

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 (4) 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:

Mr. Mato Tadić, President,  
Mr. Miodrag Simović, Vice-President  
Mr. Mirsad Ćeman, Vice-President  
Mr. Valerija Galić,  
Ms. Seada Palavrić,  
Mr. Zlatko M. Knežević,  
Ms. Angelika Nussberger,  
Ms. Helen Keller, and  
Mr. Ledi Bianku

Having deliberated on the request filed by Mr. **Bakir Izetbegović**, Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing the request, in the case no. **U-9/21**, at its session held on 2 December 2021, adopted the following

## DECISION ON ADMISSIBILITY AND MERITS

In deciding the request filed by Mr. **Bakir Izetbegović**, Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing request, for review of the constitutionality of Article 12 (2) and (4) of the Rules of Service of the Armed Forces of Bosnia and Herzegovina no. 06-02-3-4958/12 of 28 December 2012,

it is hereby established that the provisions of Article 12 (2) and (4) of the Rules of Service of the Armed Forces of Bosnia and Herzegovina no. 06-02-3-4958/12 of 28 December 2012 are not in accordance with Article II (3) (f) and (g) of the Constitution of Bosnia and Herzegovina and Articles 8 and 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Minister of Defence of Bosnia and Herzegovina is hereby ordered, in accordance with Article 61 (4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, to harmonize, no later than three months of the date of delivery of this Decision, the provisions of Article 12 (2) and (4) of the Rules of Service of the Armed Forces of Bosnia and Herzegovina no. 06-02-3-4958/12 of 28 December 2012 with Article II (3) (f) and (g) of the Constitution of Bosnia and Herzegovina and Articles 8 and 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Minister of Defence of Bosnia and Herzegovina is hereby ordered to notify the Constitutional Court of Bosnia and Herzegovina, no later than three months after the expiration of the time limit

referred to in the foregoing paragraph, about the measures taken with a view to enforcing this Decision, in accordance with Article 72 (5) of the Rules of the Constitutional Court 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 9 September 2021, Mr. Bakir Izetbegović, Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing request (“the applicant”), filed a request with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) for review of the constitutionality of Article 12 (2) and (4) of the Rules of Service of the Armed Forces of Bosnia and Herzegovina no. 06-02-3-4958/12, “the Rules”).
2. At the request of the Constitutional Court, on 13 and 19 October 2021 the applicant supplemented the request with the documents as requested, including, *inter alia*, the Rules in the Bosnian language.
3. At the request of the Constitutional Court, the Ministry of Defence of Bosnia and Herzegovina (“the Ministry”) also submitted the Rules in the three official languages of Bosnia and Herzegovina.

### II. Procedure before the Constitutional Court

4. Pursuant to Article 23 of the Rules of the Constitutional Court, on 15 September 2021 the Ministry was requested to submit its reply to the request.
5. The Ministry submitted its reply on 21 October 2021.

### III. Request

**a) Allegations stated in the request**

6. The applicant asserts that the provisions of Article 12 (2) and (4) of the Rules are not in accordance with Article II (3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”) and Article II (3) (g) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention. As to the admissibility of the request in question, since the request challenges the provisions of the act of a lower order than the law, the applicant relied on the case law of the Constitutional Court in similar situations in which the Court decided that the requests were admissible. Given that the request raises an issue of the right to respect for private life safeguarded by Article II (3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention and the right to freedom (of manifestation) of religion guaranteed by Article II (3) (g) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention, and in accordance with the position previously taken by the Constitutional Court in its Decision no. *U-8/17* (paragraph 18), the applicant holds that the request in question is *ratione materiae* admissible.

7. The applicant claims that the Standard Operating Procedure on Wearing Unique Uniform and Insignia in the Armed Forces of BiH (“the SOP”), no. 16-06-02.3.268-13/08 of 30 May 2008, allowed beards to all members of Armed Forces under prescribed conditions. However, without an appropriate analysis and any involvement of religious communities for consultation purposes considering exercising religious freedoms in accordance with particulars of each religion (Article 29(4) of the Law on Service in the Armed Forces of BiH), the Rules banned beards to all members of the Armed Forces except for the religious servants. The applicant referred to Decision no. *U-8/17*, in which the Constitutional Court considered an identical factual and legal issue in the context of a ban on wearing beards by the members of Border Police of BiH when in uniform, and cited relevant parts of the decision. Personal choices as to an individual’s desired appearance relate to the expression of his or her personality and thus fall within the notion of private life, as established in the case law of the European Court of Human Rights (*Biržietis v. Lithuania*), as well as in the case law of the Constitutional Court of BiH (*U-8/17*). In the opinion of the applicant, the issue of wearing a beard is a right safeguarded by the Constitution of Bosnia and Herzegovina and the European Convention, and, in certain circumstances, the state has the right to restrict the relevant right. That restriction must be in accordance with the law, in the public interest and proportionate to the aim pursued. Given that the challenged provisions prohibit wearing beards to all military personnel when on duty in uniform, the applicant holds it necessary to evaluate these provisions in

the context of the interference with the right to his/her private life. Therefore, the applicant points out that the European Court of Human Rights and the Constitutional Court have taken the position in their case law that wearing a beard is an aspect of private life, within the meaning of Article 8 of the European Convention. The wearing of religious symbols or clothing that is motivated by an individual's faith and his/her desire to express his/her faith is a manifestation of his religious belief and is therefore protected by Article 9 of the European Convention. In the case of *Hamidović v. Bosnia and Herzegovina*, the European Court of Human Rights confirmed that a wish of a Muslim male to wear a skullcap, although it does not represent a strong religious duty but it has such strong traditional roots that it is considered by many people to constitute a religious duty, is safeguarded by Article 9 of the European Convention.

8. In addition, the applicant states that Article 8 (2) and Article 9 (2) of the European Convention include identical reasons for which the competent authorities may restrict the rights in question. Therefore, as already underlined, such restrictions must be in accordance with the law, directed towards reaching a legitimate aim, and necessary in a democratic society. As to the lawfulness of the interference in question, the applicant holds that the restriction was introduced in a permissible manner, given that the Minister of Defence of BiH issued the Rules based on the powers vested in him by the Parliamentary Assembly of BiH by passing the Law on Defence of BiH. In the view of the applicant, referring to decision *U-8/17* (paragraph 40), irrespective of that not being the law in a formal and legal sense, the Rules may be considered the "law" and the restriction of rights in such a manner may be allowed.

9. The measure of limitation of the rights set forth in Articles 8 and 9 of the European Convention may be undertaken for the achievement of any of the legitimate aims defined by paragraph 2 of both Articles of the European Convention, and these aims are in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. The applicant is of the opinion that the impugned provisions of the Rules are not clearly reasoned, and it is unclear for what purpose and in whose interest the Rules impose the ban on beards concerning all members of the Armed Forces when on duty in uniform, except the religious servants. In particular, it is not clear what motivated the issuer of the Rules to have such a restrictive approach, given that wearing a beard in the Armed Forces of BiH was allowed in the past. The applicant cited part of the Guidelines for Review of Legislation Pertaining to Religion or Belief, issued by the Venice Commission: "the final restrictions should be made only after the appropriate analysis of restrictions, with understanding of reasonable possibility of increased interests of state security" which is omitted in this case. If the issuer of the Rules would refer to the

hygienic, aesthetic or other needs he wanted to meet by the introduction of the absolute ban on wearing a beard, the applicant refers to the position of the European Court of Human Rights in the case of *Biržietis v. Lithuania* (paragraph 57), according to which given that wearing a moustache is not prohibited, the same as in the Rules, such a prohibition may be considered arbitrary. In the case *U-8/17* (paragraph 44), the Constitutional Court of BiH considered the issue of the absolute ban on beards without any factors relating to the possible exceptions and concluded that such a prohibition did not pursue the interest of general objectives referred to in Article 8 (2) and Article 9 (2) of the European Convention.

10. Before entry into force of the Rules, this matter was regulated by the SOP, which allowed the wearing of a moustache and beard, on condition that a person who decided to grow a beard for any reason whatsoever (for personal appearance or as the manifestation of religion) is to ask for permission by the relevant military officer. The provisions of the SOP stipulated that a beard must not be longer than 1 cm and that it must be well kept and clean. Based on the rules defined in such a manner, in 2011, soldier Admir Bajrović requested and got permission to grow a beard to exercise his religious rights and freedoms. The applicant wonders why the relevant minister, by passing the Rules, prohibited the wearing of beards to all members of the Armed Forces except for the religious servants. The unofficial position of the Ministry of Defence of BiH, available to the applicant, is that wearing a beard poses a risk for the use of a protective mask. The applicant cannot accept such a position for a number of reasons and, in particular, because the appropriate analysis on that issue does not exist, because the wearing of a beard is permitted in many armies which are using the same or similar protective equipment, and given the fact that there are opinions of experts that wearing a beard is not incompatible with wearing a protective mask. In this connection, the applicant cited the relevant parts of the Rules of Service of the Armed Forces of the Republic of Croatia, the United Kingdom, *etc.* according to which members of the armed forces in those countries are allowed to wear a short beard (up to 0.5 cm in length), which must not interfere with the performance of professional duties and which allows the use of a protective mask, *i.e.* with permission, as in the United Kingdom.

11. The applicant also points out the fact that the Municipal Court in Sarajevo, in its case no. 65 0 P 652414 17 P, requested a finding and opinion of the court medical expert on the shape and length of beards which would endanger the members of the Armed Forces of BiH when wearing a gas mask. In his finding and opinion submitted to the Municipal Court in Sarajevo, the court expert states, *inter alia*, that wearing a beard, if it is neat and groomed, does not present any obstacle for the correct use of mask. In view of the aforesaid, it is obvious that the imposed restriction, *i.e.* the

imposed ban on wearing a beard is not justified by general objectives set forth in paragraph 2 of Articles 8 and 9 of the European Convention and, therefore, it cannot remain in legal force.

12. The applicant holds that the request has shown that the impugned provisions of the Rules are in violation of the provisions of Article II(3)(f) and (g) of the Constitution of Bosnia and Herzegovina and Articles 8 and 9 of the European Convention, and proposed that the request be granted, and that it be established that the impugned provisions of Article 12 (2) and (4) of the Rules are incompatible with the aforementioned provisions of the Constitution of Bosnia and Herzegovina and the European Convention, and that the impugned provisions, in terms of Article 61 (2) and (3) of the Rules of the Constitutional Court, be rendered ineffective the first day following the date of publication of the present Decision in the *Official Gazette of Bosnia and Herzegovina*.

#### **b) Reply to the request**

13. In its reply to the request, the Ministry points out that it disputes all allegations stated in the request, as the Rules are the basic act which governs relations in the armed forces, accommodation and order, life, work, internal service, *etc.* The Rules were issued in accordance with the legal powers given to the Minister by the Law on Defence of BiH. It is highlighted that all regulations in the system of defence, including the Rules, are passed based on analyses and assessments, taking into account the legal framework and the creation of preconditions for fulfilling the tasks assigned. The basic precondition for performing the tasks prescribed by the Law on Defence of BiH is to ensure uniformity and equality of all members of the Armed Forces, on all issues, and the issue of uniformity and personal appearance is a very important issue in the Armed Forces of BiH. In this connection, the Ministry underlines that the use of protective equipment, which necessarily requires a clean-shaven face, leaves no room to grant the requests of individuals to wear a beard. In this regard, the applicant's allegations, which are based on the expert's findings and opinion in the relevant individual case, cannot constitute a basis for accepting the rules of conduct in the Armed Forces of BiH. Resolving those issues, such as the issue of wearing a beard, necessarily requires an extensive discussion that includes conducting profound studies, resolving all technical and financial aspects of modifying and modernizing equipment, and reaching general agreement through amending the law. Excluding any categories and granting privileged status based on personal preferences and beliefs, leads to a weakening of readiness and ultimately leads to the fact that units and individuals cannot carry out their tasks as intended in the armed forces.

14. The applicant's allegations that the challenged provisions are in violation of the rights and freedoms safeguarded by the European Convention are not disputed, but service in the Armed Forces of BiH is specific in its purpose and necessarily presupposes a number of restrictions on human rights and freedoms. In addition, before joining the military, members of the Armed Forces of BiH are acquainted with restrictions in a transparent manner, such as prohibition of political engagement, prohibition of public appearance, prohibition of the right to join certain organizations, restrictions on travel and movement, obligation to wear a uniform, *etc.* Therefore, any subsequent attempt to impose private interests and rights falling within the private domain, which would restrict the use of units and individuals or break the cohesive environment necessary to carry out the tasks of the Armed Forces of BiH, is not acceptable and puts combat readiness of the Armed Forces at risk. The Ministry holds that the literal application of the provisions of the European Convention would make the Armed Forces of BiH meaningless as an institution and make it impossible to perform their basic functions. The service in the Armed Forces of BiH includes persons who have unconditionally accepted the restrictions on human rights and fundamental freedoms known to them in advance, and any change in the views and beliefs of individuals is not acceptable to the system if it impedes internal order, cohesion and operational readiness.

15. The applicant's reference to Article 29(4) of the Law on Service in the Armed Forces of BiH is a one-sided approach in addressing the mentioned issue, without acknowledging the norm stipulating that the organization of religious activity in the Armed Forces will be primarily based on objective military needs. In this connection, the Ministry points out that members of religious communities who have the status of an organizational unit of the Ministry and who are involved in drafting documents and regulations are assigned to the structure of defence and that they can make proposals for new or amended existing regulations and, accordingly, the request in question is premature, for the internal possibilities and mechanisms in the system of defence have not been exhausted. The issuer of the Rules considers it an objective military need that soldiers are shaved and tidy and can use the equipment needed to perform the assigned tasks without any restrictions and without the possibility of any manipulation founded on ideological or strictly private grounds, which may have a negative effect on combat readiness of the armed forces. It is especially emphasized that the Armed Forces of BiH are composed of different structures that inherit the tradition and identity of the former entity armies, including members of different religious communities, and that any issue that expands or reduces the scope of the rights of any component is necessarily conditioned by the consensus of all and that the partial resolution of anyone's rights



would lead to serious disruptions in the system. It is proposed that the request be rejected or dismissed.

#### **IV. Relevant Laws**

16. The **Rule of Service of the Armed Forces of Bosnia and Herzegovina** no. 06-02-3-4958/12 of 28 December 2012 (internal act of the Ministry of Defence of BiH) in the Bosnian language.

For the purposes of this decision, at the request of the Constitutional Court, the applicant and the Ministry submitted the mentioned Rule, which, as relevant, reads:

*12. Military personnel must always be neatly dressed, shaved and trimmed. Whiskers shall not extend below halfway down the ear and no hair shall touch the ears and collar. On the top of the head, the hair shall be no more than 5 cm in length, and on the upper half of the nape, it shall be no more than 2 cm in length. Complete haircut or "haircut to zero" shall be on a voluntary basis and cannot be imposed by an order.*

***Wearing a beard shall be permitted only to the religious servants, but the beard must be well-groomed.***

*Wearing a moustache shall be permitted to all military personnel. Moustaches should be of a width that does not extend beyond the width of the lips, and should be of a length that does not extend beyond the upper lip.*

***All military personnel must be always shaved when on duty in uniform.***

*Women, military personnel, must keep the hair well-groomed so that the hair does not undermine the training, use of protective masks, helmets and other equipment, or when conducting duties. When they are not conducting duties, make-up is permitted but must be discrete.*

17. The **Rule of Service of the Armed Forces of Bosnia and Herzegovina** no. 06-02-3-4958/12 of 28 December 2012 in the Croatian language, in the relevant part, reads:

*12. Military personnel must always be neatly dressed, shaved and trimmed. Whiskers shall not extend below halfway down the ear and no hair shall touch the ears and collar. On the top of the head, the hair shall be no more than 5 cm in length, and on the upper half of the nape, it shall be no more than 2 cm in length. Complete haircut or "haircut to zero" shall be on a voluntary basis and cannot be imposed by an order.*

***Wearing a beard shall be permitted to the religious servants, but the beard must be well-groomed.***

*Wearing a moustache shall be permitted to all military personnel. Moustaches should be of a width that does not extend beyond the width of the lips, and should be of a length that does not extend beyond the upper lip.*

***All military personnel must be always shaved when on duty in uniform.***

*Women, military personnel, must keep the hair well-groomed so that the hair does not undermine the training, use of protective masks, helmets and other equipment, or when conducting duties. When they are not conducting duties, make-up is permitted but must be discrete.*

18. The **Rule of Service of the Armed Forces of Bosnia and Herzegovina** no. 06-02-3-4958/12 of 28 December 2012 in the Serbian language, in the relevant part, reads:

*12. Military personnel must always be neatly dressed, shaved and trimmed. Whiskers shall not extend below halfway down the ear and no hair shall touch the ears and collar. On the top of the head, the hair shall be no more than 5 cm in length, and on the upper half of the nape, it shall be no more than 2 cm in length. Complete haircut or "haircut to zero" shall be on a voluntary basis and cannot be imposed by an order.*

***Wearing a beard shall be permitted to the religious servants, but the beard must be well-groomed.***

*Wearing a moustache shall be permitted to all military personnel. Moustaches should be of a width that does not extend beyond the width of the lips, and should be of a length that does not extend beyond the upper lip.*

***All military personnel must be always shaved when on duty in uniform.***

*Women, military personnel, must keep the hair well-groomed so that the hair does not undermine the training, use of protective masks, helmets and other equipment, or when conducting duties. When they are not conducting duties, make-up is permitted but must be discrete.*

19. The **Standard Operating Procedure on Wearing Unique Uniforms and Insignia in the Armed Forces of BiH**, no. 16-06-02.3.286-13/08 of 30 May 2008.

*Provisional SOPs on wearing a unique field uniform and insignia in the Armed Forces of BiH will be in force until the Ministry of Defence of BiH issues the Rulebook on wearing uniforms and insignia in the Armed Forces of BiH.*

#### *PERSONAL APPEARANCE OF MEMBERS OF THE ARMED FORCES OF BiH*

##### *8.1. Hairstyle, beard, moustache, makeup and nails*

###### *(2) Beard and moustache*

*Wearing a beard in the Armed Forces of BiH is permitted for the religious servants whose profession is being a religious servant. In that case, the beard must be well-groomed, clean and of such length not to interfere with the wearing the protective equipment. Wearing the beard for other members of the Armed Forces of BiH is permitted but the officer of at least a battalion commander rank who is in charge of issuing permissions to the persons opting to wear a beard must supply the permission. A beard may be 1 centimetre long and must be well-groomed and clean. Wearing a moustache is permitted to all members of Armed Forces of BiH. The width of the moustache must not exceed the width of the lips and must not drop below the line of the upper lip. The moustache hair cannot be longer than 1 centimetre. The moustache must be clean and groomed on daily basis. All members of the Armed Forces of BiH, except those to whom the wearing of beard is permitted and those who wear moustache, must be neatly shaven when on duty in uniform. The members of the Armed Forces of BiH who cannot shave for a certain period, due to the allergic reaction on their face or other health reasons are the exception, but they must have such recommendation by medical commission (of lowest rank) in writing.*

20. **The Law on Service in the Armed Forces of Bosnia and Herzegovina** (*Official Gazette of BiH*, 88/05, 53/07, (58/08 - ZO of the Law on Salaries and Remunerations in the Institutions of BiH), 59/09, 74/10, 42/12, 41/16 and 38/18).

For the purposes of this Decision, an unofficial consolidated text prepared by the Constitutional Court of BiH shall be used, which, as relevant, reads:

## **CHAPTER I. GENERAL PROVISIONS**

### *Article 1*

**(Subject of the Law)**

*This Law shall govern: service in the Armed Forces of Bosnia and Herzegovina (“the Armed Forces”), composition of the Armed Forces, recruitment, rights and obligations of persons serving in the Armed Forces, status of persons during service, personnel classification system, evaluation, promotion, managing personnel records and career of military personnel, ranks and insignia in the Armed Forces, standards of conduct and other status issues of persons serving in the Armed Forces.*

*Article 2*

***(Armed Forces)***

*The Armed Forces shall mean all military forces in Bosnia and Herzegovina as determined by the Law on Defence of Bosnia and Herzegovina (Official Gazette of BiH, 88/05), (“the Law on Defence”).*

*Article 3 (1) and (2)*

***(Persons serving in the Armed Forces)***

*(1) Military personnel, civilians, cadets and candidates on training may serve in the Armed Forces. Military personnel are professional military personnel and reserve personnel and civilians when on duty.*

*(2) Professional military personnel are:*

*a) soldiers,*

*b) non-commissioned officers,*

*c) officers,*

*d) generals.*

*Article 7 (1)*

***(Applicability of acts)***

*(1) Unless otherwise provided by this Law, acts regulating the status of professional military personnel, and reserve personnel and civilians in the Armed Forces shall be administrative acts and they shall be adopted in accordance with this Law, the Law on Defence, the Law on Administration of BiH (Official Gazette of BiH, 32/02), the Labour Law in the Institutions of BiH (Official Gazette of BiH, 26/04, 7/05 and 48/05), other applicable laws, as well as directives, regulations and orders issued by the Minister of Defence.*

*Article 20****(Wearing a uniform)***

*A military person on duty shall wear the prescribed uniform, in accordance with the regulation issued by the Minister of Defence.*

*Article 29****(Religious activities and freedoms)***

*(1) A military person shall be entitled to perform religious activities in order to exercise religious freedoms in accordance with the specifics of each religion.*

*(2) The organization and performance of religious activities referred to in paragraph 1 of this Article shall be based on the principle of individual freedom of expression and conduct of religious service of members of the Armed Forces.*

*(3) The organization of religious activities in the Armed Forces shall be based primarily on objective military needs.*

*(4) The Ministry of Defence of BiH, in cooperation with legally recognised churches and religious communities, shall prescribe the organisation and manner of functioning of the religious activities in the Armed Forces and secure exercising of the religious freedoms, as determined by paragraph (1) of this Article.*

21. The **Law on Defence of Bosnia and Herzegovina** (*Official Gazette of BiH*, 88/05), in the relevant part, reads:

**CHAPTER I. GENERAL PROVISIONS***Article 4*

*The missions of the Armed Forces shall be as follows:*

- a) Participation in collective security operations, peace support and self-defence operations, including combating terrorism.*
- b) Providing military defence of Bosnia and Herzegovina and its citizens in the event of an attack,*
- c) Assisting civil authorities in responding to natural and other disasters and accidents,*
- d) Countermining action in Bosnia and Herzegovina,*
- e) Fulfilling the international obligations of Bosnia and Herzegovina.*

**CHAPTER II- RIGHTS AND DUTIES OF THE INSTITUTIONS OF BOSNIA AND HERZEGOVINA**

**SECTION A – Competencies of Bosnia and Herzegovina**

*Article 6*

*(Objectives)*

*Bosnia and Herzegovina shall organise, develop and maintain the military capability and preparedness of the Armed Forces in order to:*

- a) Ensure the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina,*
- b) Promote foreign policy objectives of Bosnia and Herzegovina,*
- c) Fulfil international obligations of Bosnia and Herzegovina,*
- d) Protect citizens of Bosnia and Herzegovina.*

**SECTION D – Ministry of Defence of Bosnia and Herzegovina**

*Article 13(1) (o)*

*(Competencies of Ministry of Defence)*

*(1) The Ministry of Defence of Bosnia and Herzegovina (hereinafter: the Ministry of Defence) shall have the following competencies:*

- o) Issuing policies and basic rules for the Armed Forces,*

**SECTION E – Minister of Defence of Bosnia and Herzegovina**

*Article 15 (a)*

*(Organizational and Administrative Competencies)*

*The Minister of Defence of Bosnia and Herzegovina (hereinafter: the Minister of Defence) shall have the following organisational and administrative competencies, which shall be subject to the supreme command and control of the Presidency:*

- a) Proposing and rendering regulations, issuing directives and orders governing the organisation, administration, personnel, training, equipping, deployment and employment of the Armed Forces to ensure maximum interoperability within the Armed Forces and with NATO forces.*

## V. Admissibility

22. In examining the admissibility of the present 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.

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

*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.*

23. The request for review of constitutionality was filed by the Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, which means that the request was filed by an authorized person, within the meaning of Article VI (3) (a) of the Constitution of Bosnia and Herzegovina. As to the admissibility of the request in question, since the request challenges the provisions of the act of a lower order than the law, the Constitutional Court resolved such an issue in the case *U-8/17* (see, Constitutional Court, Decision on Admissibility and Merits no. U-8/17 of 30 November 2017, paragraphs 16-26, published in the *Official Gazette of BiH*, 90/17 of 22 December 2017, available at [www.ustavnisud.ba](http://www.ustavnisud.ba)), in which the issue of constitutionality of the impugned provision of the Rulebook Amending the Rulebook on Wearing Uniforms was raised, which imposed an absolute ban on police officers of the Border Police of BiH to wear a beard when in uniform. Namely, having analysed the request, the Constitutional Court found that the specific

absolute prohibition on wearing a beard by police officers in uniform, especially given that the previous provision before its amendment had allowed a neat and well-kept beard, meant that the impugned provision of the Rulebook interfered with the right to private life and the right to freedom to manifest one's religion. Accordingly, taking into account that the interference with the mentioned qualified rights occurred based on the Rulebook as a by-law, the Constitutional Court concluded that it had jurisdiction to examine its constitutionality.

24. Regarding the Ministry's assertion that "members of religious communities who have the status of an organizational unit of the Ministry and are involved in drafting documents and regulations are assigned to the structure of defence and that they can make proposals for new or amended existing regulations, and, accordingly, the request in question is premature, for the internal possibilities and mechanisms in the system of defence have not been exhausted", the Constitutional Court points out that the existence and possible use of these mechanisms have no influence on the powers of the subjects referred to in Article VI (3) (a) of the Constitution of Bosnia and Herzegovina to file a request for review of constitutionality.

25. In accordance with its case law established in its decision *U-8/17*, and supporting its position that it is competent to review the constitutionality of legal acts of lower order than the law, if such acts raise the issue of respect for human rights and fundamental freedoms protected by the Constitution of BiH and the European Convention, the Constitutional Court concludes that, in the particular case, the request for review of constitutionality is admissible in terms of Article VI (3) (a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Rules of the Constitutional Court.

## **VI. Merits**

26. The applicant requested that the Constitutional Court examine whether Article 12 (2) and (4) of the Rules is consistent with Article II(3)(f) and (d) of the Constitution of Bosnia and Herzegovina and Articles 8 and 9 of the European Convention.

### **Right to private life**

27. Article II(3)(f) of the Constitution of Bosnia and Herzegovina reads:

*All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:*

*f) The right to private and family life, home, and correspondence.*

28. Article 8 of the European Convention reads:



1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

### **Freedom of Thought, Conscience and Religion**

29. Article II(3) of the Constitution of Bosnia and Herzegovina in the relevant part reads: *All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:*

*g) freedom of thought, conscience and religion*

30. Article 9 of the European Convention reads as follows:

1. *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*

2. *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

31. Prior to examining the present request, the Constitutional Court reiterates that, in its case law, it considered an identical issue in the case *U-8/17 (op. cit. U-8/17*, paragraphs 30-45 of the mentioned decision). The applicant also referred to the cited case in the request.

32. The Constitutional Court recalls that the issue raised in the cited case related to the compatibility of Article 1, paragraph 1, subparagraph 7 of the Rulebook Amending the Rulebook on Wearing Uniforms, in the part reading “when in uniform, police officers are not allowed to wear a beard”, with Article II (3) (f) and (g) of the Constitution of Bosnia and Herzegovina and Articles 8 and 9 of the European Convention. Namely, the Constitutional Court first notes that, in the cited case, it examined whether the interference with the right to private life and freedom of religion was justified under Article 8 (2) and Article 9 (2) of the European Convention, taken together. In

addition, it was emphasized that in order to impose restrictions on the exercise of the rights listed in Article 8 (2) and Article 9 (2) of the European Convention, there must be a legal basis to do so and such measures must be necessary in a democratic society and prescribed in the interest of general (broader) objectives, referred to in Article 8 (2) and Article 9 (2) of the European Convention. Following a detailed analysis, the Constitutional Court concluded that the disputed restriction of the right to private life and freedom of religion was prescribed by “law”, referring to its case law in the case *AP-3947/12*, and the case law of the European Court of Human Rights in the case of *Biržietis v. Lithuania*, which states that the notion “law” encompasses not only written laws enacted by Parliament, but also statutes and regulatory measures of a lower order passed by professional regulatory bodies under independent rule-making powers delegated to them by Parliament (*op. cit. U 8-17*, paragraph 40).

33. In examining whether the impugned measure was necessary in a democratic society, the Constitutional Court underlined in the cited case that it was necessary first to determine whether the impugned measure was passed in the interest of legitimate aims under Article 8 (2) and Article 9 (2) of the European Convention, which should be interpreted strictly, and if so, whether the impugned measure, as such, was proportionate to the aim pursued and necessary in a democratic society. In the cited case, the Constitutional Court points out that a beard, as part of the body and physical appearance of a person, is a form of expression of one’s religion only where the beard is worn for religious reasons but it is also an aspect of one’s private life, as it is not associated only with religious symbols. In conducting its analysis, the Constitutional Court took into account that the Rulebook on Wearing Uniforms, prior to the amendments thereto, had prescribed that a well-groomed beard and moustache had been permitted. In addition, the Constitutional Court took into account the case law of the European Court of Human Rights, according to which the Contracting States have a certain margin of appreciation in assessing the existence and extent of the need for interference with citizen’s rights, but this margin is subject to European supervision, and the Court’s task is to determine whether the measures taken at national level were justified in principle (*op. cit. U-8/17*, paragraph 42). In deciding, the Constitutional Court took into account the response of the issuer of the disputed amendments to the Rulebook, which it assessed as arbitrary and irrelevant. The Constitutional Court emphasized that it did not find any reason that would be, in itself, an obstacle for the police to perform its duty in the interest of public safety or for the protection of public order, if some of its members wore a well-groomed beard. In addition, the Constitutional Court highlighted that all the aforementioned could be reiterated (also) with regard to the fulfilment of other standards set forth in the second paragraph of the right to respect for private life and the

right to freedom of religion (the protection of health or morals, the protection of the rights and freedoms of others), meaning that the impugned measure, which was prescribed by the impugned provision, could not be justified even in terms of the remaining standards referred to in Article 8 (2) and Article 9 (2) of the European Convention. Based on the aforementioned arguments, the Constitutional Court concluded in the cited case that no relevant and sufficient reasons were offered based on which the Constitutional Court could conclude that the disputed measure of restriction was prescribed in the interest of the legitimate aims referred to in Article 8 (2) and Article 9 (2) of the European Convention, for the impugned provision prescribed an absolute prohibition on wearing a beard without any possible guidelines on its aesthetic appearance. Therefore, it was concluded that an absolute prohibition on the BiH Border Police' police officers to wear a beard when wearing their police uniform was in violation of the right to respect for private life safeguarded by Article II (3) (f) and (g) of the Constitution of BiH and Article 8 of the European Convention and the right under Article 9 of the European Convention.

34. The request in question raises the same issue regarding the ban on wearing a beard, but in the present case, it concerns military personnel in the Armed Forces of BiH when on duty in uniform. Therefore, in the present case, an identical issue is raised, *i.e.* whether the impugned restriction prescribed by Article 12 (2) and (4) of the Rules, which allows only the religious servants to wear a well-kept beard, while all military personnel must always be shaved when on duty in uniform, is in violation of the provisions of Article II (3) (f) and (g) of the Constitution of BiH and Articles 8 and 9 of the European Convention. The Constitutional Court notes that the only difference between the present case and the case *U-8/17* is, formally, that the restriction on wearing a beard in the present case applies to military personnel in the Armed Forces of BiH. Therefore, in both cases, it is about the state services of BiH, namely the Armed Forces of BiH and the Border Police of BiH, whose personnel wear appropriate uniforms when performing their official duties. Therefore, the Constitutional Court will bring the circumstances of the present case into connection with the standards referred to in its Decision *U-8/17*.

35. In examining the issue whether "law" prescribes the interference in question (ban on wearing a beard), the Constitutional Court notes that the applicant does not raise an objection that the impugned provisions, issued by the relevant minister in accordance with the powers vested in him by the Law on Defence of BiH (see relevant regulations), are not prescribed by "law". In accordance with its case law established in its Decision *U-8/17* (paragraph 40), the Constitutional Court concludes that the restrictions on the right to respect for private life and the right to freedom

of religion in the present case are prescribed by “law”, within the meaning of Article 8 (2) and Article 9 (2) of the European Convention.

36. With regard to the issue whether the restriction in question is prescribed in the interest of the legitimate aims referred to in Article 8 (2) and Article 9 (2) of the European Convention, the Constitutional Court notes that under the impugned paragraph 2 of Article 12 of the Rules in the Bosnian language, submitted by the applicant and the provisions of which he disputes, wearing a well-kept beard is permitted “only” to the religious officials. The Constitutional Court does not find a problem with religious servants being permitted to wear a well-groomed beard, but the word “only” restricts these rights exclusively to religious servants. In addition, the Constitutional Court notes that paragraph 2 of Article 12 of the Rules in the Serbian language and Croatian language does not prescribe the word “only” and reads as follows: “Wearing a beard shall be permitted to the religious servants, but the beard must be well-groomed.” Therefore, the substance of the cited provision is that a well-groomed beard is permitted to religious servants, but the content of the cited provision does not imply the conclusion that that right is reserved exclusively for religious servants, as in the text of the Rules in Bosnian. Paragraph 4 of Article 12 of the Rules prescribes that all military personnel must always be shaven when on duty in uniform. The Constitutional Court notes that the cited provision is essentially identical in all three official languages in Bosnia and Herzegovina. According to the content of the cited provision, it can be concluded that military personnel in the Armed Forces of BiH are absolutely prohibited to wear beards when on duty in uniform, as in the case of police officers of the Border Police of BiH. In response to the request, the Ministry sought to justify the disputed restriction by stating, *inter alia*, that the objective military need was that soldiers were shaven and tidy, and who could use the military equipment they needed to perform the tasks assigned, without any restrictions. In this connection, the Constitutional Court holds that the Ministry states the objectives of a general nature, since it is completely understandable that military personnel of the armed forces of any country in the world ought to look uniform and orderly. However, the response does not explain why wearing a neat, short and well-groomed beard would be in violation of that general objective. All the more so because of the fact that the provisions of the SOP had prescribed the possibility of wearing beards for military personnel in the Armed Forces of BiH when on duty in uniform, with the approval of a superior officer (see, relevant regulations Article 8.1 (2) of the SOP). The Ministry’s response does not provide an explanation as to why wearing a tidy and well-groomed beard would be an obstacle to the use of military equipment, and it is neither specified which military equipment is involved.

37. The Ministry holds that the restriction is prescribed in a legal manner, and that in the military service there are restrictions in respect of the rights and freedoms guaranteed by the Constitution of Bosnia and Herzegovina and the European Convention and that members of the Armed Forces of BiH, before joining the military, are acquainted with such restrictions in a transparent manner. The Constitutional Court agrees that it is understandable that in military service there are restrictions on certain rights and freedoms, but also that any restriction must pursue legitimate aims. In the present case, the Ministry failed to offer any relevant legitimate aim and reason to restrict the right to wear a well-groomed beard to all military personnel when on duty in uniform, as is permitted “only” to religious servants. All the more so, because of the fact that wearing a moustache is allowed to all military personnel (Article 12 (3) of the Rules), so the question then arises why wearing a well-groomed beard would be an obstacle for military personnel in the execution of professional duties, while a moustache, allegedly, would not be the obstacle. In this connection, the Constitutional Court notes that the applicant, *inter alia*, submitted an excerpt of the Rules of Service of the Armed Forces of the Republic of Croatia, which is a member of NATO, which allows members of the armed forces to wear a beard up to 0.5 cm in length and which must not interfere with the performance of professional duties. In view of all the above, in the present case, the Constitutional Court does not find relevant reasons leading to a conclusion that the disputed restriction is prescribed in the interest of legitimate aims under Article 8 (2) and Article 9 (2) of the European Convention.

38. Therefore, in accordance with the case law established in its Decision *U 8-17*, the Constitutional Court finds no reason to decide differently in the circumstances of the present case. Referring to the reasons stated in the aforementioned case, the Constitutional Court concludes that the absolute ban on soldiers of the Armed Forces of BiH to wear a beard when on duty in uniform is in violation of the right to respect for private life and the right to freedom of religion safeguarded by Article II (3) (f) and (g) of the Constitution of BiH and Articles 8 and 9 of the European Convention, as the disputed measure does not pursue the general objectives set forth in Article 8 (2) and Article 9 (2) of the European Convention.

39. The Constitutional Court highlights that, in deciding, it applied the provision of Article 61 (4) of the Rules of the Constitutional Court, holding that the relevant minister is in the best position to assess, in accordance with the powers granted to him by law, how to settle the disputed issue complying with the standards referred to in the present decision. The Constitutional Court holds that the time limit of three months given to the relevant minister to act is the adequate time to enforce the present decision.

## **VII. Conclusion**

40. In accordance with the case law established in its Decision *U 8-17* and for the same reasons stated in that decision, the Constitutional Court concludes that the provisions of Article 12 (2) and (4) of the Rules, which were challenged by the applicant, are in violation of the provisions of Article II (3) (f) and (g) of the Constitution of BiH and Articles 8 and 9 of the European Convention.

41. Pursuant to Article 59 (1) and (2) and Article 61 (4) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this decision.

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