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Constitutional Court of Bosnia and Herzegovina
Expert opinion in case no. U 1/11

On 21 July 2011, the Registrar of the Constitutional Court of Bosnia and Herzegovina, Mr. Zvonko Mijan invited me to present my expert opinion in the capacity as a participant in the public hearing in case no. U 1/11 concerning state property. By the same letter, I was informed that the subject-matter of the hearing was a request for review of constitutionality of the Law on the Status of State Property Located on the Territory of the Republika Srpska and under Disposal Ban and he informed me that in case of my acceptance, I would cover my own accommodation and travel costs.

The following has been attached to the letter:

- Request for review of constitutionality, which was filed by the Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, and the attachments thereto;

At my request, on 22 July 2011, the Office of the Registrar of the Constitutional Court of Bosnia and Herzegovina additionally delivered the following:

- Response of the National Assembly of the Republika Srpska and the allegations set forth in the request for review of constitutionality of the Law on the Status of State Property, dated 14 February 2011 and
- Translation of written observations of the Office of the High Representative in case no. U 1/11, dated 26 April 2011.

At my own request, on 25 October 2011 the following was delivered to me:

- Opinion of the Venice Commission no. 642/2011

To a question relating to the list of precise questions, on 22 July 2011 I received the answer that experts present their own views on the relevant issues. The relevant issues have not been determined.

Having examined the delivered material, I confirmed my participation in the public hearing to the Registrar of the Constitutional Court of Bosnia and Herzegovina.

In that sense, I am submitting the following:

**OPINION
ON THE RELEVANT ISSUES IN CASE NO. U 1/11**

I. As to the essence of the request

§ 1. As to the question whether the Law on the Status of State Property Located on the Territory of the Republika Srpska and under Disposal Ban (*Official Gazette of the Republika Srpska* no. 135/10) is compatible with the Constitution of Bosnia and Herzegovina, two aspects are relevant:

- a) Whether the enactment of the challenged Law on the Status of State Property violates in any way whatsoever the Constitution of Bosnia and Herzegovina and implied constitutional law and whether the challenged law, by its content, is not compatible with the Constitution and implied constitutional law. In the sense of this question, one must check whether the challenged law is inconsistent with the explicit constitutional prescriptions or unwritten constitutional law, that is whether the enactment of the Entity Law on the Status of Property violates the concrete constitutional principles from which direct normative prescription, rights or obligations follow. Such procedure implies the review of formal (procedural) and substantive (content regulation) constitutionality of the challenged law.
- b) The second aspect comes down to the question whether the challenged law is inconsistent with few explicit constitutional regulations:

§ 2. The applicant alleges that the challenged law is inconsistent with few explicit constitutional regulations:

- first and foremost, to lines 2 and 6 of the Preamble emphasizing peace, justice and reconciliation on the one hand, and State sovereignty, on the other hand, as the constitutional objectives containing general normative prescriptions.
- then to the constitutional regulation on the State continuity under Article I(1) and III(3)(b) of the Constitution of BiH in conjunction with Article 1 of Annex A to the Agreement on the Succession regulating that the property of the former Yugoslavia shall be transferred to the successor States, thus, to the State of BiH. Therefore, the challenged law is not in accordance with the substantive content of the principle of State continuity, to say the least, as the continuity of statehood implies first of all the continuity of property and property rights.

Furthermore, the applicant claims that the challenged law has been enacted contrary to the explicit constitutional regulation on the distribution of responsibilities between the State and its Entities under Article IV(4)(e) of the Constitution of BiH and that the existence of formal shortcoming already renders it unconstitutional.

Finally, the applicant claims that the challenged Law is contrary to Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms as it makes impossible for the State to control its property in accordance with the general interest.

§ 3. The National Assembly of the Republika Srpska contests all allegations as a whole referring, insofar as the responsibilities are concerned, to Article 68(6) of the Constitution of the Republika Srpska as the legal grounds for enacting the challenged law and to the Decision of the Constitutional Court of Bosnia and Herzegovina in case no. U 5/98, to the presumption of legislative responsibility in favour of the Entities under Article III(3)(a) and III(5)(a) of the Constitution which requires an agreement by the Entities for the State responsibility to be established. As to the violation of the principle of continuity, which implies the continuity of property rights, the very possibility for BiH to dispose of its own property is challenged by referring to the internal structure of the State regulated by Article I(3) in conjunction with Article III(1) and III(3)(a) of the Constitution of BiH. As to the violation of Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the application of law referring to the Convention has been challenged due to the lack of standing of Bosnia and Herzegovina to be sued.

