

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 (*the 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 the **Basic Court in Zvornik (Judge Selma Zećo)**, in the case no. **U-18/21**, at its session of 24 March 2022, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

In deciding the request of the **Basic Court in Zvornik (Judge Selma Zećo)** for review of the constitutionality of the Law on Salaries and Other Compensations of Judges and Prosecutors in the Republika Srpska (*Official Gazette of the Republika Srpska*, 66/18),

it is hereby established that the Law on Salaries and Other Compensations of Judges and Prosecutors in the Republika Srpska (*Official Gazette of the Republika Srpska*, 66/18) is incompatible with Article I(2) of the Constitution of Bosnia and Herzegovina and the provisions of 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, 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, as it does not contain the provisions on a meal allowance.

Pursuant to Article 61 (4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the National Assembly of the Republika Srpska is hereby ordered to harmonise, within six months from the date on which the present Decision is delivered, the Law on Salaries and Other Compensations of Judges and Prosecutors in the Republika Srpska (*Official Gazette of the Republika Srpska*, 66/18), with regard to the meal allowance, with the provisions of Articles I (2) and 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, 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, by prescribing the provisions governing the meal allowance.

The National Assembly of the Republika Srpska is hereby ordered to inform the Constitutional Court of Bosnia and Herzegovina, within the time limit referred to in the foregoing paragraph, about the measures taken to enforce this Decision, as required by 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*.

REASONING

I. Introduction

1. On 8 December 2021, the Basic Court in Zvornik (Judge Selma Zećo) filed a request with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) for review of the compatibility of the Law on Salaries and Other Compensations of Judges and Prosecutors in the Republika Srpska (*Official Gazette of the Republika Srpska*, 66/18; “the impugned Law”), with the provisions of Articles I(2) and II(4) of the Constitution of Bosnia and Herzegovina (“the Constitution of BiH”) 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. Pursuant to Article 23(2) of the Rules of the Constitutional Court, on 16 December 2021, the National Assembly of Republika Srpska (“the National Assembly”) was requested to submit a response to the request.

3. The National Assembly submitted its response on 24 February 2022.

III. Facts of the Case

a) Allegations in the request

4. The applicant holds that the impugned law is inconsistent with the provisions of the Constitution of BiH and the European Convention, namely, the provisions of Articles I(2) and II(4) of the Constitution of BiH in conjunction with Article 14 of the European Convention, Article 1 of Protocol 12 to the European Convention and Article 26 of the International Covenant on Civil and Political Rights, for it does not prescribe the right to reimbursement for meal expenses (meal allowance) for judges and prosecutors.

5. In the reasoning of the allegations about the inconsistency of the impugned Law with the above provisions of the Constitution of BiH and the European Convention, the applicant states the following: pursuant to Article II(4) of the Constitution of BiH, Article 14 of the European Convention, Article 1 of Protocol 12 to the European Convention and Article 26 of the International Covenant on Civil and Political Rights, discrimination is prohibited on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. As a result of the lack of provisions in the impugned Law that would regulate compensation for meals, judges and public prosecutors in the Republika Srpska have been discriminated against on three grounds: (1) when compared with civil servants and other employees in ministries, other republic administrative bodies and employees in professional services of the Government of Republika Srpska; (2) when compared with all other employees, and (3) when compared with judges and prosecutors in the Federation of Bosnia and Herzegovina.

6. In giving reasons for discrimination in relation to the category of employees mentioned under number 1, the applicant points out that the Law on Salaries of Employees in Administrative Bodies of the Republika Srpska (*Official Gazette of the Republika Srpska*, 66/18) stipulates as follows: (4) *Meal allowance and holiday allowance shall be included in the amount of the base salary referred to in paragraph 2 of this Article and cannot be stated separately.* Discrimination also applies to the salaries of other employees (those who are not judges and prosecutors) in the

courts and prosecutor's offices of the Republika Srpska, the Republika Srpska Attorney's Office, and the Republika Srpska penal institutions, the Republika Srpska Judicial Police and the Republika Srpska Judicial and Prosecutorial Training Centre. The provision of Article 8 of the Law on Salaries of Employees in the Judicial Institutions of the Republika Srpska (*Official Gazette of the Republika Srpska*, 66/18 and 49/21) prescribes: *Compensation up to 35% for the conditions of work, the nature of work and special conditions of work, meal allowance and holiday allowance shall be included in the base salary and cannot be stated separately.* According to the above provisions, civil servants and other employees in ministries, other republic administrative bodies and employees in professional services of the Government of Republika Srpska are entitled to a meal allowance in such a way that the meal allowance is included in the salary and that such allowance is specified within the salary. In this context, the applicant points to the decisions of the Constitutional Court nos. *U-29/13* and *U-7/12*, which emphasise the particularity and importance of judges and prosecutors.

7. As to the category of all other employees mentioned under number 2, the applicant points out that the provision of Article 132, paragraph 1, subparagraph 4 of the Labour Law of RS (*Official Gazette of RS*, 1/16 and 66/18) stipulates that the employer shall pay the employee the costs of one meal per one working day, as well as in case of overtime work exceeding three hours a day. Pursuant to Article 134, paragraph 2 of the Labour Law (*Official Gazette of the RS*, 1/16) and Article 43, paragraph 3 of the Law on the Government of the RS (*Official Gazette of the RS*, 118/08), at the 15th special session held on 29 June 2016, the Government of the Republika Srpska passed a Decision determining the salary increase, the amount of work-related remuneration and the amount of assistance to employees (*Official Gazette of the RS*, 53/16). Subparagraph 1, line 4, paragraph III reads: *The employer shall pay the employee... the costs of one meal per one working day, as well as in case of overtime work exceeding three hours a day in the amount of 0.75% of the average net salary in the Republika Srpska in the previous calendar year, for each working day of the employee, if the employer has not provided food to the employees at the workplace.* In view of the above provisions, as stated in the request, it can be concluded that the categories of employees mentioned under 1 and 2, *i.e.* civil servants, employees and all other employees, unlike judges and public prosecutors in the Republika Srpska, have the right to meal allowance, which is exercised in three ways: (1) the meal allowance is included in the salary; (2) the meal allowance is paid independently of the salary in the amount of 0.75% of the average net salary in the Republika Srpska in the previous calendar year for each working day, and (3) the employer provides food to the employees at the workplace.

8. The applicant points out that the three ways mentioned above in which the right to meal allowance is exercised do not apply to judges and prosecutors in the Republika Srpska.

9. In addition to discrimination in relation to the categories of employees mentioned under numbers 1 and 2, the applicant highlights that judges and prosecutors in the Republika Srpska are also discriminated against in comparison to judges and prosecutors in the Federation of Bosnia and Herzegovina. In that context, the appellant stresses that the provision of Article 6a of 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 and 55/13) stipulates that *a judge, prosecutor and judicial associate shall be entitled to a cash allowance for meals during work (meal allowance), in the amount of 1% of the average net salary paid in the Federation according to the latest statistics.*

10. The applicant points out that the provision of Article I (4) of the Constitution of BiH guarantees, *inter alia*, freedom of movement which does not include “movement literally” but movement under equal conditions. In this connection, an issue arises as to the respect for the representation of the constituent peoples in the judiciary of the Entities, and working conditions in the Entities are different. In this regard, the applicant points to the decision of the Constitutional Court no. *AP-2985/19* of 7 August 2021, which states: *The Constitutional Court especially emphasizes the need to provide judicial office holders family separation allowance, in order to satisfy the principle of proper territorial and ethnic representation of judges and prosecutors in judicial institutions. Namely, in the opinion of the Constitutional Court, taking into account the social and political order of Bosnia and Herzegovina, and the war events, which, inter alia, resulted in a change in the structure of the population in Bosnia and Herzegovina and internal migration, there is a need to ensure adequate territorial representation of the constituent peoples and Others. Therefore, prescribing the mentioned compensation will ensure adequate territorial representation of the constituent peoples and Others in the judiciary, which, in the opinion of the Constitutional Court, strengthens the trust and reputation of the judiciary in the eyes of the public and citizens of Bosnia and Herzegovina.*

11. The applicant points out the following: *The position of judges and prosecutors in both Entities should be taken into consideration and the fact that judges and prosecutors in the RS are discriminated against compared to judges and prosecutors in the FBiH.* In this context, the applicant states that it is necessary to assess whether the impugned Law is compatible with the following international documents: UN Basic Principles on the Independence of the Judiciary adopted in November 1995, Recommendation No. 94 (12) of the Committee of Ministers of the

Council of Europe dated 13 October 1994, Conclusion under Item 4 of the multilateral meeting of the Council of Europe Member States on the guarantees of judicial independence, Budapest, May 1998, the European Charter on the Statute for Judges, Strasbourg 1998, and the Universal Charter of the Judge from Taipei (Taiwan), November 1999, according to which the Constitutional Court has previously assessed the constitutionality of laws regulating salaries and compensations for judges and prosecutors.

b) Facts of the case in respect of which the request has been filed

12. The applicant points out that the case in respect of which the plaintiff (judge elected to the Basic Court in Srebrenica, the name of the plaintiff is stated in the request) filed an action against the respondents Republika Srpska, the Ministry of Justice of Republika Srpska and the Basic Court in Srebrenica, represented by the Republika Srpska Attorney's Office, is about a request for compensation for travel expenses and meal allowance. The plaintiff based the claim on the provision of Article 132 of the Labour Law of the Republika Srpska. The applicant holds that she cannot apply the said Law because the salaries and allowances of judges and public prosecutors in the Republika Srpska are prescribed by the impugned Law, and by applying the mentioned law there would be a danger of violating the constitutional rights of the parties to the proceedings, for it does not contain provisions governing the meal allowance. In that context, the applicant refers to the case law of the Constitutional Court in the cases *U-7/12* of 30 January 2013 and *U-7/21* of 23 September 2021. The appellant notes that it is about a labour dispute, which is of an urgent nature, and that the decision on the plaintiff's request for meal allowance depends on the decision of the Constitutional Court, which is why it is proposed that the case be decided promptly.

IV. Response to the request

13. After the session of the Committee on Constitutional Affairs, the National Assembly submitted a response outlining general considerations, a main consideration and concluding recommendations. As to the general considerations, it is stated that the applicant requested a review of compatibility of the impugned Law, although it is essentially a matter of determining compliance with the provisions of the Constitution and the European Convention. In this connection, it is noted that the applicant should have requested the review of conformity and not the review of compatibility, which makes the request in question inadmissible. It is further stated that if the Constitutional Court finds that the request in question is admissible, the request should be dismissed as unfounded for the following reasons: the provisions of the impugned Law are not in contravention of the provisions of the Constitution, the European Convention and the International

Covenant on Civil and Political Rights; the International Covenant on Civil and Political Rights, as a multilateral treaty, does not have the same legal effect as the Constitution and the European Convention, as it does not apply directly; as regards the other provisions referred to by the applicant (Articles I (2) and II (4) of the Constitution of BiH, Article 14 of the European Convention and Article 1 of Protocol No. 12 to the European Convention), it cannot be determined in what part the applicant considers that the impugned law is not in accordance with the aforementioned provisions of the Constitution and of the European Convention; the impugned Law contains no discriminatory provisions nor does the applicant allege specific provisions that are inconsistent with constitutional and convention rights. In addition, it is stated that the applicant asserts in an arbitrary manner that the impugned Law is discriminatory in relation to other laws in effect in the territory of the Republika Srpska or Bosnia and Herzegovina, which does not fall within the scope of jurisdiction of the Constitutional Court. Furthermore, the applicant's assessment that the decision depends on the decision of the Constitutional Court is arbitrary and does in no way condition a judgment on the lawsuit, as presented in the request. It follows that the impugned Law is in accordance with the Constitution and the European Convention, for it contains no discriminatory provision. As to the allegations of an unequal position of judges and prosecutors in the Republika Srpska compared to the Federation of Bosnia and Herzegovina, it is stated that it is not within the competence of the Constitutional Court to assess these allegations. Finally, it is proposed that the Constitutional Court dismiss the request and establish that the impugned Law on Salaries and Other Compensations of Judges and Prosecutors in the Republika Srpska is in accordance with the constitutional and convention provisions referred to by the applicant.

V. Relevant Law

14. The **Law on Salaries and Other Compensations of Judges and Prosecutors in the Republika Srpska** (*Official Gazette of the Republika Srpska*, 66/18). For the purposes of this decision, an unofficial consolidated text prepared by the Constitutional Court of BiH is used, which reads:

Article 1

This Law shall regulate the salary, compensations and certain material rights of Judges and Public Prosecutors in the Republika Srpska.

Article 14

Judges and Public Prosecutors shall be entitled to compensation for travel costs in accordance with the Book of Rules for the operation of courts and public prosecutor offices and within the approved budget of the court/ public prosecutor's office.

Article 15

Judges and Public Prosecutors shall be entitled to compensation for educational expenses in accordance with the Book of Rules for the operation of courts and public prosecutors offices and within the approved budget of the court/public prosecutor's office.

15. The **Labour Law** (*Official Gazette of the Republika Srpska*, 1/16, 66/18, 91/21 – DCC of the RS, and 119/21). For the purposes of this decision, an unofficial consolidated text prepared by the Constitutional Court of BiH is used, which reads:

5. Other remuneration based on employment

Article 132

(1) The employer shall pay the employee:

- 1) per diem for business travel in the Republika Srpska, in the Federation of BiH and abroad,*
- 2) reimbursement for transportation costs to and from work, if the transport is not provided by the employer,*
- 3) compensation for increased costs of living related to carrying out fieldwork,*
- 4) the costs of one meal per one working day, as well as in case of overtime work exceeding three hours a day, if the employer has not provided food to the employees at the workplace,*
- 5) severance pay to an employee on retirement,*
- 6) reimbursement of expenses for the use of one's own car for purposes of official business, ordered by the employer, and*
- 7) other remuneration determined by a collective agreement, general act and employment contract.*

(2) The amount and manner of exercising the right to remuneration referred to in paragraph 1 of this Article shall be regulated by a collective agreement.

16. The **Law on Salaries of Employees in the Administrative Bodies of the Republika Srpska** (*Official Gazette of the Republika Srpska, 66/18, 105/19 and 119/21*). For the purposes of this decision, an unofficial consolidated text prepared by the Constitutional Court of BiH is used, which reads:

Article 6

(1) The base salary shall be calculated and stated monthly for full-time work, according to the job and the appropriate pay grade and pay sub-grade.

(2) The base salary referred to in paragraph 1 of this Article shall be the price of labour that expresses the value of the simplest job and the coefficient determined according to the pay grade and pay sub-grade.

(3) The increase in the base salary for each completed year of service shall be:

1) 0.3% a year for an employee who has up to 25 years of service

2) 0.5% a year for an employee who has more than 25 years of service

(4) Meal allowance and holiday allowance shall be included in the amount of the base salary referred to in paragraph 2 of this Article and cannot be stated separately.

(5) The base salary calculated in accordance with this Article shall not be lower than the minimum salary determined in the Republika Srpska.

17. The **Law on Salaries of Employees in the Judicial Institutions of the Republika Srpska** (*Official Gazette of the Republika Srpska, 66/18, 54/19, 105/19, 49/21 and 119/21*)

Article 8

Compensation up to 35% for the conditions of work, the nature of work and special conditions of work, meal allowance and holiday allowance shall be included in the base salary and cannot be stated separately.

18. The **Law on Salaries and Other Compensations of Judges and Prosecutors in the Federation of BiH** (*Official Gazette of the Federation of BiH, 72/05, 22/09, 27/12 - DCC of FBiH, 55/13, 55/17 - DCC of FBiH and 90/21 - DCC of BiH*). For the purposes of this decision, an unofficial consolidated text prepared by the Constitutional Court of BiH is used, which reads:

Article 6a

Remuneration for meal during work

A judge, prosecutor and judicial associate shall be entitled to a cash allowance for meals during work (meal allowance), in the amount of 1% of the average net salary paid in the Federation according to the latest statistics.

19. The **Law on Salaries and other Compensations in the Institutions of Bosnia and Herzegovina** (*Official Gazette of BiH*, 50/08, 35/09, 75/09, 32/12, 42/12, 50/12, 32/13, 87/13, 75/15, 88/15, 16/16, 94/16, 72/17, 25/18, 32/20, and 65/20). For the purposes of this decision, an unofficial consolidated text prepared by the Constitutional Court of BiH is used, which reads:

Article 32

(Remuneration for meal during work)

(1) An employee of the Institutions of Bosnia and Herzegovina shall be entitled to a cash allowance for meals during work.

(2) The amount of compensation shall be determined by the Council of Ministers by a bylaw, provided that the daily amount of compensation may not exceed 2.35% of the base for calculation of salaries determined in accordance with Article 7 of this Law.

20. The **Decision determining the salary increase, the amount of work-related remuneration and the amount of assistance to employees** (*Official Gazette of the RS*, 53/16 and 12/22). In the present case, the Decision determining the salary increase, the amount of work-related remuneration and the amount of assistance to employees, which was applicable at the time when the challenged decisions were passed, is applied and as relevant reads:

(Pursuant to Article 134, paragraph 2 of the Labour Law (Official Gazette of the Republika Srpska, 1/16) and Article 43, paragraph 3 of the Law on the Government of the Republika Srpska (Official Gazette of the Republika Srpska, 118/08), the Government of the Republika Srpska, at its 15th special session, held on June 29, 2016, adopts ...)

Paragraph III, subparagraph 1, line 4 and subparagraph 2

1) The employer shall pay the employee

-the costs of one meal per one working day, as well as in case of overtime work exceeding three hours a day in the amount of 0.75% of the average net salary in the Republika Srpska

in the previous calendar year, for each working day of the employee, if the employer has not provided food to the employees at the workplace.

2) Employees shall be entitled to the remuneration referred to in subparagraph 1, line 4 of this paragraph if the remuneration, under the provisions of other laws, is not an integral part of the salary.

VI. Admissibility

21. 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.

22. Article VI(3)(c) of the Constitution of Bosnia and Herzegovina 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.

23. The request for review of constitutionality was filed by the Basic Court in Zvornik (Judge Selma Zećo), which means that the request was filed by an authorized person for the purposes of Article VI(3)(c) of the Constitution of BiH (see Constitutional Court, Decision on Admissibility, U-5/10 of 26 November 2010, paragraphs 7-14, published in the *Official Gazette of Bosnia and Herzegovina*, 37/11). In view of the provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina and Article 19(1) of the Rules of the Constitutional Court, the Constitutional Court concludes that the request is admissible as it has been filed by an authorized person and there is no formal requirement under Article 19(1) of the Rules of the Constitutional Court which would render the request inadmissible.

24. The first objection of the National Assembly, as the enactor of the impugned Law, relates to the difference between the term “harmonized” and the term “compatible”. The National Assembly sees it as a reason for dismissing the request in question as inadmissible. In this regard, the Constitutional Court finds that the stated objection is not relevant for the admissibility of the request, for the terms “harmonized” and “compatible” have the same meaning. In any case, this objection can have no effect on the admissibility of the request, since this reason for the

admissibility of the request for review of constitutionality is not prescribed by the relevant provisions of the Constitution of BiH or by the relevant provisions of the Rules of the Constitutional Court.

25. In addition, the Constitutional Court will respond to the objection of the National Assembly that it is not within the competence of the Constitutional Court to assess whether judges and prosecutors in the Republika Srpska are in an unequal position compared to judges and prosecutors in the Federation of BiH. In this connection, it is emphasized that the present case concerns a review of compatibility of the law with the Constitution of BiH and, therefore, there is an indisputable competence of the Constitutional Court under the relevant provisions of the Constitution of BiH.

The Constitutional Court does not find any other reason to declare the request inadmissible and therefore declares it admissible.

VII. Merits

26. In the present case, the applicant holds that the impugned Law is not compatible with Articles I(2) and 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.

27. 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, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

28. Article 14 of the European Convention reads:

Prohibition of discrimination

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.

29. Article 1 of Protocol No. 12 to the European Convention reads:

General prohibition of discrimination

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.

30. International Covenant on Civil and Political Rights, of 16 December 1966, as relevant, reads:

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.

31. The National Assembly points out that the impugned Law does not contain any provisions on the compensation of judges and prosecutors for meals and, therefore, it does not contain any discriminatory provisions. In the opinion of the National Assembly, the applicant does not cite any specific provisions of the Law on Salaries of Judges and Public Prosecutors that are not in

accordance with the Constitution of BiH and the European Convention to be the subject of consideration by the Constitutional Court. It follows from the aforementioned that the enactor of the impugned Law indicates that the non-existence of provisions in the law cannot be subject to review by the Constitutional Court, *i.e.* that the “norm”, as such, must be prescribed by law in order to be subject to review by the Constitutional Court.

32. In response to the above objection, the Constitutional Court will recall its case law related to a review of compatibility with regard to the issue of “lack of relevant provisions”. In the case *U-6/12* (see, Constitutional Court, Decision on Admissibility and Merits *U-6/12* of 13 December 2012, available at www.ustavisud.ba), the applicant (Court of Bosnia and Herzegovina) raised the issue of non-existence of provisions in the Law on Civil Procedure before the Court of BiH. The applicant claimed that it did not provide for the possibility of the transfer of jurisdiction, meaning that there was a legal gap amounting to a violation of the right of access to a court, *i.e.* the right to a fair trial. In the mentioned decision, the Constitutional Court highlighted the following: *...In the legal theory the legal gaps are defined as the situations which are not regulated by the general or individual legal norms, although their content is in the interest of the legal system, which is the reason why it requires their subsequent legal treatment. Therefore, the comprehensiveness of the legal system does not exist as the applicable positive law does not make it possible for all cases to be resolved. There are always cases which cannot be subsumed under “their own” norm as the legislator has failed to provide for such case (the legislator has not envisaged such case) or it failed (forgot) to resolve it. This is why there are gaps in the legal system, i.e. incompleteness, lack of precision. The aforementioned situations are called legal gaps. These are situations in law when a case should be covered, regulated or resolved by law, whereas there is no necessary legal norm provided for it...* (paragraph 20 of the cited decision). In the same decision, the Constitutional Court also emphasised that in its case-law, the Constitutional Court dealt with the cases which could be subsumed under the issue of legislative failures and that, in most cases, these were the issues of review of the compatibility of provisions of a law with the provisions of the Constitution of BiH, protecting the human rights and those guaranteed by the European Convention (see, Constitutional Court, Decision on Admissibility and Merits, *U-14/05* of 2 December 2005). Recalling the position taken in decision *U-14/05*, which related to the issue of old foreign currency savings, the Constitutional Court took the position that Bosnia and Herzegovina failed to undertake all necessary measures to secure the property rights of the owners of old foreign currency savings in order for those persons to exercise the very essence of their rights to property, as referred to in the Constitution of Bosnia and Herzegovina and the European Convention, meaning that Bosnia and

Herzegovina failed to create the legislative and institutional framework for resolving that issue in a uniform manner throughout Bosnia and Herzegovina (paragraph 21 of the cited decision). In addition, the Constitutional Court stressed that the issue of reviewing legislative failures was also the subject of examination within its jurisdiction *in concreto*, indicating that *the Constitutional Court, if need be, entertains jurisdiction to review constitutionality in a procedure under appellate jurisdiction (jurisdiction in concreto of the Constitutional Court) by virtue of Article VI.3 (c) of the Constitution of Bosnia and Herzegovina* (see Decision of the Constitutional Court, no. U-106/03 of 26 October 2004, paragraph 34), and the Constitutional Court found the basis for such type of its jurisdiction by relying on its task to protect the human and constitutional rights guaranteed by the Constitution of BiH (paragraph 22 of Decision no. U-6/12). Furthermore, it is underlined that the Constitutional Court decided in several cases (which will be referred to in detail below), in which it was indicated that the relevant laws were not in accordance with the Constitution of BiH, for they did not prescribe certain remuneration for judges and prosecutors (e.g. Decisions nos. U-7/12, U-29/13 and U-7/21). Therefore, it follows that the Constitutional Court has jurisdiction to review the compatibility of laws in a situation where the existence of a certain legislative failure is indicated (the legislator failed to envisage or failed to resolve a certain situation).

In interpreting the ECHR, the Strasbourg Court has maintained that in order to avoid discrimination prohibited by Article 14 ECHR and Article 1 of Protocol 12 ECHR, Contracting States might be required to take concrete positive measures. (see *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV, *Pla and Puncernau v. Andorra*, No. 69498/01, § 62, 13/07/2004, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 44, ECHR 2009, *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 388 ECHR 2012. More specifically, the European Court of Human Rights has indicated that those positive measures might also require the adoption of legislative acts in order to avoid discrimination (see *Oliari and Others v. Italy*, nos. 18766/11 36030/11, § 185, 21/07/2015).

33. Before examining the present request, the Constitutional Court will first present its relevant case-law regarding the requests for review of the compatibility of the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the level of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina. In these cases, the applicants, the Court of Bosnia and Herzegovina and the Municipal Court in Sarajevo, requested a review of compatibility of certain provisions with the provisions of the Constitution of BiH and the European Convention, for the mentioned laws did not contain provisions on certain remuneration for judges and prosecutors at different levels.

34. In the case no. *U-7/12* (see Constitutional Court, Decision on Admissibility and Merits no. *U-7/12* of 30 January 2013, published in the *Official Gazette of Bosnia and Herzegovina*, 17/13, available at www.ustavnisud.ba), the Constitutional Court considered the request for review of the compatibility of the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the level of Bosnia and Herzegovina. In the cited decision, the Constitutional Court found that the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina was incompatible with the provisions of Article I(2) and 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, for it did not contain provisions on compensation of travel expenses, meal allowance and family separation allowance. In the mentioned decision, the Constitutional Court examined whether the challenged Law, by failing to stipulate the mentioned compensations, infringes upon the principle of independence of judiciary which is an integral part of the principle of rule of law proclaimed in Article I(2) of the Constitution of Bosnia and Herzegovina. In this connection, the Constitutional Court took into account, *inter alia*, the Opinion of the European Commission for Democracy through Law (Venice Commission) on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina of 15-16 July 2012 (“the Opinion”), according to which (...) *The judiciary must be granted sufficient funds to properly carry out its functions... Individual judicial independence refers to the independence enjoyed by individual judges in carrying out their professional duties. ... Individual judicial independence has many aspects and one of them is the security of tenure and financial security (...)* (paragraphs 33 and 34 of the mentioned decision).

35. In addition, the Constitutional Court recalls that in the case no. *U-29/13* (see, Constitutional Court, Decision on Admissibility and Merits, *U-29/13* of 28 March 2014, published in the *Official Gazette of BiH*, 40/14, available on the website of the Constitutional Court www.ustavnisud.ba), in the proceedings initiated upon a request of the Court of Bosnia and Herzegovina, the Constitutional Court, *inter alia*, granted the request of the Court of Bosnia and Herzegovina for review of the compatibility of the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at Bosnia and Herzegovina. In the mentioned decision, the Constitutional Court established that the challenged law was inconsistent with the provisions of Article I(2) and 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, for it did not contain the provisions on

reimbursement of accommodation expenses incurred in the performance of duties and responsibilities. In the mentioned decision, the Constitutional Court stated, *inter alia*, that *for the same reasons as offered in the Decision no. U-7/12, the Constitutional Court concludes that, by failing to stipulate the reimbursement of accommodation expenses for judges, prosecutors and other professional staff, the legislative branch infringes upon the principle of independence of judiciary, as a guarantor of the rule of law. It follows, therefore, that the reason behind the challenged law is inconsistent with the principle of the independence of judiciary, as a guarantor of the rule of law contained in Article I(2) of the Constitution of Bosnia and Herzegovina.* Furthermore, the Constitutional Court recalled the Magna Charta of Judges obliging a state to ensure the human, material and financial resources necessary to the proper operation of the justice system. In the mentioned case, the Constitutional Court indicated that it respected the discretionary power of the legislature to regulate certain areas as it deemed appropriate. In that regard, the Constitutional Court referred to its Decision no. *U-12/09*, where it expressed its respect for the particularities of the constitutional order of Bosnia and Herzegovina, but that the common constitutional standards of complex states – especially at the European level – must be taken into account, and deviations therefrom should only occur where there is sufficient justification (see Constitutional Court, Decision no. *U-12/09* of 28 May 2010, paragraph 34). The Constitutional Court highlighted that the earnings of the judicial office-holders had to be at an appropriate level in order to ensure effectiveness and independence of judiciary, which implies the independence of the judiciary as an institution, but also of each individual judge/prosecutor. In that context, the Constitutional Court referred to the reasoning given in the decision *U-29/13*, paragraphs 26 through 28.

36. In the case no. *U-7/21* (see, Constitutional Court, Decision on Admissibility and Merits no. *U-7/21* of 23 September 2021, published in the *Official Gazette of BiH*, 63/21 of 15 October 2021, available at www.ustavisud.ba), the Constitutional Court examined the request for review of the compatibility of the Law on Salaries and Other Compensations of Judges and Prosecutors in the Federation of Bosnia and Herzegovina. In the cited decision, the Constitutional Court established that the impugned law was inconsistent with the provisions of Article I(2) and 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, for it did not contain the provisions on the compensation for on-call duty/standby. In the mentioned decision, the Constitutional Court took into account the case-law established in the aforementioned cases *U-7/12* and *U-29/13* and

concluded that the contested law violated the principle of independence of the judiciary as a basic guarantee of the rule of law and that it was discriminatory for not stipulating the right to compensation for the mandatory call-on/standby duty of the prosecutors and judges (paragraph 34 of the cited decision).

37. In addition to the aforementioned case law, the Constitutional Court also recalls the relevant case law under the appellate jurisdiction. In the case no. *AP-2985/19* (see, Constitutional Court, Decision on Admissibility and Merits *AP-2985/19* of 8 July 2021, available at www.ustavnisud.ba), the Constitutional Court pointed out that the decision of the Constitutional Court of the Federation of Bosnia and Herzegovina, *U-28/11* of 24 January 2012, resulted in the adoption of the Law Amending the Law on Salaries and Other Compensations of Judges and Prosecutors in the Federation of Bosnia and Herzegovina, published on 17 July 2013. In the mentioned decision, the Constitutional Court of the Federation of Bosnia and Herzegovina ordered the Parliament of the Federation of Bosnia and Herzegovina to amend the law and regulate the rights of the judges, prosecutors and judicial associates to: meal allowance, transportation from and to the workplace; compensation for overtime work, work during weekly days off, night work, work during holidays that are state holidays under the law, illness or injury compensation, compensation for the expenses in the event of death, serious illness or disability, maternity leave, retirement allowance, as arranged for other budgetary beneficiaries entitled thereto. In the same case, the appellant (Judge of the Municipal Court in Bugojno) filed a lawsuit before the ordinary courts and requested payment of a certain amount of money for unpaid family separation allowance and accommodation allowance, which was dismissed by the judgment (of the Cantonal Court in Novi Travnik). In the relevant appellate proceedings, the Constitutional Court, irrespective of the Decision of the Constitutional Court of the Federation of Bosnia and Herzegovina no. *U-28/11*, which it did not “review”, took into account its own case law establishing that certain provisions of the law were in contravention of the Constitution of BiH and the European Convention. In the mentioned case, the Constitutional Court found a violation of Article I(2) of the Constitution of Bosnia and Herzegovina, Article II(4) of the Constitution of Bosnia and Herzegovina and 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 and quashed the judgment of the Cantonal Court in Novi Travnik in the part deciding on family separation allowance and accommodation allowance and, for the effective protection of the appellant’s right, remitted the case back to the competent court for a new decision (paragraph 54 of the cited decision).

The Court of Justice of the European Union is in the same line of thinking is. In its judgment of 27 February 2018, in the case of *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, sitting as a Grand Chamber formation, that Court recalled that:

45. Like the protection against removal from office of the members of the body concerned (see, in particular, judgment of 19 September 2006, Wilson, C-506/04, EU:C:2006:587, paragraph 51), the receipt by those members of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence.

38. In the case at hand, it is indisputable that the impugned Law does not prescribe meal allowance for judges and prosecutors (it prescribes remuneration for travel expenses and educational expenses). In contrast, according to the relevant laws referred to by the applicant (see, chapter V. Relevant Law), civil servants and other employees in ministries, other republic administrative bodies and employees in professional services of the Government of Republika Srpska, as well as employees in judicial institutions are entitled to a meal allowance (Article 6, paragraph 4 of the Law on Salaries of Employees in the Authorities of the Republika Srpska, and Article 8 of the Law on Salaries of Employees in the Judicial Institutions of the Republika Srpska). Therefore, this type of compensation is prescribed to other budget beneficiaries, and not to judges and public prosecutors. According to these provisions, the meal allowance is included in the amount of the base salary. In addition, employees who are not budget beneficiaries are entitled to meal allowance based on the provisions of the Labour Law of the Republika Srpska (Article 132, paragraph 1, subparagraph 4) in the amount of 0.75% of the average net salary in the Republika Srpska in the previous calendar year, for each working day of the employee, if the employer has not provided food to the employees at the workplace. Furthermore, judges and prosecutors in the Federation of BiH are entitled to a cash allowance for meals during work (meal allowance), in the amount of 1% of the average net salary paid in the Federation according to the latest statistics (Article 6a of the Law on Salaries and Other Compensations of Judges and Prosecutors in the Federation of BiH). Therefore, it follows that there is a difference in the exercise of the right to compensation for meals between judges and prosecutors in the Republika Srpska, on the one hand, when compared with other budget beneficiaries in the Republika Srpska, and all other employees in the Republika Srpska who are not budget beneficiaries, as well as when compared with the holders of judicial and prosecutorial functions in the Federation of BiH (see, in relation to discrimination cases concerning benefits recognised under national law *Petrovic v. Austria*, 27 March 1998,

Reports of Judgments and Decisions 1998-II, *Okpisz v. Germany*, no. 59140/00, 25 October 2005, *Vrontou v. Cyprus*, no. 33631/06, 13 October 2015).

39. In view of the above, by applying the case-law established in the cases nos. *U-7/12*, *U-29/13* and *U-7/21* to the present case, and given that this is a *de facto* situation that has already been decided by the Constitutional Court, but at different levels of the judiciary (Bosnia and Herzegovina and the Federation of BiH), the Constitutional Court is of the opinion that the impugned Law is inconsistent with the provisions of Article I(2) of the Constitution of BiH, for it is in violation of the principle of judicial independence (which includes the financial independence of the judiciary in general and the judge as an individual), as a basic guarantee of the rule of law. In addition, referring to the reasons given in the mentioned decisions, the Constitutional Court concludes that the impugned Law, for it does not contain provisions regulating a meal allowance, is also inconsistent with the provisions of Article II(4) of the Constitution of Bosnia and Herzegovina and 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. Finally, the Constitutional Court holds that it is not necessary to examine separately the allegations in the requests that refer to the international instruments (UN Basic Principles on the Independence of the Judiciary adopted in November 1995, Recommendation No. 94 (12) of the Committee of Ministers of the Council of Europe dated 13 October 1994, Conclusion under Item 4 of the multilateral meeting of the Council of Europe Member States on the guarantees of judicial independence, Budapest, May 1998, the European Charter on the Statute for Judges, Strasbourg 1998, and the Universal Charter of the Judge from Taipei (Taiwan), November 1999), since the detailed reasoning of the aforementioned is given in the cases nos. *U-7/12*, *U-29/13* and *U-7/21*, wherein the Constitutional Court reviewed the constitutionality of the laws regulating judges' and prosecutors' salaries and allowances.

VII. Conclusion

40. The Constitutional Court holds that the impugned Law is inconsistent with the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina, 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 because it does not contain the provisions on meal allowance.

41. Having regard to Article 59(1) and (2) and Article 61(4) of the Constitutional Court's Rules, the Constitutional Court decided as stated in the operative part 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.

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina