

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI (3) (c) 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:

Ms. Valerija Galić, President

Mr. Mirsad Ćeman, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Helen Keller, Vice-President

Ms. Seada Palavrić,

Ms. Angelika Nußberger, and

Mr. Ledi Bianku

Having deliberated on the request filed by **the Municipal Court in Sarajevo (Judge Edina Kršlak)**, in case no. **U-25/22**, at its session held on 19 January 2023, adopted the following

## DECISION ON ADMISSIBILITY AND MERITS

In deciding the request of **the Municipal Court in Sarajevo (Judge Edina Kršlak)** for review of the constitutionality of the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 90/05, 32/07, 17/13, 5/14, 40/14, 48/15 and 77/20),

it is hereby established that the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 90/05, 32/07, 17/13, 5/14, 40/14, 48/15 and 77/20) is not in conformity with Article I (2) of the Constitution of Bosnia and Herzegovina, Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 26 of the International Covenant on Civil and Political Rights, on the ground that it does not contain the provisions on on-call/standby allowances.

Pursuant to Article 61 (4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Parliamentary Assembly of Bosnia and Herzegovina is hereby ordered to harmonise, within six months from the date of the publication of the present Decision in the *Official Gazette of Bosnia and Herzegovina*, the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 90/05, 32/07, 17/13, 5/14, 40/14, 48/15 and 77/20), regarding on-call/standby allowances, with Article I (2) of the

Constitution of Bosnia and Herzegovina, the provisions of Article II (4) of the Constitution of Bosnia and Herzegovina, Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 26 of the International Covenant on Civil and Political Rights.

The Parliamentary Assembly of Bosnia and Herzegovina is hereby ordered to inform the Constitutional Court of Bosnia and Herzegovina, within the time limit set forth in the foregoing paragraph, about the measures taken to enforce 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 in the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

## **R E A S O N I N G**

### **I. Introduction**

1. On 16 September 2022, the Municipal Court in Sarajevo (Judge Edina Kršlak; “the applicant”) filed a request with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) for review of the constitutionality of the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*. 90/05, 32/07, 17/13, 5/14, 40/14, 48/15 and 77/20; “the Law on Salaries and Other Compensations”) with Article I (2) and Article II (4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”),

Article 1 of Protocol No. 12 to the European Convention and Article 26 of the International Covenant on Civil and Political Rights.

## **II. Procedure before the Constitutional Court**

2. In the request, the applicant stated that, pursuant to Article VI (3) (c) of the Constitution of Bosnia and Herzegovina, in case no. 65 0 Rs 973405 22 Rs, upon a lawsuit filed by plaintiff Darko Samardžić against defendant Bosnia and Herzegovina, she referred the plaintiff's request for review of the constitutionality of the Law on Salaries and Other Compensations with Article I (2) and Article II (4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention, Article 1 of Protocol No. 12 to the European Convention and Article 26 of the International Covenant on Civil and Political Rights. Pursuant to Article 22 of the Rules of the Constitutional Court, the Constitutional Court requested a supplement to the request, in a sense for the court to provide the reasoning for the filed request, and not only to refer to the allegations of the parties to the proceedings. The supplemented request was submitted to the Constitutional Court on 10 October 2022.

3. Pursuant to Article 23 of the Rules of the Constitutional Court, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina ("the House of Representatives") and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina ("the House of Peoples") were requested on 12 October 2022 to submit their respective replies to the request.

4. The House of Representatives and the House of Peoples failed to submit their respective replies to the request within the given deadline.