II. Preliminary issues

§ 4. In my opinion, in order for the constitutionality of the challenged law to be reviewed, the following questions must be clarified:

- *the standard (scope) of review (§ 5);*
- *the subject of review (§ 6);*
- *the hierarchy of legal norms (§ 7 - § 8);*
- *the relevance of collision (§ 9);*
- *the scope of the constitutional principle of the rule of law (§ 10);*
- *typization of the BiH federalism according to the distribution of responsibilities (§ 11 - § 12);*
- *the obligation of comity or loyalty (§ 13);*
- *the normative nature of the Preamble (§ 14), and*
- *the status of imposed laws.*

§ 5. *The standard of review* of constitutionality of the challenged law is the Constitution of BiH (Annex 4). In addition to it, according to Article IV(3)(c), in conjunction with the principle of direct application of Article II(2) of the Constitution, the standard of review includes the ECHR with its Additional Protocols and international mechanisms for the protection of human rights and freedoms under Annex I to the Constitution of BiH (Annex 4) which apply as an

incontestable part of constitutional law of BiH.¹ Practically, the challenged law must be reviewed with regards to the possibility of violating the Constitution and the ECHR.

§ 6. *The subject of review* is the challenged Entity law on the disposal of State property. If, in this connection, there is a doubt about the jurisdiction of the Constitutional Court to examine the constitutionality of Entity law, I am of the opinion that the explicit jurisdiction rests on Article VI(3)(a) – the second alternative of the Constitution. This regulation, in the form of constitutional prescription, provides that the Constitutional Court shall have exclusive jurisdiction to decide the compatibility of any provision of a law of one Entity with the Constitution of BiH in resolving a dispute that arises between the Entities and State or institutions of BiH under this Constitution. The Constitutional Court confirmed this jurisdiction in its case-law.²

§ 7. *The principle of hierarchy of legal norms* determines mutual relation of legal norms according to the rule implying that in case of collision, higher-ranked norms exclude the lower-ranked norms, either wholly or partially. It is of primary significance in all federal States, as it plays the role of collision norm.

Article III(3)(b), the first sentence thereof, of the Constitution of BiH regulates the normative rank in the form of constitutional prescription on the primacy of the Constitution of BiH, so as to oblige the Entities to render ineffective all constitutional and law provisions which are incompatible with the *Constitution and decisions of the institutions* of BiH.³ This regulation stipulates that the Constitution of BiH and decisions of the institutions of BiH are higher-ranked than the Entity laws. Therefore, the Constitution of BiH and decisions of the institutions of BiH, in case of collision, derogate the constitutional and legal provisions of the Entities that are conflicting to them.

Based on the constitutional primacy, within the meaning of principle of hierarchy of constitutional norms under Article III(3)(b), the second sentence thereof of the Constitution, every formally and substantively constitutional decision of institutions of BiH (for example of some Ministry) will derogate the regulation of an Entity (for example constitutional regulation of entity) that is not in accordance with it. It follows from this that the Entities and all their administrative units, if they enact regulations contrary to the Constitution or a decision of an institution of BiH, will violate the constitutional principle of normative hierarchy, either by violating the constitutional prescription relating to the primacy of the Constitution of BiH, or by violating the constitutional prescription relating to the primacy of decisions of the institutions of BiH. The laws and normative acts which are made by the authorities of the Entities shall be null if they are not compatible with the laws and normative acts of the institutions of BiH and Constitution of BiH because they violate the constitutional principle of State law.

¹ Article VI(3), the first sentence; moreover, the consistent practice which follows from the legal nature of the appeal as an instrument for subjective/individual legal protection and appeal as an instrument for objective constitutional protection.

² Compare with U 2/21 od 27 May 2011, paragraph 44 with further ref.

³ Upheld in Decisions U 14/04 and U 2/21 (paragraph 53 here).

§ 8. The Constitutional Court has authority to make incidental review as to whether there is a manifest collision between Entity regulations and State regulations (“decisions of the institutions of BiH”) and substantive content of the Constitution of BiH. If this jurisdiction was challenged, the State as a guardian of the constitutional principles under Article III(3)(b) and Article I(2)-(3) of the Constitution,⁴ would remain without legal protection in all cases of State laws which are formally and substantively compatible with the Constitution.

