bosnia and Herzegovina, including regulations passed by the National Assembly of the Republika Srpska, shall remain in force. To that end, it was further stated that Amendment XXXII to Article 68(6) of the Constitution of the Republika Srpska prescribes that the Republika regulates and ensures ownership and obligation relations and protection of all forms of ownership, legal status of enterprises and other organisations, their associations and chambers, those economic relations with foreign countries which have not been

transferred to the institutions of Bosnia and Herzegovina, market relations and planning. Paragraph 8 of the same Article stipulates that the Republika Srpska regulates objectives and directions for economic, scientific, technological, demographic and social development, for the development of agriculture, rural and urban areas, policies and measures for development planning, and commodity reserves. In addition, it is pointed out that Article 58(1) of the Constitution of the Republika Srpska prescribes that the ownership rights and obligations relating to publicly owned assets, as well as the conditions of transferring these assets into other forms of ownership shall be regulated by law. Thus, as pointed out by the National Assembly, the aforementioned provisions of the Constitution of the Republika Srpska are the constitutional basis for the adoption of the impugned Law. It clearly stems from these that the Republika Srpska has the competence to enact laws on immovable property used for the functioning of public authorities, i.e., it has the competence to regulate all matters of importance for ownership rights, i.e., property rights, and that primarily concerns the matters related to “state property”. Therefore, the impugned Law is not contrary to the Constitution of the Republika Srpska and especially not to the Constitution of Bosnia and Herzegovina.

15. In the part of the response to the request entitled “II. Main Consideration”, the National Assembly of the Republika Srpska emphasized, *inter alia*, that law regulates property rights and that legal solutions concerning property rights are equally valid for all subjects of law, irrespective of being of a private or public nature. The fact that the owner of a thing is a city or municipality, a public company or natural person, does not affect the scope or content of the property right. Consequently, it is pointed out that the one who has the authority to regulate property relations cannot be declared incompetent because a public-law subject can appear as the titleholder of the ownership right in relation to some things. On the other hand, it is stated that “state property” as category does not exist in the Constitution of Bosnia and Herzegovina, because all property that is not owned by natural or legal persons belongs to the Entities. The final confirmation of this claim, as stated, they found in the fact that the privatization process was carried out precisely in such a way that each of the Entities carried out the privatization - sold the state capital in the companies that were located on their territory, thereby, the territorial principle has been accepted and implemented. Hypothetically speaking, if the claims of the applicants are correct and well-founded, then the process of privatization of state capital in companies, privatization of state-owned apartments, concessions, public-private partnerships, natural resource management and similar, amongst other things, is called into question.

16. As for as the rights of the State of Bosnia and Herzegovina are concerned, as the applicants emphasize, pursuant to Article I(1) of the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina can only have these rights in the context of its international legal subjectivity. In fact, the State can only have rights in this context in international law, as the applicants indicate, because international law deals with relations between states and international organizations. The National Assembly points out that in internal law the State of Bosnia and Herzegovina can only have responsibilities, not any rights, because it acts from the position of authority (*ius imperii*) in internal law, and these issues are not regulated by any specific Article of the Constitution of Bosnia and Herzegovina. In other words, Article I(1) of the Constitution of Bosnia and Herzegovina defines the continuity of Bosnia and Herzegovina in its relations with other states, international organizations and with regard to concluded international agreements, which explicitly confirms that continuity in internal law does not exist. In addition, this provision does not regulate the internal organization of the State body in any way, and especially not the issue of “state property”. In support of the above, it is also pointed out that the laws passed by the Parliamentary Assembly of Bosnia and Herzegovina confirm the understanding that “state property” belongs to the Entities. Thus, as they state, the Framework Law on the Privatization of Companies and Banks in Bosnia and Herzegovina was enacted by the High Representative’s decision of 1998, and on 19 July 1999, the Parliamentary Assembly of Bosnia and Herzegovina passed the same Framework Law. This Law, as pointed out, recognizes that the Entities are the owners of “state property” and that they have full authority to regulate issues related to “state property”. It was also pointed out that the Constitutional Court, in its decision *U 19/06* of 3 March 2007, upheld the constitutionality of the provisions of the aforementioned law on privatization.