## **III. Request**

### **I. Allegations stated in the Request**

5. The applicant requested the Constitutional Court to review whether the Law on Salaries and Other Compensations is in conformity with the provisions of Article I (2) and Article II (4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention, Article 1 of Protocol No. 12 to the European Convention and Article 26 of the International Covenant on Civil and Political Rights, on the ground that it does not contain the provisions on on-call/standby allowances. In the reasoning of the request, the applicant alleged that the judges of the Court of Bosnia and Herzegovina, besides discharging their duties during the regular working hours, discharge on-call duties, which implies that they are on standby during on-call duty if required to discharge the necessary duties and tasks. In addition, it is mentioned that a

judge receives no monetary compensation for the mentioned on-call duties, namely standby, and a judge's salary is not increased on that ground. The applicant indicates that, contrary to the aforementioned, the Law on Salaries and Other Compensations prescribes a possibility for the payment of a lower salary to a judge when working part-time, *i.e.* less than 40 hours a week.

6. The applicant alleges that, unlike the Law on Salaries and Other Compensations, the Law on Salaries and Other Compensations of Judges and Prosecutors in the Federation of Bosnia and Herzegovina (*Official Gazette of FBiH*, 72/05, 22/09, 27/12, 55/13, 102/13, 55/17 and 61/22) prescribes in Article 6e that judges in municipal and cantonal courts in the Federation of Bosnia and Herzegovina are entitled to the compensation on the ground of the time they spend discharging mandatory on-call duty or standby duty commensurate with to the duration of mandatory on-call duty or standby duty. The applicant refers to the Decisions of the Constitutional Court nos. *U-7/12*, *U-29/13* and *U-7/21*, wherein the Constitutional Court decided on the issue of differential treatment of judicial office holders. She holds that the denial of the remuneration of salary for equal work constitutes a form of direct discrimination. In addition, she holds that the right to payment of equal salary for the work of equal value arises from the statutory obligation of equal treatment, and differences in salaries have to be justified by the criteria of nature and type of work, which must not contain the elements of discrimination.

#### **The case in respect of which the request was filed**

7. The applicant states that a civil proceeding is pending before the Municipal Court in Sarajevo upon a lawsuit filed by plaintiff Darko Samardžić (Judge of the Court of BiH) against defendant Bosnia and Herzegovina, for the purpose of monetary claims arising from labour relations and discrimination. The lawsuit seeks the payment of compensation for the work of judges during on-call or standby duty.

#### **IV. Relevant law**

8. The **Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, 90/05, 32/07, 40/08 – decision of the Constitutional Court of BiH, 17/13 – decision of the Constitutional Court of BiH, 5/14 – ruling of the Constitutional Court of BiH, 40/14 – decision of the Constitutional Court of BiH, 48/15 – ruling of the Constitutional Court of BiH and 77/20)

##### *Article 1*

##### *Scope of the Law*

*This Law regulates the salary, compensations and certain material rights of Judges, Prosecutors and certain categories of professional staff in judicial institutions at the level of Bosnia and Herzegovina.*

*Article 7*

*Working Hours*

- 1. The working hours for Judges and Prosecutors shall be 40 hours per week.*
- 2. If a Judge or a Prosecutor works on a part time basis in accordance with specialized legislation or regulations, the Basic Monthly Salary under Articles 2, 3 and 4 of this Law respectively shall be adjusted according to the number of days worked in relation to the number of normal working days in that month.*

9. **The Law on Salaries and Other Compensations of Judges and Prosecutors in the Federation of Bosnia and Herzegovina** (*Official Gazette of FBiH*, 72/05, 22/09, 27/12 – decision of the Constitutional Court of BiH, 55/13, 55/17 – decision of the Constitutional Court of BiH, 90/21 – decision of the Constitutional Court of BiH, 64/22 – ruling of the Constitutional Court of BiH, and 61/22). For the purposes of this decision, the unofficial revised text prepared in the Constitutional Court is used, which reads:

*Article 1*

*Scope of the Law*

*This Law stipulates the salary, compensations and other material rights of Judges, Prosecutors and professional associates in the Federation of Bosnia and Herzegovina.*

*Article 6e*

*(Allowance for Mandatory On-call or Standby Duty)*

- (1) Judges in Municipal and Cantonal Courts and Prosecutors in the Cantonal Prosecutor's Office shall be entitled to compensation on the basis of the time they have spent discharging mandatory on-call or standby duty commensurate with the duration of mandatory on-call or standby duty.*
- (2) The amount, conditions and method of realising the compensation referred to in paragraph (1) of this Article shall be established by the competent Governments of Cantons by means of a special regulation.*

## V. Admissibility

10. In examining the admissibility of the request, the Constitutional Court invoked the provisions of Article VI (3) (c) of the Constitution of Bosnia and Herzegovina.

11. Article VI (3) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

*c) The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.*

12. The request for review of constitutionality was submitted by the Municipal Court in Sarajevo (Judge Edina Kršlak), which means that the request was submitted by an authorised person under Article VI (3) (c) of the Constitution of Bosnia and Herzegovina (see Constitutional Court, Decision on Admissibility and Merits *U-5/10* of 26 November 2010, paragraphs 7-14, published in the *Official Gazette of Bosnia and Herzegovina*, 37/11). Having regard to the provisions of Article VI (3) (c) of the Constitution of Bosnia and Herzegovina and Article 19 paragraph (1) of the Rules of the Constitutional Court, the Constitutional Court considers that this request is admissible as it was submitted by an authorised person. In addition, there is not any formal reason under Article 19, paragraph (1) of the Rules of the Constitutional Court rendering this request inadmissible.

## VI. Merits

13. The applicant deems that the Law on Salaries and Other Compensations is not in conformity with the provisions of Article I (2) and Article II (4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention, Article 1 of Protocol No. 12 to the European Convention and Article 26 of the International Covenant on Civil and Political Rights.

14. The Constitution of Bosnia and Herzegovina, as relevant, reads:

### *Article I*

#### *Bosnia and Herzegovina*

##### *2. Democratic Principles*

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

*Article II*

*Human Rights and Fundamental Freedoms*

*4. Non-discrimination*

*The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

15. Article 14 of the European Convention reads as follows:

*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

16. Article 1 of Protocol No. 12 to the European Convention reads as follows:

*1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

*2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.*

17. The International Covenant on Civil and Political Rights was signed on 19 December 1966 in New York (*Official Gazette of SFRY*, 7/71 and *Official Gazette of R BiH*, 5/92 and 25/93). The text of the regulation as published in the Official Gazette shall be used for the purpose of this decision, as it was not published in all official languages and scripts, which insofar as relevant reads:

*Article 26*



*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

18. In the present case, the task of the Constitutional Court is to examine whether the provisions of the Law on Salaries and Other Compensations are compatible with the provisions of the Constitution of Bosnia and Herzegovina and the International Covenant on Civil and Political Rights, on the ground that they do not prescribe on-call/standby allowances.

19. The case-law based on the decision of the Constitutional Court *U-7/21* of 23 September 2021 is relevant for resolving the present case (see, Constitutional Court, Decision on Admissibility and Merits no. *U-7/21* of 23 September 2021, published in the *Official Gazette of Bosnia and Herzegovina*, 63/21). In the aforementioned decision, the Constitutional Court considered whether the provisions of the Law on Salaries and Other Compensations of Judges and Prosecutors in the Federation of Bosnia and Herzegovina were compatible with the provisions of the Constitution of Bosnia and Herzegovina and the European Convention, on the ground that they did not prescribe the compensation for the segment of work – mandatory on-call duty of prosecutors. In the mentioned decision, the Constitutional Court emphasised:

*33. [...] Given all the circumstances, starting from the need for the courts and prosecutors' offices to be independent, that one of the safeguards of the independent judiciary is the financial position and that concerning the prosecutors a need was recognised for appropriate compensations to be ensured in accordance with the importance of the tasks they perform, the Constitutional Court holds that there is a justified need to valorise on-call or standby duty of the prosecutors (and judges), i.e. to ensure a compensation for it, the amount of which should be specified by the relevant authority. All the more so in a situation where it is obvious, just like in the above-mentioned decisions *U 7/12* and *U 29/13*, that such a compensation is stipulated in other areas and that there is a circle of persons who have a recognised right to compensation for on-call duty or standby. [...]. To make the situation even more absurd, the prosecutors and judges do not have the right to such a compensation, whereas the persons assisting them have that compensation. [...].*

34. *In the present case, just like in its previous decisions, the Constitutional Court wishes to point out that it respects the legislator's discretion to regulate certain areas, as it deems most appropriate. In this respect, the Constitutional Court indicated in its Decision no. U 12/09 that it respected the particularities of the constitutional order of Bosnia and Herzegovina but that, however, the common constitutional standards of complex states – especially at the European level – had to be taken into account, while departures may only occur when there was sufficient justification (see Constitutional Court, Decision no. U 12/09 of 28 May 2010, paragraph 34). However, the Constitutional Court reiterates that the wages of the judicial office holders must be at an adequate level in order to ensure the efficiency and independence of the judiciary, notably if one takes into account the work itself and functioning of the prosecutor's offices and courts. In view of the aforementioned, by referring to the same reasons provided in the quoted decisions nos. U 7/12 and U 29/13, the Constitutional Court concludes that the contested law violates the principle of the independence of the judiciary as the main safeguard of the rule of law and is discriminatory for not stipulating the right to compensation for the costs of the mandatory on-call/standby duty of the prosecutors and judges.*

20. In the opinion of the Constitutional Court, this case concerns the same constitutional issue as in case no. U-7/21. The only difference lies in the fact that the Law on Salaries and Other Compensations, which has been challenged in the present case, constitutes law of the state level, whereas in case no. U-7/21 the Law on Salaries and Other Compensations of Judges and Prosecutors - a law at the level of an Entity (the Federation of BiH) was challenged. However, both cases concern the same constitutional issue – the lack of the provisions in the laws prescribing the compensation to be granted to judges and prosecutors for mandatory on-call or standby duty. In that connection, the Constitutional Court observes that, following the Decision of the Constitutional Court no. U-7/21, on 6 July 2022, the Constitutional Court rendered the Decision (Administrative Ruling) on non-enforcement no. U 7/21 (see, the Constitutional Court, Decision no. U-7/21 of 6 July 2022, published in the *Official Gazette of Bosnia and Herzegovina*, 49/22), which established that the Parliament of the Federation of Bosnia and Herzegovina failed to enforce the Decision of the Constitutional Court no. U-7/21 of 23 September 2021 and determined the manner of enforcement of this Decision of the Constitutional Court, pending the enforcement by the Parliament of the Federation of Bosnia and Herzegovina. Thereafter, the Law on Salaries and Other Compensations of Judges and Prosecutors was amended in the Federation of Bosnia and

Herzegovina, by prescribing under Article 6e the compensation to be granted to judges and prosecutors for on-call or standby duty (Amendments to the Law on Salaries and Other Compensations of Judges and Prosecutors published in the *Official Gazette of FBiH*, of 3 August 2022).

21. It is indisputable that the applicable Law on Salaries and Other Compensations at the state level does not contain the provisions prescribing the compensation to be granted to judges and prosecutors for on-call or standby duty. Besides, it is emphasised that the Parliamentary Assembly of BiH, as the body passing the Law on Salaries and Other Compensations at the state level, neither submitted a reply to the request to the Constitutional Court, nor provided any reasoning for setting such a norm. In view of all the aforementioned, particularly the case law of the Constitutional Court on the same issue at the level of an Entity, the Constitutional Court deems that there is not a single reason to depart from its positions taken in the case no. *U-7/21*. Therefore, instead of a separate reasoning, the Constitutional Court *mutatis mutandis* refers to the reasoning provided in the decision no. *U-7/21* with a conclusion that the challenged Law on Salaries and Other Compensations violates the principle of independence of the judiciary as a fundamental safeguard of the rule of law.

22. As to the allegations that the Law on Salaries and Other Compensations is discriminatory, the Constitutional Court observes that the European Court of Human Rights (“the European Court”), in the case of *Pinkas and Others v. Bosnia and Herzegovina*, indicated that in the enjoyment of the rights and freedoms guaranteed by the European Convention, Article 14 of the European Convention (the meaning of the notion of “discrimination” in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 of the European Convention) affords protection against different treatment of individuals in analogous, or relevantly similar, situations. The European Court further indicated that, for the purposes of Article 14, a difference in treatment is discriminatory if it “has no objective and reasonable justification”, that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality” between the means employed and the aim sought to be realised. The European Court indicated in the mentioned judgment that the notion of discrimination within the meaning of Article 14 also includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the European Convention (see, the European Court, *Pinkas and Others v. Bosnia and Herzegovina*, judgment of 4 October 2022, Application no. 8701/21, paragraphs 57 and 58).

23. In the present case, when compared to the judges and prosecutors at the level of Bosnia and Herzegovina, the Constitutional Court deems that the judges and prosecutors at the level of the Federation of Bosnia and Herzegovina can be regarded as “other persons in analogous situation”, since both cases concern judicial office holders, only at different judicial levels. In that connection, the Constitutional Court recalls that it was indicated above that the judges and prosecutors at the level of the Federation of Bosnia and Herzegovina were afforded under Article 6e of the Law on Salaries and Other Compensations of Judges and Prosecutors in the Federation of Bosnia and Herzegovina a compensation for on-call or standby duty. Furthermore, the Parliamentary Assembly of Bosnia and Herzegovina, as the body passing the Law on Salaries and Other Compensations at the state level, did not submit a reply to the request to the Constitutional Court, wherein it could have explained the *ratio legis* (reason behind the law) for differently treating, in the manner aforementioned, the judges and prosecutors at the level of Bosnia and Herzegovina. Notwithstanding, the Constitutional Court cannot find the justification for such different treatment in the Law on Salaries and Other Compensations, neither does it deem that there are reasons justifying such difference in treatment of the judicial office holders at two different levels. In view of the aforementioned, the Constitutional Court deems that the challenged law is discriminatory for not prescribing the right to compensation for mandatory on-call or standby duty to be granted to judges and prosecutors of BiH, in a situation where such compensation is afforded to judicial office holders in FBiH and where the body passing the challenged law failed to provide any reasonable and convincing explanations whatsoever for the existence of such difference between the two comparable groups.

24. Therefore, the Law on Salaries and Other Compensations, for not containing the provisions on the compensation granted to judges and prosecutors for mandatory on-call or standby duty, is not in conformity with the provisions of Article I (2) of the Constitution of Bosnia and Herzegovina, as it violates the principle of independence of judiciary as the fundamental guarantee of the rule of law. In addition, the Law on Salaries and Other Compensations is not in conformity with the provisions of Article II (4) of the Constitution of Bosnia and Herzegovina, Article 1 of Protocol No. 12 to the European Convention and Article 26 of the International Covenant on Civil and Political Rights, as it makes prohibited difference with respect to the compensation for mandatory on-call or standby duty when compared to the judges and prosecutors at the level of the Federation of Bosnia and Herzegovina.

## **VII. Conclusion**

25. The Constitutional Court concludes that the Law on Salaries and Other Compensations is not compatible with the provisions of Article I (2) and Article II (4) of the Constitution of Bosnia and Herzegovina, Article 1 of Protocol No. 12 to the European Convention and Article 26 of the International Covenant on Civil and Political Rights for not containing the provisions on the compensation granted to judges and prosecutors for mandatory on-call or standby duty.
26. Having regard to Article 59 (1) and (2) and Article 61 (4) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the operative part of this decision.
27. According to Article VI (5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.