§ 9. One shall decide whether the *collision has occurred* on the basis of interpretation of the challenged regulation and normative content of the relevant constitutional regulation, i.e. relevant decision of the BiH institution. One could come to a general conclusion that the collision exists if an Entity regulation deals with the same matter as a State regulation (*regulation of the same legal relations*) and leads to the same legal consequences (*considerable departure of normative contents*). One shall determine whether the collision exists on the basis of specific regulative content of the norm. The consequence of the collision is the nullity of lower-ranked norm.⁵

§ 10. The principle closely dependant on the principle of normative hierarchy is *the principle of legal State*, (compare § 7), which is prescribed in the Constitution of BiH on principle through the formula of the rule of law under Article I(2) of the Constitution of BiH. This being so as the “rule of law” primarily implies “the rule of the Constitution”. It constitutes the primacy of constitutional law over all lower-ranked acts and requires all levels of the State authority to comply with the constitutional law. Such conclusion follows not only from the principle of legal certainty as an element of the legal statehood, which is admitted by the Constitutional Court if BiH,⁶ but also from the generally accepted understanding of legal state as the constitutional principle which is included in the Community acquis.⁷ The balance struck in the legal state in that manner requires the principle of the “rule of law” as its obligatory element to include the requirement of lawfulness of State activity, which, in the federally organized systems, requires the legal acts of lower federal units to be harmonized as a whole with legal acts of the State.

This means that every Entity law which is not compatible with the State law, insofar as the substantive content is concerned (which is formally and substantively compatible with the Constitution), will be unconstitutional as it is contrary to the principle of the rule of law under Article I(2) of the Constitution of BiH. The Entity legislator violates the constitutional law of BiH in the form of violation of the principle of legal State every time it enacts the regulations, within the scope of its own legislative responsibilities, which violate, by its substantive content, the State law or derogate its application.

§ 11. Bosnia and Herzegovina is a *federation* formed beyond the standards of “federal State”. This being so as the Entities are not the States⁸ but highly independent territorial units with

⁴ *Ibid.*

⁵ Instead of exhaustive literature, M. Huber, in Sachs, Grundgesetz Kommentar, 2011, pp. 2095 *et seq.*

⁶ U 68/02 of 25 June 2004, paragraph 45.

⁷ Compare with E. Schmidt-Aßman, Der Rechtsstaat, HBSStR II, 2004, paragraphs 604 *et seq.*; R. Hofmann/J. Marko/F. Merli/E. Wiederin, Rechtsstaatlichkeit in Europa 1996.

⁸ Third Partial Decision in case no. U 5/98, paragraph 29.

quasi-State responsibilities and competencies which concretise the type the BiH federalism.⁹ It is mostly concretized in the distribution of responsibilities between the State and Entities.

§ 12. The issue of *responsibility* is resolved by the principle of presumed responsibility of the Entities for the matters which are not explicitly enumerated as the responsibilities of the institutions of BiH. The matters which are not explicitly enumerated in Article III(1) of the Constitution are not the exclusive responsibility of the Entities in the same manner as the Entities may have residual responsibilities related to the responsibility of the institutions of BiH.¹⁰

§ 13. The principle of “pro-federal comity or loyalty“ is an unwritten constitutional principle which equally permeates the entire federal setup of the Constitution of BiH like all other federally regulated states.¹¹ This principle follows, from, on the one hand, the imperfection of regulating the federal relations and the necessity for the state and its entities not just to maintain formal accuracy in fulfilling their rights and obligations, but also to concentrate upon constant finding and establishing good federal relationship and harmonious activity which excludes dispute even when the requests at issue are formally and legally well-founded. On the other hand, what follows from the written constitutional law and is its complement in terms of the requirement that in the procedure of asserting their constitutional rights and obligations, the state and its entities have to be loyal to the state and its constitutional values. This principle follows primarily from the dual decision of the framer of the constitution: first concerning the vertical distribution of competencies in exercising state power between the state and its entities, second concerning the very essence of federalization of BiH which requires the functional ability of the whole to perform the tasks of the state as a state system of distributed responsibilities. The principle does not establish specific responsibilities and it does not affect the distribution of responsibilities in the written constitution, but, in the area of exercising of responsibilities, it corrects actual take over of regulative competencies that are based upon written constitutional law.

The principle of “pro-federal comity or loyalty“ follows from the systematic relationship of Article III(5) with Article III(2)(d) and Article III(3)(b) with lines 2, 3 and 6 of the Preamble and Article I(1) of the Constitution of BiH. In their systematic relationship, they determine the synchronization (mutual consultation and coordination) as the fundamental reason for developing federal relations. Such reason is guided by the preservation of territorial sovereignty, international subjectivity and political independence of state as fundamental constitutional values that constitute the identity of the state continuity of BiH. Additional obligations may be derived from it both for entities and for state. However, the key dogmatic message indicates the obligation of entities and state to use and carry out their responsibilities in the area of their acting in such a way as not to impair the integrity of the state as well as its sovereignty in all the aspects thereof.

⁹ Compare, Venice Commission, Opinion on the Compatibility of the Constitutions of the Federation of Bosnia and Herzegovina and the Republika Srpska with the Constitution of Bosnia and Herzegovina, CDL (1996) 056rev2.

¹⁰ U 25/00 of 23 March 2001, paragraph 32.

¹¹ Analogous to the principle of “Bundestreue” or “Bundesfreundliches Verhalten” as an unwritten constitutional principle which complements as a corrective the written constitutional law in the areas of relevance for the cooperation of a federal state or federal countries. See the Federal Constitutional Court of the Federal Republic of Germany, the Judgment of the second senate of 28 February 1961 etc.

§ 14. The Preamble to the Constitution of BiH is in its legal nature an integral constitutional part¹² with normative properties.¹³ The normativity of the Preamble means that it is possible to subsume factual situations under it and that it is possible to derive direct rights and obligations from it. It represents the “Standard for Controlling the Constitutional Court”.¹⁴

§ 15. The imposed laws have to be considered as the laws of the institutions of Bosnia and Herzegovina. From the fact that a law was enacted by the High Representative for BiH, not the Parliamentary Assembly, it does not follow that it loses the status of a law, either as regards its form or as regards its substance. The form has been kept by its publication in the official gazette, the substance is maintained by the matter it regulates because it falls within the legislative responsibility of the Parliamentary Assembly of BiH, pursuant to Article IV/a) of the Constitution.¹⁵ Accordingly, the Law on the Temporary Prohibition of Disposal of State Property (*Official Gazette of BiH*, nos. 18/05, 29/06, 85/06, 32/07, 41/07, 74/07, 99/07 and 58/08) is a decision by an institution of BiH in terms of Article III(3)(b), the first sentence of the Constitution.

III. Formal Constitutionality of the Challenged Law

§ 16. The Law on the Status of State Property Located on the Territory of the Republika Srpska and under the Disposal Ban is constitutional in the formal sense if it was enacted in accordance with the regulations which regulate the responsibilities for its enactment and if regular legislative procedure has been adhered to in everything else. In respect of the legislative procedure the jurisdiction of the Constitutional Court of BiH is unquestionable because the matter has been regulated by the Entity Constitutions. What remains as an open issue is whether the enactment of the law regulating the matter of disposal of state property in a specific way by itself violates any regulations on distribution of legislative responsibilities under the Constitution of BiH.

The responsibility of BiH is being based every time upon the constitutional regulation (see above paragraph 12), which, in its turn, suspends entirely or partially the responsibility of the Entities (according to the type of responsibility – exclusive, competitive or framework).

§ 17. Responsibility will in case of a challenged Entity law have to be determined with regard to the subject being regulated. That it “state property”, therefore, the property gained by BiH pursuant to the Agreement on Succession of SFRY¹⁶ and the property in respect of which the

¹² See Article 31(2) of the Vienna Convention on the Law on Treaties.

¹³ The Third Partial Decision in case U 5/98, pps. 23-26.

¹⁴ The Third Partial Decision (see note 13).

¹⁵ See the Third Partial Decision of the Constitutional Court on the Law on State Border Service, U 9/00 (OGBiH 01/02), pps.5, 7, 8 and 29; see also U 25/00, p. 22.

¹⁶ The Succession Agreement, ratified by the decision of the Presidency of 28 November 2011, following the consent by the Parliamentary Assembly BiH and its decision 56/01 of 24 October 2001, OGBiH – International Contracts, 10/01.

proprietary rights belonged to SRBiH or its bodies prior to 31 December 1991.¹⁷ The matter regulated by the challenged law is thus determined by a narrow real dependence of the property in the succession mass with the property of the Republic of BiH. It is within that definite element that the constitutional principle of continuity (identity) is to be interpreted in the context with the international agreement on succession, so that by starting from their normative contents one may arrive at a conclusion on inner responsibility for regulation of state property. Namely, the Succession Agreement, as an international contract, and the constitutional principle of continuity enshrined in Article I(1), the first sentence of the Constitution, prejudice the decision on responsibility for regulation of this matter.

What is shown to us here is the dogmatic significance of the constitutional regulation as enshrined in Article I(1) of the Constitution in conjunction with Article III(1)(a) and (e), and Article IV(4)(d) and (e).

- (a) Article I(1) of the Constitution under the title *Continuation* of BiH defines the *identity* of BiH with the state which against the background of dismemberment of Yugoslavia in 1992 has been recognized as an independent state, but in such a way that continuity and identity may not be distinguished in the legal sense. The regulation establishes that the Republic of BiH shall change its name and shall continue its legal existence under international law as a state, with its internal structure (constitution) modified as provided therein. Existence under international law involves assuming of the obligations of the Republic of BiH and ensuring the existing rights¹⁸ (continuation of validity of the previous law, Annex II to the Constitution, Article 2-5). The constitutional regulation does not reveal the intention to approach selectively the realization of rights and obligations in respect of the existence of BiH as a state under international law. It is hard to imagine a situation in which the first article of its constitution prescribes its continuity to the state in respect of its constitutional identity and international subjectivity, while, at the same time, depriving that state of the possibility to regulate itself the area which is of essence for the realization of its continuity and its international subjectivity. Continuity in rights and obligations, by the nature of things, involves the disposal of public goods/property which is in direct function of performing of public authority, whether it is to serve as basis for realization of budgetary income or for direct utilization by state institutions. It is indeed the public property that serves to fulfill this purpose.¹⁹

¹⁷ The notion of “state property” does not, therefore, include all the assets, e.g. the property gained by SRBiH/RBiH after 31 December 1991 or upon some other grounds. See E. Mehmedovic, Public Law Notebooks 5/2011, pps. 27 ff; Final Report of the Office of the High Representative on the Inventory of the State Property in BiH, December 2009, item A.

¹⁸ Changes in the system of rule are irrelevant for the state continuity just as it is the transition from monarchy to a republic or dictatorship, even a violent revolution which entails interruption of constitutional continuity does not change anything in the position of the legal subjectivity of a state. It is also irrelevant for the existence under international law whether any specific authority is legitimate, i.e. whether, in terms of national constitutional law, it has come to power in accordance with law (see. E.g. T. Stein/v. Buttlar, Völkerrecht, 2009, p. 97; S. Hobe, Einführung in das Völkerrecht, 208, pps. 73, 104).

¹⁹ Affirmed in the Decision of the Parliamentary Assembly of BiH 152/05, in the judgment of the Court of BiH P-254/06 of 3 October 2008 and in the legally binding ruling by the Land Registry Office of the Mostar Municipality Dn:224/04 of 26 May 2009.

How will the institutions of BiH, given its internal structure, specifically regulate this issue will be determined according to the assessment of those institutions themselves. This, however, does not by itself exclude the responsibility of BiH to include, based upon the regulation on continuity, the ownership right over movable and immovable property of the Republic of BiH into its own identity and then regulate it. It is obliged to do that. Otherwise, the continuity as enshrined in Article I(1) of the Constitution would only mean the continuity in assuming rights and obligations without the possibility for the state institutions to regulate the areas which are the subject of those rights and obligations.

Such position additionally strengthens the Agreement on the Succession Issues which unambiguously obligates the successor states to accept the contracted principles and take the necessary measures in order to prevent loss, damage or destruction of archives, property and capital of the former SFRY (Articles 2 and 8 of the Agreement). Such measures may not be taken by BiH if exclusive regulative competence in the area of the state property is denied to it.

Accordingly, the principle of continuity in the specific form of the identity of the Republic of BiH with the state of BiH *indicates* the responsibility of the state to regulate the matter.

- (b) Such conclusion is confirmed and concretized by the systematic relationship of the state continuity under Article I(1) of the Constitution with Article III(a) and (e) of the Constitution. One can see in them that foreign policy and finances of the institutions of BiH as well as a part of a wide range of international relations are the exclusive responsibility of the state, complemented by the powers of the Parliamentary Assembly of BiH under Article IV(4)(d) and (e): deciding upon the sources and amounts of revenues for the operation of the institutions of Bosnia and Herzegovina and for the international obligations of Bosnia and Herzegovina together with other issues necessary to carry out the responsibilities of the Parliamentary Assembly of BiH, which are established as the responsibility of the state institution, i.e. the Parliamentary Assembly of BiH. Accordingly, international obligations, international status and membership in international organizations are exclusive regulatory areas of the state. International law is blind to the internal structure of a state. Regulation of state property is nothing but implementation of the obligation under international law determined by the ratification of the international Agreement on the Succession Issues. In brief: as a subject under international law which, by taking over of its property and resolving its status, meets the international agreement (on the succession issues), the state meets at the same time the constitutional regulation on state identity as enshrined in Article I(1) of the Constitution, the regulation on the responsibilities of the institutions of BiH in the area of foreign policy (III(1)(a) of the Constitution) and financing of international obligations (Article III(1)(d) of the Constitution) as well as the constitutional regulations on powers of the Parliamentary Assembly of BiH under Article IV(4)(d) and (e).

- (c) If the regulation of the status of state property under the Agreement on the Succession Issues would be dealt with as an issue of the Entity responsibility, the above quoted regulations would be in idle gear because it would be made impossible for the state to venture into regulating the matter which, pursuant to explicit constitutional regulations, falls within the scope of obligations stemming from its subjectivity under international law. In other words, in international transactions, the state would be concluding agreements whose implementation in the internal legal space it could not guarantee.

Conclusion: Regulation of the state property matter by an Entity law is inconsistent with the Constitution of BiH because taking over of the state property matter into the exclusive responsibility of the Entities violates the principle of continuity under Article I(1) of the Constitution in conjunction with the regulations on responsibility of the institutions of BiH under Article III(1)(a) and (e) and the regulations on powers of the Parliamentary Assembly of BiH under Article IV(4)(d) and (e) of the Constitution. The cited regulations are the normative basis for the responsibilities of BiH in the areas which in addition to the state continuity also regulate the cases of obligations under international law, their financing, their ratifications and, based upon that, the funding for their operation. The state property is one of these areas.

The Law on the Status of State Property Located on the Territory of the Republika Srpska and under Disposal Ban is therefore unconstitutional for formal reasons.

§ 18. The constitutionality of the challenged law must also be reviewed given the fact that the same matter has been regulated by the laws on temporary prohibition of disposal of state property enacted on the level of BiH, FBiH and RS.²⁰ The relevant law for the issue of constitutionality is the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina²¹ because it is the law of an *institution* of BiH (see above paragraph 15). The explicit provisions of this law prohibit the disposal of state property, stating that any decision, act, contract or any other legal instrument disposing of state property in contravention of the provisions of this law, shall be deemed null and void. The Law on the Status of State Property Located on the Territory of the Republika Srpska and under Prohibition of Disposal, in contravention of explicit provisions of the Law on the Temporary Prohibition of Disposal of State Property, actually *disposes* of state property. By defining the property (Article 2), the regulations on registering of state property in favor of RS (Article 3), the regulation on powers of the Government of RS to manage and dispose of the property by entering into legal transactions (Articles 4-7), it regulates the same matter as does the Law on the Temporary Prohibition of Disposal of State Property, but in such a way that, in contravention of the state Law on the Prohibition of Disposal, it governs, pursuant to the territorial principle, the specific forms of disposal of this property.

²⁰ For more detail see Mehmedovic (note 17), p. 31.

²¹ *Official Gazette of BiH*, no. 18/05, 29/06, 85/06, 32/07, 41/07, 74/07, 99/07 and 58/08. (The law was imposed by the High Representative in BiH, Mr. Paddy Ashdown in 2005).

Therefore, the Law on Status of State Property located on the Territory of the RS and under Disposal Ban regulates the same legal relations which the Law on Temporary Prohibition of Disposal of State Property of BiH regulates and this law, by regulating different legal consequences by its normative content, derogates extensively from the BiH Law on Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina. In this case the Entity law is in collision with the state law (compare, paragraph 9 supra). In this case the constitutional principle of normative hierarchy under Article III(3)(b) has been violated and this, pursuant to the requirement for the primacy of the state law, must lead to the annulment of the disputed law as a whole (compare, paragraph 7 supra).

Conclusion: Regulation of the issue of state property by the Entity law is inconsistent with the Constitution of BiH because it regulates, on entity level, the disposal of the state property contrary to the explicit provisions of the state law. In this case the principle of normative hierarchy under Article III(3)(b)- the first sentence of the Constitution, has been violated.

The Law on Status of State Property located on the Territory of the RS and under Disposal Ban is unconstitutional for formal reasons.

§ 19. As a rule, any violation of the principle of normative hierarchy in a form of violation of the primacy of constitutional law under Article III(3)(b) of the Constitution will automatically lead to the violation of the principle of the rule of law under Article I(2) of the Constitution. Whenever it happens that a law (which is enacted by the entity legislature) violates the state law by its normative content that law will be considered formally unconstitutional because the principle of normative hierarchy includes a requirement that the lower ranked law, by its substantive content, should not exclude or contradict the higher ranked law. If something like that happens, as in this case, the rule of the Constitution will be automatically violated and this rule of the Constitution is a central element of the legal statehood prescribed in the formula of “the rule of law” under Article I(2) of the Constitution (compare, paragraph 10 supra).

Given that the substantive content of the entity Law on Status of State Property located on the Territory of the RS and under Disposal Ban is inconsistent with the state law on prohibition of disposal of this property, the principle of the rule of law under Article I(2) of the Constitution has been violated by the enactment of the Entity law.

Conclusion: By enacting the entity law on state property, which is the subject to be regulated by the state law and is under the disposal ban, the constitutional law has been violated, i.e. the principle of the rule of law under Article I(2) of the Constitution.

Therefore, the Law on Status of State Property located on the Territory of the RS and under Disposal Ban is unconstitutional for formal reasons.

§ 20. The formal unconstitutionality of the disputed law must also be confirmed if there is a violation of an unwritten constitutional principle which is ranked as a written constitutional law and is relevant when it comes to the determination of the respective Entity’s circle of responsibilities. In this case, the principle of pro-federal loyalty should first come to mind and

this principle, as an unwritten constitutional law, corrects the exercise of legislative responsibilities in states with federal organization (compare, paragraph 13 supra). This principle will be considered violated when the Entities, even if they comply with the responsibilities determined by the respective constitutions, violate one of the aspects of the state integrity or sovereignty by exercising these responsibilities.

By enacting the disputed law the Entity authorities have violated several of major constitutional principles: the principle of continuity relating to the responsibilities of the state institutions and Parliamentary Assembly of BiH, sup-principle of constitutional primacy (within the principle of normative hierarchy) and the principle of rule of law. Furthermore, in the substantive content of the disputed law a regulation has been entered according to which the RS may conclude with the Council of Ministers of BiH an agreement on transfer of usage of the part of property required by the institutions of Bosnia and Herzegovina for conduct of affairs within their competence (Article 5 and 6 of the Law on Status of State Property located on the Territory of the RS and under Disposal Ban). Given that it clearly follows from the disputed law as a whole, in particular from Article 5 and Article 6, that there is a possibility for excluding from public sphere the property which serves for functioning of the state and for providing the state related services and given that it may result in weakening of the financial position of the state, it must be inferred that in this way the principle of pro-federal loyalty has been violated since the act of depriving the state - the actual holder of the title of its property would result in the weakening of the state.

Conclusion: In the event that the enactment of the disputed Entity law would not be considered unconstitutional for any of the reasons listed in paragraphs 17 through 19, then its formal unconstitutionality will be reflected in the violation of an unwritten constitutional principle – the principle on obligation of pro-federal comity or loyalty, which follows from the systematic conjunction between Articles III (5), III(2) (d), III(3) (b), the second, third and sixth line of the Preamble and Article 1(1) of the Constitution of BiH (subsidiary application of unwritten constitutional principles).

IV. Subsidiary issues along with the issue of constitutionality in the formal sense

§ 21. The issue of legal basis of the disputed law in the Constitution of the RS was irrelevant when it comes to the issue of reviewing its constitutionality before the Constitutional Court of BiH. The respective Entity Constitutional Court is in charge of reviewing whether the enactment of the said law is based on the Entity constitutional law. The argument about the legal basis which refers to the 3rd partial Decision U – 5/98 and its paragraph 26, as a proof that the issue of the constitutionality of the disputed law has been resolved, is unusable as there is no analogical constellation. One time it is about the responsibility for *regulation* and the second time it is about the *usage* of property. In its 3rd partial decision the Court finds that the Entity constitutional regulation, which creates the responsibility for *regulation* of this issue, is constitutional.²² However, nothing has been said regarding the issue of *usage* and *taking over* of the state property, i.e. about a concrete aspect of regulation of this issue.

²² The 3rd Partial Decision U 5/98 of 18 and 19 February 2000, paragraph 26.

§ 22. The argument that the position of the State Union of Serbia and Montenegro in the Succession Agreement must be used as a relevant position is pointless regarding the regulation of the state property in BiH. Making any analogy between BiH and the State Union of Serbia and Montenegro is pointless as they have no historical or constitutional or public-law related similarities that could be used within the meaning of legal arguments. The definition from Article 2 of the Constitutional Charter of the State Union of Serbia and Montenegro²³ makes any analogy unnecessary as it stipulates that the union is based on the equality of the two member states, “the State of Serbia and the state of Montenegro“. Article 8 of the Succession Agreement implies that the term successor states is related to the subject of international law, which means that in this case that subject is solely Bosnia and Herzegovina. The term “internal law“, within the meaning of this regulation, may only encompass the legislation of the state.

§ 23. The argument about the state revenues is also unusable since it equalizes the budgetary revenues and property. The thesis that the state does not have its own revenues and thus that it does not have its own property is arbitrary given the regulation under Article VIII (3) of the Constitution. Any identification of budgetary revenues with the property is legally unsustainable.

§ 24. The Constitutional Court is not called upon to determine criteria according to which Bosnia and Herzegovina will dispose of the state property. It is an exclusive duty of the legislator to determine whether and to which extent the state property will be transferred to the Entities for their disposal. Also, there is no legal basis for favoring territorial or functional principle as relevant criteria for registration and disposal of the state property. The state has responsibilities to dispose of the property according to other criterion it deems to be the most appropriate. There is no constitutional regulation requiring that the state distribute the property to each level of authority. In this regard, the only constitutional requirement is related to the manner in which this issue is regulated- either in a form of constitutional amendment or in a form of law. By the Law on the Distribution, Purpose and Use of Part of the Property Assigned to Bosnia and Herzegovina based on the Succession Agreement (2002),²⁴ Bosnia and Herzegovina has just met this requirement.

§ 25. With reference to the law provision regulating the continuity and identity of the state legacy, the law provision on reforming the internal structure (Article I(1) of the Constitution) and the law provision on responsibilities of the institutions (Article III(1), Article III(3)(a), Article III(5)(a)), it follows that Bosnia and Herzegovina has a unique legal system with its own rights and obligations. Those institutions are independent from the Entities and, within the meaning of the law, they form a single legal personality which cannot be identified with the Entities and it cannot represent only a formal frame for the legal existence of Entities²⁵.

²³ Official Gazette of Serbia and Montenegro 1/2003.

²⁴ Official Gazette of BiH 11/02.

²⁵ The third Partial Decision U 5/98 of 1 July 2000, pages 29-30.

V. Inter-balance

§ 26. The Law on Status of State Property located on the Territory of the RS and under Disposal Ban is unconstitutional for formal reasons. That law was not enacted in accordance with written and unwritten constitutional law of Bosnia and Herzegovina. Thus, the enactment of this law violates several constitutional principles and concrete constitutional prescriptions (compare paragraphs 17-20 supra). However, just based on the aforesaid, the disputed law must be quashed so that it is not necessary to review the disputed law with regards to the substantive constitutionality relating to violation of Article 1 of Protocol No. 1 to the European Convention.

VI. Substantive constitutionality

§ 27. The issue of substantive constitutionality will be considered as a secondary issue in the text bellow given that this issue will not be raised in the constitutional review procedure in the case of formally unconstitutional laws.

§ 28. In the substantive sense, this law will be considered constitutional if it does not violate any constitutional-law provision which, outside the legislative procedures and responsibilities, imposes concrete obligations on all levels of the state authority. Furthermore, the substantive compatibility with the Constitution requires that the law as a whole complies with the principle of proportionality: that regulation must use legitimate means in pursuing legitimate aims and, in order to achieve these aims and given its purpose, it must show that its shortcomings do not prevail over the advantages resulting from its proportionality.

§ 29. The issue of the constitutionality in the substantive sense has been raised with respect to possible violations of Article 1 of Protocol No.1 to the ECHR which corresponds to Article II(3)(k) of the Constitution. Given the scope of the protection of this right, it is noticeable that the state lacks the standing to sue as it does belong to the circle of persons that may refer to violation of Article 1 of Protocol No. to the ECHR.²⁶ However, paragraph 2 of Article 1 of Protocol No. 1 to the ECHR postulates an exception in a way that it ensures that the state may apply laws deemed to be necessary for regulation or usage of property in accordance with general interests, including payment of taxes, other expenses or fines. In other words, paragraph 2 ensures that the state should first regulate the usage of property.²⁷ This right will be considered as violated in the event that the state is prevented from regulating the issue of usage of property.

§ 30. Taking into account the fact that the state property on the Entity level is regulated by the law, an issue is raised as to whether the state is prevented from enacting its own laws whereby it would regulate the same matter in the same, similar or different manner. The constitutional law does not contain a provision whereby the state is denied the right to regulate the matter that has already been or it is still the subject to be regulated on the Entity level. That is why it is impossible to see that the state institutions are in any way prevented from regulating the issue of

²⁶ Compare Konkordanzkommentar EMRK/GG (R. Grote/T. Marauhn Hrsg.), 2006, p. 1270.

²⁷ Compare J. Sprecher, Beschränkungen des Hnadels mit Kulturgut und die Eigentumsgarantie, 2004, p. 152; Konkordanzkommentar, (note 26), p. 1320.

usage of property by a law or by some other legal act. This possibility leads to a conclusion that the state, in accordance with the responsibilities of its institutions, may, at any time, start with regulating the issue of state property. In other words, the state may dispose of the property upon regulating the issue of property. It must not be disputable that the content of disposal of the state property in a form of enacting concrete laws, within the scope of the state institutions' activity, may be different from the content of the Entity law. In that case the law of the institutions of BiH will derogate from the Entities' colliding regulations either partially or as a whole.

Therefore, Article 1 of Protocol No. 1 to the ECHR and Article III(k) of the Constitution have not been violated.

VII. Conclusion

§ 31. The Law on Status of State Property located on the Territory of the RS and under Disposal Ban (Official Gazette of RS 135/10) is unconstitutional for formal reasons and therefore it is null and void.

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