17. It is then indicated as known that the Council of Ministers of Bosnia and Herzegovina passed the Decision on the Establishment of the Commission for State Property in 2005, which had the task of determining the criteria for the division of “state property” between different levels of government, but that the Commission had never reached an agreement on these issues. The unresolved status of “state property” represented the reason for the prescription of a ban on the disposal of that property. In this connection, the National Assembly pointed out that the High Representative for Bosnia and Herzegovina, without any legal authority, banned Bosnia and Herzegovina and its Entities from further disposing of certain categories of “state property” by his Decision Enacting the Law on Temporary Prohibition of Disposal of State Property of the Federation of Bosnia and Herzegovina of 21 March 2005 and the Decision Enacting the Law on Temporary Prohibition of Disposal of State Property of the Republika Srpska of 21 March 2005.

These decisions obviously indicate that the High Representative also recognizes that the Entities are entrusted with “state property”. In addition, the aforementioned decisions on the prohibition of disposal of “state property” do not claim that the level of Bosnia and Herzegovina is in itself the titleholder over “state property” located on the territory of the Entities, nor do they determine the title holder.

18. In addition, it is stated that the applicants misinterpret the provision of Article III(3)(b) of the Constitution of Bosnia and Herzegovina by putting it in direct correlation with the Succession Agreement. In that sense, it is stated that the aforementioned Agreement can only determine the relationship of Bosnia and Herzegovina with other successor states in terms of property, and in no way can define the law or responsibilities of Bosnia and Herzegovina in the internal legal order. It is also said that the claim of the applicants that “in this way, the State of Bosnia and Herzegovina was deprived of the right to fulfil its international obligations stipulated in Article III(3)(b) of the Constitution of Bosnia and Herzegovina” is erroneous since this Article does not provide for such a thing. In addition to the fact that the said Article of the Constitution of Bosnia and Herzegovina does not define the above issue, it is indicated that the even bigger problem is that the states under the international law cannot have “right to fulfil their obligations” but only (active/working) ability or capacity. It is also stated that the claim of the applicants, that the issue of “state property” is one of other matters for which the Parliamentary Assembly of Bosnia and Herzegovina is responsible and that it falls under the exclusive jurisdiction of Bosnia and Herzegovina is *contradictio in adiecto*, and a purely arbitrary construct as well. Therefore, it is claimed that the Parliamentary Assembly of Bosnia and Herzegovina is responsible only for the issues that are required for the implementation of duties expressly entrusted to it by Article III(1) of the Constitution of Bosnia and Herzegovina and not for any other matters whatsoever.

V. Relevant Law

19. The **Constitution of Bosnia and Herzegovina** as relevant reads:

Article I(1)

Bosnia and Herzegovina

1. Continuation

The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be “Bosnia and Herzegovina”, shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders. [...]

Article III(3)(a) and (b)

3. Law and Responsibilities of the Entities and the Institutions

- a) All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.*
- b) The Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and Herzegovina. The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities.*

Article IV(4)(e)

4. Powers

The Parliamentary Assembly shall have responsibility for:

- e) Such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities.*

20. The Law on Immovable Property Used for the Functioning of the Public Authority of the Republika Srpska (*Official Gazette of Republika Srpska*, 29/22) reads:

Article 1

This Law shall regulate the ownership of immovable property, which serves as a means of exercising and carrying out public authority, which is used by the subjects exercising that authority since the signing of the Dayton Peace Agreement.

Article 2

The subjects of public authority are the Republika Srpska, local self-government units, public companies, public institutions and other public services, founded by the Republika Srpska, or by the local self-government units (“the subjects of public authority”).

Article 3

Immovable property, which is considered ownership of the subjects of public authority referred to in Article 2 of this Law, which is used by the said subjects to execute their

activities and the functioning thereof, shall be ex lege the ownership of the said subjects.

