

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 – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in Plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Mirsad Ćeman, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Helen Keller, Vice-President

Ms. Seada Palavrić,

Ms. Angelika Nussberger, and

Mr. Ledi Bianku

Having deliberated on the request lodged by **Mr. Denis Zvizdić**, Second Deputy Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing the request, in the case no. **U-23/22**, at its session held on 19 January 2023, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

In deciding on the request lodged by **Mr. Denis Zvizdić**, Second Deputy Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing the request, for review of the constitutionality of Article 5(1)(a) of the Law on the Flag of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 19/01 and 23/04),

it is hereby established that Article 5(1)(a) of the Law on the Flag of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 19/01 and 23/04), in the part reading: “the common institutions or institution which is administered by or reporting to common institutions”, is not compatible with Article I(2), in conjunction with Article III(1) of the Constitution of Bosnia and Herzegovina.

Pursuant to Article 61(2) of the Constitution of Bosnia and Herzegovina, Article 5(1)(a) of the Law on the Flag of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 19/01 and 23/04) is hereby quashed in the part reading: “the common institutions or institution which is administered by or reporting to common institutions”.

Pursuant to Article 61(3) of the Rules of the Constitutional Court of Bosnia and Herzegovina, Article 5(1)(a) of the Law on the Flag of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 19/01 and 23/04), in the part reading: “the common institutions or institution which is administered by or reporting to common institutions” shall be rendered ineffective on the next day following

the date of the publication of the decision 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 1 September 2022, Mr. Denis Zvizdić, Second Deputy Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing the request (the “applicant”), filed a request with the Constitutional Court of Bosnia and Herzegovina (the “Constitutional Court”) for review of the constitutionality of the relevant part of Article 5(1)(a) of the Law on the Flag of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 19/01 and 23/04; hereinafter referred to as the “Law on the Flag”).

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, on 5 September 2022, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina (the “House of Representatives”) and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina (the “House of Peoples”) were requested to submit responses to the request.

3. The House of Representatives and the House of Peoples failed to submit their responses to the request.

III. Request

a) Allegations in the request

4. The applicant claims that the relevant provisions of Article 5(1)(a) of the Law on the Flag are inconsistent with the Articles I(1), I(3) and III of the Constitution of Bosnia and Herzegovina.

5. The applicant contends that the syntagm “common institutions” referred to in the contested provision is “incorrect and contrary to the constitutional principles”. When it comes to the institutions at the State level, the syntagm the “institutions of Bosnia and Herzegovina” is mentioned 15 times in the Constitution of Bosnia and Herzegovina, including Amendment I thereto. The applicant further contends that the syntagm the “common institutions” is nowhere mentioned in the Constitution of Bosnia and Herzegovina. In semantic terms, it is clear that that wording does not correspond to the terms referred to in the Constitution of Bosnia and Herzegovina and should not therefore exist in any legal act of the institutions of Bosnia and Herzegovina or those at the lower level. In the applicant’s opinion, the contested syntagm is incorrect in legal terms as well, the reason being that the consequences could be very serious for historical and legal continuation, sovereignty and statehood of Bosnia and Herzegovina if it remains an integral part of any law.

6. With regard to the allegations on inconsistency of the contested provisions with Articles I(1), I(3) and III of the Constitution of Bosnia and Herzegovina, the applicant referred to the decisions of the Constitutional Court, wherein Article I(1) of the Constitution of Bosnia and Herzegovina was interpreted (decision *no. U-1/11*, paragraph 72, and decisions *nos. U-4/21, U-9/19 and U-8/19* in which the Constitutional Court followed the position expressed in decision *no. U-1/11*). It can be concluded with certainty from the interpretation of the Constitutional Court, as he further claims, that there are no “common institutions”, but only the “institutions of Bosnia and Herzegovina”. The applicant further alleges that the Constitutional Court has clearly indicated in its case law that Bosnia and Herzegovina is not a “federal state”, meaning that it is not a state community, and that the use of the syntagm “common institutions” is therefore unconstitutional and legally incorrect. The applicant further specifies the notion of sovereignty to the effect that it is exclusively afforded to the State under the Constitution of Bosnia and Herzegovina, and not to the Entities. He alleges that the Entities are not “States” because sovereignty belongs only to Bosnia and Herzegovina and there cannot therefore be “common institutions”. The applicant recalls that the syntagm the “institutions of Bosnia and Herzegovina” is also used in the Law on the Coat of Arms of Bosnia and Herzegovina, which was adopted in 2001 at the same session of the House of Representatives and the House of Peoples of the Parliamentary Assembly when the Law on the Flag was adopted. The applicant does not exclude the possibility of an error made during the adoption of the Law on the Flag and proposes therefore that the Constitutional Court should “correct an obvious error”.

7. The applicant proposed that the request be granted and that the inconsistency of the contested provision of Article 5(1)(a) of the Law on the Flag with Articles I(1), I(3) and III of the Constitution of Bosnia and Herzegovina be established.

IV. Relevant Law

8. The relevant provisions of the **Constitution of Bosnia and Herzegovina**¹ read:

Article I

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. It shall remain a Member State of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organizations within the United Nations system and other international organizations.

2. Democratic Principles

Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.

3. Composition

Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska (hereinafter „the Entities”).

Article III:

Responsibilities of and Relations between the Institutions of Bosnia and Herzegovina and the Entities

1. Responsibilities of the Institutions of Bosnia and Herzegovina

¹ The Constitution of Bosnia and Herzegovina has not been officially translated from the English language into the official languages of Bosnia and Herzegovina. For the purpose of its work, the Constitutional Court uses the unofficial translation submitted by the Office of the High Representative for Bosnia and Herzegovina. The Constitutional Court published that text on its official website www.ustavnisud.ba and in the “Rules of the Constitutional Court of Bosnia and Herzegovina”.

The translation of the Constitution of Bosnia and Herzegovina into the Bosnian language is available at www.ustavnisud.ba.

*The following matters are the responsibility of **the institutions of Bosnia and Herzegovina**:*

(...)

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.*

5. Additional Responsibilities

*a) Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between **the institutions of Bosnia and Herzegovina**. Additional institutions may be established as necessary to carry out such responsibilities.*

*b) Within six months of the entry into force of this Constitution, the Entities shall begin negotiations with a view to including in the responsibilities of **the institutions of Bosnia and Herzegovina** other matters, including utilization of energy resources and cooperative economic projects.*

Article VI

Constitutional Court

3. Jurisdiction

The Constitutional Court shall uphold this Constitution.

9. The Constitution of Bosnia and Herzegovina²

² The translation of the Constitution of Bosnia and Herzegovina into the Croatian language is available at www.ustavnisud.ba.

10. The Constitution of Bosnia and Herzegovina³

11. The **Law on the Flag of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, 1/98, 19/01 and 23/04).

An unofficial revised text drafted by the Constitutional Court of BiH will be used for the purpose of this decision, reading as follows:

Article 5(1)(a)

1. The flag of Bosnia and Herzegovina shall be officially displayed at the level of the State of Bosnia and Herzegovina in the following ways:

*a) On all buildings of the Presidency of Bosnia and Herzegovina, the Council of Ministers and its Ministries, the Parliamentary Assembly of Bosnia and Herzegovina, the Constitutional Court of Bosnia and Herzegovina, the Court of Bosnia and Herzegovina, the Prosecutor's Office of Bosnia and Herzegovina, the Standing Committee of Military Matters, the Commission of Human Rights, the Central Bank and the Election Commission and on any other building of **the common institutions or institution which is administered by or reporting to common institutions.***

12. The **Law on the Coat of Arms of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, 8/98, 19/01 and 23/04), as relevant, reads:

Article 9

1. The Coat-of-Arms of Bosnia and Herzegovina shall be officially displayed in the following way:

*a) At the entrance of all buildings of the Presidency of Bosnia and Herzegovina, the Council of Ministers and its Ministries, the Parliamentary Assembly of Bosnia and Herzegovina, the Constitutional Court, the Court of Bosnia and Herzegovina, the Prosecutor's Office of Bosnia and Herzegovina, the Standing Committee on Military Matters, the Commission of Human Rights, the Central Bank and the Election Commission and **any other building of the institutions of Bosnia and Herzegovina or other institution administered by or reporting to these institutions.***

b) On all buildings of Embassies and Consulates of Bosnia and Herzegovina.

c) As part of the seal of Bosnia and Herzegovina and in accordance with the Law on the Seal of Bosnia and Herzegovina.

³ The translation of the Constitution of Bosnia and Herzegovina into the Serbian language is available at www.ustavnisud.ba.

- d) *On official correspondence, invitations, cards and similar documents used by the Members of the Presidency, Council of Ministers, Ministers and Deputy-Ministers, Speakers and Deputy Speakers of both Houses of the Parliament of Bosnia and Herzegovina, and other **institutions of Bosnia and Herzegovina** as mentioned under paragraph 1(a).*
 - e) *On official means of transport used by State Officials.*
 - f) *At border crossings of Bosnia and Herzegovina.*
 - g) *At the entrance of all buildings of the Armed Forces of Bosnia and Herzegovina.*
2. *In all cases referred to in the previous paragraph, no other coat of arms from Bosnia and Herzegovina shall be displayed together with the Coat-of-Arms of Bosnia and Herzegovina.*

V. Admissibility

13. In examining the admissibility of the request, the Constitutional Court invoked the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Rules of the Constitutional Court of Bosnia and Herzegovina.

14. Article VI(3)(a) of the Constitution of Bosnia and Herzegovina reads:

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.

15. In terms of the aforementioned provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, it is undisputable that the Constitutional Court has jurisdiction to decide on the constitutionality of the provisions of the Law on the Flag. In addition, the request for review of constitutionality was filed by the Second Deputy Chairman of the House of Representatives of the Parliamentary Assembly of BiH at the time of filing the request, which means that the request was filed by an authorized person within the meaning of Article VI(3)(a) of the Constitution of BiH. In view of the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court concludes that the request is admissible for it has been filed by an authorized person, and there is not any formal requirement under Article 19 of the Rules of the Constitutional Court that would render the request inadmissible.

VI. Merits

16. The applicant claims that Article 5(1)(a) of the Law on the Flag, in the part reading: “**the common institutions or institution which is administered by or reporting to common institutions**”, is not compatible with Articles I(1), I(3) and III of the Constitution of Bosnia and Herzegovina.

17. The Constitutional Court first points out that, in the present case, the legislator failed to submit a response to the request thereby failing to answer the question of what is the *ratio legis* (the reason behind the law) is, i.e. what is the public interest the legislator sought to achieve by stipulating the syntagm the “common institutions” referred to in the Law on the Flag.

18. Taking into account the factual background of the request, the Constitutional Court observes that the issues raised by the request relate to the compatibility of the syntagm the “common institutions” with the term the “institutions of Bosnia and Herzegovina” (the word “institutions” laid down in the Constitution of Bosnia and Herzegovina is declined in different cases). The Constitutional Court will therefore examine the request with regard to Articles I(2) and III(1) of the Constitution of Bosnia and Herzegovina by applying the rule *iuria novit curia* and in compliance with its case law implying that the factual background of a request or appeal may subsume any right (see, Constitutional Court, Decision on Admissibility and Merits, no. U-23/18 of 5 July 2019, paragraph 17, available at www.ustavnisud.ba).

19. The Constitutional Court recalls that the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina enshrine the principle of the rule of law as a democratic principle under which the State of Bosnia and Herzegovina shall operate. The rule of law principle envisages a political system that is based on the adherence to the constitution, laws and other regulations by all

citizens and government. In addition, that principle requires that all constitutions, laws and other regulations passed be harmonized with the constitutional principles, which means that the legal system is based on a hierarchy of legal acts, starting from the Constitution of Bosnia and Herzegovina, as a supreme legal act, to the bylaws (see, *inter alia*, Decisions on Admissibility and Merits, no. *U 21/16* of 1 June 2017, paragraph 19, *U 6/06* of 29 March 2008, paragraph 22).

20. In addition, the principle of the rule of law is not confined only to the formal adherence to the principle of constitutionality and lawfulness but it requires that all legal acts (laws and regulations etc.) have a certain quality that is appropriate to a democratic system, so that they protect human rights and freedoms as regards a relationship between citizens and governmental bodies within a democratic political system. In this connection, the Constitutional Court emphasized in its case law that the principle requires laws to meet certain standards of the quality, wherein a legal norm must be adequately accessible for persons to whom it will be applied and it must be foreseeable, meaning that it must be formulated with sufficient precision, so that the persons can know actually and specifically their rights and obligations, to a degree that is reasonable in the circumstances, to regulate their conduct accordingly (see Decision of Admissibility and Merits no. *U-15/18* of 29 November 2018, paragraph 26).

21. Turning to the instant case, the Constitutional Court observes that in terms of language, the difference between the syntagm the “common institutions” laid down in the contested provisions of Article 5 of the Law on the Flag and the term the “institutions of Bosnia and Herzegovina” laid down in Article III of the Constitution of Bosnia and Herzegovina is apparent. In particular, the term “the institutions of Bosnia and Herzegovina” (declined in different cases) is exclusively mentioned in several places in Article III of the Constitution of Bosnia and Herzegovina, in all official languages in Bosnia and Herzegovina as well as in the original English language text of the Constitution Bosnia and Herzegovina. The syntagm “common institutions” does not occur in the text of the Constitution of Bosnia and Herzegovina, in any of the official languages, either in Article III or in any other provision of the Constitution of Bosnia and Herzegovina. Therefore, there is no doubt that the disputed provision of Article 5 of the Law on the Flag is linguistically inconsistent with the relevant text of Article III of the Constitution of Bosnia and Herzegovina.

22. Furthermore, the Constitutional Court observes that the Law on the Coat of Arms of Bosnia and Herzegovina stipulates that the coat of arms of Bosnia and Herzegovina shall be officially displayed and used at the entrance of any other building of the “institutions of Bosnia and Herzegovina”. The use of the expression “the institutions of Bosnia and Herzegovina” in the Law on the Coat of Arms of Bosnia and Herzegovina corresponds to same expression used in Article III

of the Constitution of Bosnia and Herzegovina. In addition, a whole series of laws at the state level, the names of which speak for themselves, namely: Law on Civil Service in the Institutions of BiH, Law on Financing of the Institutions of BiH, Law on the Budget of the Institutions of BiH, Law on Salaries and Benefits in the Institutions of BiH, Law on Internal Audit of the Institutions of BiH, Labour Law in the Institutions of BiH, Law on Treasury of the Institutions of BiH, *etc.* may be considered. All of the mentioned laws exclusively use the term “the institutions of Bosnia and Herzegovina” in accordance the expression found in Article III of the Constitution of Bosnia and Herzegovina. Therefore, the Constitutional Court considers that, even in a systemic sense, there is an inconsistency between the contested provision of Article 5 of the Law on the Flag and the relevant text of Article III of the Constitution of Bosnia and Herzegovina.

23. In addition, the Constitutional Court notes that Article III of the Constitution of Bosnia and Herzegovina, in its English language text as well as in all official languages of Bosnia and Herzegovina, stipulate identically the responsibilities and relations between “the institutions of Bosnia and Herzegovina” and the Entities. The title of Article III of the Constitution of Bosnia and Herzegovina “Responsibilities of and Relations between the Institutions of Bosnia and Herzegovina and the Entities” is further elaborated on in all paragraphs of that Article. The expression “[i]nstitutions of Bosnia and Herzegovina” is used in all of these paragraphs. That Article is related to Articles IV and V of the Constitution of Bosnia and Herzegovina, which stipulate in more detail the responsibilities and functions of some of the institutions of Bosnia and Herzegovina, such as the Parliamentary Assembly of Bosnia and Herzegovina, the Presidency of Bosnia and Herzegovina and the Council of Ministers of Bosnia and Herzegovina.

24. Bearing in mind the above and having analysed Article III of the Constitution of Bosnia and Herzegovina, the Constitutional Court notes that the framer of the Constitution, in using the expression “the institutions of Bosnia and Herzegovina”, aimed to recognise the organs acting for the State, with their responsibilities, procedures, relationships with the entities and others. Also, the objective behind this term is to recognize the status of “institutions of Bosnia and Herzegovina” as such in the public space of Bosnia and Herzegovina, and more widely in international relations through the exercise of responsibilities, such as, for example, those of the Presidency which is an “institution of Bosnia and Herzegovina. Not a single provision of the Constitution of Bosnia and Herzegovina suggests that the framer of the Constitution intended that the expression “institutions of Bosnia and Herzegovina” be qualified by any determiner, which would “clarify” the character or indicate some particularity thereof. Therefore, the Constitutional Court considers that the addition of the prefix “common” or any other determiner to the constitutional expression “the institutions of

Bosnia and Herzegovina” should be avoided, because this would change the constitutional meaning of this expression and the character of the state institutions as determined in the Constitution of Bosnia and Herzegovina. Adding such or similar determiners could suggest that there are some other institutions at the state level besides the “institutions of Bosnia and Herzegovina”. Such a thing is not envisaged by the Constitution of Bosnia and Herzegovina, and especially not by Article III of the Constitution of Bosnia and Herzegovina, which clearly recognizes the existence of the “institutions of Bosnia and Herzegovina” and the institutions of the Entities, regulates their mutual relations, but neither recognizes nor foresees the existence of any kind of “common institutions” of the State and Entities. It is no less important to note that the laws which were enacted by the High Representative for Bosnia and Herzegovina and which established other institutions of Bosnia and Herzegovina (Court of Bosnia and Herzegovina, Prosecutor’s Office of Bosnia and Herzegovina, High Judicial and Prosecutorial Council of Bosnia and Herzegovina, Border Police of Bosnia and Herzegovina, *etc.*) were also exclusively established as the “Institutions of Bosnia and Herzegovina”, with a view to ensuring the implementation of the jurisdiction of Bosnia and Herzegovina, and by no means as “common institutions”.

25. Bearing in mind all of the above, it follows that the contested provision which contains the qualifier “common” before the term “institutions”, is inconsistent with and may have unwarranted implications for the meaning of Article III(1) of the Constitution of Bosnia and Herzegovina, which only recognizes the existence of “Institutions of Bosnia and Herzegovina”. In this way, the legislator acted contrary to the principle of the rule of law laid down in Article I(2) of the Constitution of Bosnia and Herzegovina by indirectly altering the substance of a clear constitutional provision of Article III of the Constitution of Bosnia and Herzegovina.

26. The Constitutional Court therefore holds that Article 5(1)(a) of the Law on the Flag, in the contested part, is not compatible with Article I(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article III(1) and should therefore be quashed in the part reading *the common institutions and institution which is administered by or reporting to common institutions*.

VII. Conclusion

27. The Constitutional Court holds that Article 5(1)(a) of the Law on the Flag, in the part reading *the common institutions or institution which is administered by or reporting to common institutions*, is not compatible with Article I(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article III(1) of the Constitution of Bosnia and Herzegovina.

28. 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 set out in the enacting clause of the present decision.

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina
/signed/