Article 4

Immovable property, referred to in Article 3 of this Law, as well as management and disposal of the said property by the subjects of public authority, shall be established in accordance with a special law.

Article 5

This Law shall enter into force eight days upon the publication thereof in the Official Gazette of the Republika Srpska.

VI. Admissibility

21. In examining the admissibility of the request, the Constitutional Court invoked the provisions of Articles IV(1) and VI(3)(a) of the Constitution of Bosnia and Herzegovina.

22. Article IV(1) of the Constitution of Bosnia and Herzegovina in the relevant part reads:

The House of Peoples shall comprise 15 Delegates [...]

23. Article VI(3)(a) of the Constitution of Bosnia and Herzegovina reads as follows:

The Constitutional Court shall uphold this Constitution.

a) The Constitutional Court shall have exclusive jurisdiction to decide any dispute that

arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

- Whether an Entity's decision to establish a special parallel relationship with a neighbouring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.

- Whether any provision of an Entity's constitution or law is consistent with this Constitution.

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the

Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

24. In view of the provisions of Articles IV(1) and VI(3)(a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court primarily concludes that the contested request is lodged by an authorised subject. Namely, the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina comprises 15 Delegates, thus six Delegates who lodged the request represent at least one-fourth of total number of members in terms of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

25. In view of the provision of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19(1) of the Rules of the Constitutional Court, the Constitutional Court established that the present request is admissible as being filed by an authorised subject. In addition, there are no other formal reasons under Article 19(1) of the Rules of the Constitutional Court due to which the request would be held inadmissible.

VII. Merits

26. The applicants consider that there is no constitutional basis for the National Assembly to issue the impugned Law as it is not in conformity with Article I(1), Article III(3)(b), Article IV(4) (e) of the Constitution of Bosnia and Herzegovina and Article 2 of Annex II to the Constitution of Bosnia and Herzegovina.

27. The Constitutional Court points out that from the content of the disputed Law follows that it covers immovable property used by the public authorities of the Republika Srpska enumerated in Article 2 of the impugned Law. It stems from the above that the impugned Law refers exclusively to existing immovable property, which is currently used for carrying out the activities and the functioning of the aforementioned subjects of the public authority of the Republika Srpska. At the same time, the impugned Law stipulates that such immovable property be considered to be *ex lege* the ownership of the aforementioned subjects (Article 3).

28. The impugned Law implicitly refers to immovable properties, which are “state property” of the former SFRY or SR BiH. There is no dispute about this fact between the applicants and the National Assembly of the Republika Srpska. In its response to the request, the National Assembly did not dispute the allegations that the impugned Law prescribes the right of ownership over immovable property that is “state property” of the former SFRY or SR BiH. In the response to the

request (paragraphs 13-18 of the Decision), as the author of the impugned Law and its authentic interpreter, the National Assembly affirmatively indicates that the impugned Law indeed pertains to “state property”. The Constitutional Court notes that the basic disagreement between the applicants and the National Assembly manifests itself in relation to the question of whether or not the Republika Srpska has the authority to independently regulate legal issues concerning the entire “state property” through regulations.

29. The Constitutional Court recalls that it considered the issue concerning the competence of the Entities’ or the State of Bosnia and Herzegovina to dispose with “state property” in the context of the constitutional division of responsibilities on several occasions in its hitherto case-law (see Decisions on Admissibility and Merits of the Constitutional Court in cases *U 1/11* of 13 July 2012, *U 8/19* of 6 February 2020, *U 9/19* of 6 February 2020 and *U 4/21* of 27 September 2021; available at www.ustavisud.ba).

30. Specifically, in the Decision *U-1/11*, the Constitutional Court examined whether the Republika Srpska had the constitutional authority to enact the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the disposal ban. In that decision, the Constitutional Court explained what is considered under the term “state property”. The Decision in paragraph 62 reads: “State property, although similar in its structure to civil-legal private property, is a specific legal concept enjoying a special status for this reason. State property is characterized by the public law nature of the relationship between the subjects and the use of that property as well as its titleholder. It includes, first of all, movable and immovable objects in the hands of public authorities and can include furthermore a ‘public good’ (sea water and seabed, river water and river beds, lakes, mountains and other natural resources, public transport networks, traffic infrastructure, etc.). It, by its nature, primarily serves all people in the country. As such, the ‘public good’ may be exempted from legal transaction (*res extra commercium*) due to its importance, as it is the only way to preserve and protect it.”

31. Further on, in paragraph 77 of the said Decision, the Constitutional Court pointed out that the subject-matter regulated by the impugned Law was “the immovable property which Bosnia and Herzegovina got on the basis of the International Agreement on Succession Issues”, and “the immovable property over which the former SRBiH had the right to manage and to dispose of”. In the subsequent part of its reasoning, the Constitutional Court further clarified that not only the real property such as buildings and similar can be held as encompassed under the term “state property”, and further emphasized: “The Constitutional Court reiterates that the state property has a special

status that encompasses, on the one hand, movable and immovable objects in the hands of public authorities used to exercise that authority and, on the other hand, the state property can include a public good, which, by its nature, primarily serves all people in the country (running water, protection of climate-related living conditions and protection of other natural resources such as forests and state infrastructural networks within the meaning of Annex 9 to the General Framework Agreement for Peace in Bosnia and Herzegovina, etc.). Such property reflects the statehood, sovereignty and territorial integrity of Bosnia and Herzegovina. Furthermore, the interest of Bosnia and Herzegovina should not be disregarded when it comes to preserving its ‘public good’, as a part of the state property serving all citizens of Bosnia and Herzegovina and as a part, which is not essential in order for specific competence of certain administrative-territorial level of government to be effectively exercised in the State. In addition, this property may serve as ‘another means for financing the expenses necessary for performing the operations of the Institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina’, within the meaning of Article IV(4)(b) in conjunction with Article VIII(3) of the Constitution of Bosnia and Herzegovina” (*U 1/11*, paragraph 82).

32. In the particular case, the impugned Law implicitly regulates the issue of ownership over the immovable property that is “state property” of the former SFRY or SRBiH. Article 3 of the impugned Law provides for immovable property, which is considered ownership of the subjects of public authority referred to in Article 2 of the impugned Law, which is used by the said subjects to execute their activities and the functioning thereof, shall be by force of law the ownership of the said subjects. The impugned Law establishes the legal basis for all immovable “state property” to be legally registered as property of the Republika Srpska and for the ownership right over immovable property that is “state property” of the former SFRY and SRBiH to be transferred to the Republika Srpska and other subjects of public authority enumerated in Article 2 of the impugned Law. The Constitutional Court holds this to be inconsistent with the Constitution as interpreted by the Constitutional Court in its case law, primarily in the Decision *U-1/11*. Therein, the Constitutional Court found the violation of the Constitution of Bosnia and Herzegovina due to the Law enacted by the National Assembly and which, in its essence, is the same as the impugned Law. In this decision the Constitutional Court held that: “[...] the Republika Srpska enacted the challenged Law contrary to both Article I(1) of the Constitution of Bosnia and Herzegovina and Article III(3)(b) of the Constitution of Bosnia and Herzegovina, which reflects the principle of constitutionality, and Article IV(4)(e) of the Constitution of Bosnia and Herzegovina, which gives the Parliamentary Assembly competence to regulate such other matters as necessary to carry out the duties of the

State, as the matter falls under the exclusive responsibility of Bosnia and Herzegovina to regulate the issue of property referred to in Article 2 of the challenged Law. For the aforesaid reasons, the challenged Law is unconstitutional. The whole law cannot remain in force...” (see paragraph 81 of the cited Decision).

33. The Constitutional Court also indicates that all objections of the National Assembly of the Republika Srpska are essentially the same as in the earlier cases in which the Constitutional Court decided on the issues of “state property”. The Constitutional Court considered these objections and allegations in the decisions it adopted and, therefore, it holds that there is no need to reiterate them once more (see, Decisions on Admissibility and Merits of the Constitutional Court in cases *U 1/11* of 13 July 2012, *U 8/19* of 6 February 2020, *U 9/19* of 6 February 2020 and *U 4/21* of 27 September 2021; available at www.ustavnisud.ba). The Framework Law on the Privatization of Companies and Banks in Bosnia and Herzegovina, which the National Assembly refers to in its response to the request, is the only thing to which the Constitutional Court wants to point out again. In connection with this Law, the Constitutional Court emphasizes that the decision (law) was passed at the State level, which allows the Entities to privatize state enterprises and banks located on their territory. In the mentioned practice, the Constitutional Court has continuously emphasized that the issue of “state property” must be resolved at the State level. It has never been said in the decisions of the Constitutional Court how the issue of state property should be resolved, but the emphasis has solely been on the fact that this issue should be resolved at the State level. The fact that the law on “state property” has not yet been adopted does not mean that the Entities can regulate this issue with their own laws.

34. In view of the above, the Constitutional Court concludes that the National Assembly passed the disputed Law in violation of Articles I(1) and III(3)(b) of the Constitution of Bosnia and Herzegovina, as well as Article IV(4)(e) of the Constitution of Bosnia and Herzegovina, which bestows on the Parliamentary Assembly of Bosnia and Herzegovina the responsibility in such other matters as are necessary to carry out its duties of the State, because it is the exclusive competence of Bosnia and Herzegovina to regulate property issues from the impugned Law. For these reasons, the impugned Law is unconstitutional. The entire impugned Law cannot remain in legal force.

35. Lastly, the Constitutional Court reiterates the standpoint from its previous decisions: “[...] the Constitutional Court is aware of the fact that the State tried to resolve this issue by the Decision of the BiH Council of Ministers of December 2004 on the formation of the State Property Commission. The aforementioned Commission was tasked to select the criteria for establishing

which property is owned by the State and which property is owned by the Entities and the Brčko District of Bosnia and Herzegovina. In addition, the State Property Commission was tasked with preparing the path leading to the legislation on the state level and legislation on the lower administrative-territorial level regarding the ownership rights, management and other issues related to the state property. Moreover, the High Representative, in order to help this process, passed the relevant laws on the temporary prohibition of the disposal of state property. This is a positive step as a state expert body was established, so that both the Entities and the Brčko District of Bosnia and Herzegovina may articulate their respective interests. Nevertheless, this issue has not been resolved yet. This issue was neither resolved at the time of the establishment of the mentioned Commission nor at the time of the entry into force of the Constitution of Bosnia and Herzegovina, i.e. on 14 December 1995. Therefore, there is a true necessity and positive obligation of Bosnia and Herzegovina to resolve this issue as soon as possible” (*op.cit. U 1/11*, paragraph 84 and *U 4/21*, paragraph 46).

Other allegations

36. Given that it determined that the impugned Law is not passed in compliance with Articles I(1), III(3)(b) and IV(4)(e) of the Constitution of Bosnia and Herzegovina, the Constitutional Court holds that it is not necessary to separately consider the allegation of the request on violation of Article 2 of Annex II of the Constitution of Bosnia and Herzegovina.

VII. Conclusion

37. The Constitutional Court concludes that the Republika Srpska passed the impugned Law in contravention with Articles I(1), III(3)(b) and IV(4)(e) of the Constitution of Bosnia and Herzegovina, as that matter falls within the exclusive responsibility of Bosnia and Herzegovina to regulate the issues of immovable “state property” referred to in the impugned Law. For these reasons, the impugned Law is unconstitutional in its entirety.

38. Pursuant to Article 59(1) and (2) and Article 61(2) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

39. Given the decision in the instant case, the Constitutional Court will not separately consider the motion for the issuance of an interim measure.

40. In terms of Article 43(1) of the Rules of the Constitutional Court, the Vice-President Miodrag Simović gave the statement of dissent from the decision of the majority.

41. According to Article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and legally binding.

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina