

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2) and Article 63(2) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* Nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Mr. Miodrag Simović, President
Ms. Valerija Galić, Vice-President
Ms. Constance Grewe, Vice-President
Ms. Seada Palavrić, Vice-President
Mr. Tudor Pantiru
Mr. Mato Tadić
Mr. David Feldman,
Mr. Mirsad Ćeman

Having deliberated on the request of **23 members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina** and **5 delegates to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina**, in Case No. **U-12/09**, at its session held 28 May 2010 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request of **23 members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina and 5 delegates to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina** for the review of the constitutionality of Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina (*Official Gazette of BiH*, No. 50/08 and 35/09) is hereby granted.

It is hereby established that Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina (*Official Gazette of BiH*, No. 50/08 and 35/09) is inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, with Articles 1, 2 and 11 of the UN Convention on the Elimination of All Forms of Discrimination Against Women as well as with Article 26 of the International Covenant on Civil and Political Rights and Article 10 of the International Covenant on Economic, Social and Cultural Rights.

Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina (*Official Gazette of BiH*, No. 50/08 and 35/09) is hereby quashed, pursuant to Article 63(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The Decision of the Council of Ministers on the Manner and Procedure of Realisation of the Right to Remuneration during Maternity Leave in the Institutions of Bosnia and Herzegovina (*Official Gazette of BiH*, No. 58/09) is hereby quashed, in accordance with Article 63(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina, since following the quashing of Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina (*Official Gazette of BiH*, No. 50/08 and 35/09) legal grounds for its adoption has ceased to exist.

Quashed Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina (*Official Gazette of BiH*, No. 50/08 and 35/09) and the Decision of the Council of Ministers on the Manner and Procedure of Realisation of the Right to Remuneration during Maternity Leave in the Institutions of Bosnia and Herzegovina (*Official Gazette of BiH*, No. 58/09) shall cease to be in force as of the date following the date of publication of this

Decision in the *Official Gazette of Bosnia and Herzegovina*, pursuant to Article 63(3) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, *Official Gazette of the Federation of Bosnia and Herzegovina*, *Official Gazette of the Republika Srpska* and *Official Gazette of the Brcko District of Bosnia and Herzegovina*.

REASONING

I. Introduction

1. On 1 October 2009, 23 members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina and 5 delegates to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, ("the applicants"), filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for a review of the constitutionality of Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina (*Official Gazette of BiH*, Nos. 50/08 and 35/09 -"the challenged provisions") and Decision of the Council of Ministers on the manner and procedure of realisation of the right to remuneration during maternity leave in the Institutions of Bosnia and Herzegovina (*Official Gazette of BiH*, No. 58/09-"the challenged decision of the Council of Ministers"). The applicants also sought the adoption of an interim measure whereby the Constitutional Court would suspend the application of Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina claiming that this would partially alleviate the difficult financial situation of families and households that were

unjustifiably and unlawfully left without income and benefits they are entitled to pending a final decision of the Constitutional Court upon the aforementioned request.

II. Procedure before the Constitutional Court

2. By its decision on interim measure of 22 October 2009, the Constitutional Court dismissed the request for an interim measure as ill-founded.

3. The Constitutional Court did not accept the applicants' proposal to seek, within the meaning of Article 15(3) of the Rules of the Constitutional Court, an expert opinion of the Human Rights Ombudsmen of Bosnia and Herzegovina and concluded that it was sufficient to present the Special Report of Human Rights Ombudsmen of Bosnia and Herzegovina of 12 May 2009, attached to the request.

4. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 7 October 2009, the House of Representatives and the House of Peoples of the Parliamentary Assembly and the Council of Ministers of Bosnia and Herzegovina were requested to submit their respective replies to the request.

5. On 12 and 30 October and on 13 November 2009 the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, the Council of Ministers and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina submitted their respective replies to the request.

6. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the request were communicated to the applicants on 18 December 2009.

III. Request

a) Statements from the request

7. The applicants claim that the challenged provision and the challenged decision of the Council of Ministers are inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina. They also consider that the challenged provision and the challenged decision are in violation of Article 1 paragraphs 1 and 2 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”), the International Covenant on Civil and Political Rights (1966), Optional Protocols (1966 and 1989), the UN Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Economic, Social and Cultural Rights and the European Social Charter. In addition, they consider that the challenged law and the Decision are inconsistent with the Law on Prohibition of Discrimination of BiH (*Official Gazette of BiH*, No. 59/09).

8. The applicants allege that, following the entry into force of the challenged law and challenged provision, the Ministry of Finance and Treasury of BiH issued an Instruction to terminate payment of salary reimbursement from the BiH Budget to women employees on maternity leave residing in the Federation of BiH, which until then had been paid on a regular basis. At the same time, salary reimbursement is completely paid from the BiH Budget funds to women employees residing in the Republika Srpska, but at the expense of the Public Fund of the mentioned Entity. In the applicants’ opinion, the application of the challenged provision gives rise to discrimination and segregation of women employees within the same institution as employees from the same institution at the same level of authority are prevented from equal enjoyment of the right originating from the labour relations. The employer, the BiH Institutions, pay a salary reimbursement to women employees residing in the RS, while women employees residing in the Federation of BiH do not receive a salary reimbursement or only receive a percentage depending on the respective canton’s regulations, as the BiH Institutions interpret this provision so that such women employees (residing in the FBiH) acquire their right to salary reimbursement in accordance with the cantonal regulations.

9. In the applicants’ opinion there is discrimination even among women employees who are residents of the FBiH but who live in different cantons, as some cantons in the FBiH do not make any social welfare payment for women on maternity leave and, consequently, they do not pay contributions into the pension fund and health insurance fund. In addition, they

have stated that the mentioned provision is in conflict with other provisions of the Law on Salaries and, primarily, in conflict with the provision of Article 4 of that Law. This provision provides that the funds for salaries and other compensations of the employees in the BiH Institutions shall be secured solely from the Budget of the BiH Institutions and this provision relates to all compensations foreseen in and regulated by this Law and by the Labour Law of Bosnia and Herzegovina, which also include reimbursement during maternity leave. They also state that the Council of Ministers, by the challenged Decision, had only worsened the situation and confirmed the differential treatment of employees in the BiH Institutions. Due to the application of the challenged provision, many cantons in the Federation of BiH pay out certain financial means to families with children and those cantons also pay contributions for social and health insurance. However, some cantons do not foresee such payment at all or foresee only a minimum amount for the payment of contributions. This means that contributions for pension and disability insurance and health insurance are not paid for expectant mothers and, therefore, they are not able to obtain access to primary health-care services in those cantons for themselves and their newborn children. Therefore, the applicants have suggested that Jasminka Dzumhur, the Human Rights Ombudsman for BiH, be invited to act as an *amicus curie* in the present case.

b) Reply to the request

10. In its reply to the request, the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina alleges that the Constitutional-Legal Commission of the House of Peoples does not support the mentioned request.

11. In its reply the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina alleges that the Constitutional-Legal Commission of the House of Peoples, upon the discussion resulting in five votes in favour, none against and two abstained, supported the request.

12. In its reply to the request the Council of Ministers alleges that the mentioned legal solution derives from the constitutional stipulation that the issue of direct taxes *i.e.* the exercise of the right to health insurance, social welfare and pension-disability insurance falls under the responsibility of the Entities in BiH. Accordingly, the Entities enacted the laws and

established the funds through which the employees in the BiH Institutions, conditional on the place of residence, exercise their right to maternity leave benefits, their right to sick leave allowance, and the right to pension-disability insurance. Such a legal solution has identified the various current solutions of the competent funds of the Entities as to the manner in which the beneficiaries exercise their rights as well as to the remuneration amount which the legally determined beneficiaries are entitled to. In this regard, the budget beneficiaries differently interpreted the manner in which maternity leave benefits for employees in the institutions of BiH residing in the Federation of BiH have been calculated and paid. Namely, pursuant to Article 90(2) of the Law on Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official Gazette of the FBiH* No. 36/99) all cantons in the Federation of BiH are obliged to enact a law governing the terms, conditions, procedure and financing of the right to reimbursement for maternity leave. However, despite the specific legal obligation, some cantons in the Federation of BiH (for example, the Herzegovina-Neretva Canton) failed to enact such a law and, consequently, an issue has been raised as to the right to reimbursement for maternity leave of persons who reside in the cantons in the Federation of BiH.

13. Furthermore, it is stated that the Council of Ministers, at its 64th session held on 30 October 2008, considered Information regarding the application of the Law on Salaries and Remunerations in the Institutions of BiH. One of the problems underlined in the said Information is the issue related to the calculation and payment of maternity leave benefits. In this context, the Council of Ministers adopted the following conclusion: “The budget beneficiaries and the Ministry of Finance and Treasury are hereby obliged to ensure that the employees on maternity leave have health coverage and social protection at least within the scope of the law applicable at lower levels of government, including the obligation to bring lawsuits against the lower levels of government which do not meet their legal obligations. At the same time, it is recommended that all levels of government improve health protection and maternity protection and protection of the expectant mothers and that the application of the rights throughout BiH be harmonized.”

14. In its letter No. 01-08-16-5259-1/09 of 4 November 2008, the Ministry of Finance and Treasury informed all budget beneficiaries about the aforementioned conclusion and obliged

the managers of the budget beneficiaries, in cases where the terms, conditions, procedure and financing of the right to reimbursement for maternity leave for employees who reside in the territory of the Federation of BiH are not specified by law at the cantonal level, to compute and pay remuneration to employees on maternity leave residing in the Federation of BiH in the amount commensurate with the lowest cost of labour defined in the General Collective Agreement within the Federation of BiH. Moreover, the institutions are tasked with calculating and paying the taxes and contributions on the mentioned amount as referred to under the relevant regulations.

IV. Relevant Law

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

Article II(2)

Article 2, as relevant, reads:

The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.

Article II(4)

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.

Convention on the Elimination of All Forms of Discrimination against Women as relevant reads:

Article I

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

International Covenant on Civil and Political Rights, 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.

International Covenant on Economic, Social and Cultural Rights, as relevant, reads:

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and

social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Law on Salaries and Remunerations in the Institutions of BiH (*Official Gazette of BiH*, No. 50/08 and 35/09)

Article 4

(Securing funds for salaries)

Funds for salaries and other compensations of the employees in the BiH Institutions shall be secured solely from the Budget of the BiH Institutions.

Article 35

(Remuneration during maternity leave)

An employee in the BiH Institutions shall be entitled to remuneration during maternity leave in accordance with the regulations governing this field according to the place of payment of the contributions per each employee.

16. Decision on the Manner and Procedure of Realisation of the Right to Remuneration during Maternity Leave in the Institutions of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, No. 58/09), as relevant, reads:

Article 1

(Subject-matter of the Decision)

This Decision shall regulate the manner and procedure of realisation of the right to remuneration during maternity leave of the employees in the Institutions of Bosnia and Herzegovina in accordance with Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina and Article 50(1) of the Law on Labour in the Institutions of BiH.

Article 2

(Amount of Remuneration)

(1) An employee in the Institutions of Bosnia and Herzegovina shall be entitled to remuneration during maternity leave in accordance with the regulations governing this field according to the place of payment of the contributions per each employee of the Institutions of Bosnia and Herzegovina.

(2) In case where the Entities' regulations i.e. the regulations of the Brcko District of Bosnia and Herzegovina do not specifically stipulate the manner and procedure of realisation of the right to remuneration during maternity leave, the calculation and payment of remuneration during maternity leave shall be made in the amount commensurate with the lowest cost of labour as defined by the Entities' general collective agreements i.e. by the general collective agreement of the Brcko District of Bosnia and Herzegovina.

Article 3

(Manner in which an employee has to prove the eligibility for maternity leave) (1) To acquire the right to remuneration during maternity leave, an employee shall submit a

report on temporary incapacity for work issued by a competent medical institution, which shall prove that the employee is on a maternity leave.

(2) The employee shall deliver the report referred to in paragraph 1 of this Article to the competent office of the budget beneficiary no later than the day on which salary calculation commences for the month the employee was on maternity leave.

Article 4

(Calculation and Payment of Remuneration)

The calculation and payment of remuneration during maternity leave for the employees in the institutions of Bosnia and Herzegovina shall be made together with the monthly calculation and payment of salaries to the employees in the institutions of Bosnia and Herzegovina based on the report referred to in paragraph 1 of Article 3 of the present Decision and the ruling on maternity leave issued by the head of the Institution.

Article 5

(Institutions responsible for implementation of the present Decision)

The Institutions of Bosnia and Herzegovina and the Ministry of Finance and Treasury shall be responsible for implementing the present Decision.

Article 6

(Entry into force)

The Decision shall enter into force on the first day following the date of its publication in the Official Gazette of BiH.

V. Admissibility

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

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

The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

- Whether an Entity's decision to establish a special parallel relationship with a neighbouring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.

- Whether any provision of an Entity's constitution or law is consistent with this Constitution.

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

18. The Constitutional Court finds that the request was submitted by 23 members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina and 5 delegates to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, which means that the request was submitted by an authorized person within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

19. Bearing in mind the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Constitutional Court's Rules, the Constitutional Court establishes that the present request is admissible as it was submitted by an authorised person, and that there is no single reason under Article 17(1) of the Constitutional Court's Rules rendering this request inadmissible.

VI. Merits

20. As to the instant case, the applicants consider that the challenged provision and the challenged decision of the Council of Ministers are inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1(1) and (2) of Protocol No. 12 to the European Convention. They also consider that the mentioned provision and the challenged decision of the Council of Ministers are in violation of the following international instruments: 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto, Convention on the Elimination of All Forms of Discrimination against Women, International Covenant on Economic, Social and Cultural Rights, and European Social Charter. In addition, they consider that the challenged law and the Decision are inconsistent with the BiH Law on Prohibition of Discrimination.

21. Article II(4) of the of the Constitution of Bosnia and Herzegovina, as relevant, reads:

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.

22. Article 1 of Protocol No. 12 to the European Convention, as relevant, reads:

Article 1

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.

23. The Constitutional Court recalls that Article II(4) of the Constitution of Bosnia and Herzegovina provides that the enjoyment of rights and freedoms envisaged under the international agreements listed in Annex I to the Constitution of Bosnia and Herzegovina is granted to all persons without discrimination on any ground. Annex I item 7 to the Constitution of Bosnia and Herzegovina sets out a list of Additional Human Rights Agreements to be applied in Bosnia and Herzegovina. Among these conventions, the applicants invoked the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination against Women. The latter Convention establishes that the State Parties to the said Convention condemn discrimination against women in all its forms and the term ‘discrimination against women’ shall mean any distinction. Article 11 prohibits especially discrimination against women in the field of employment in order to ensure the right to the same employment opportunities. In addition, the State Parties are obliged by this Convention to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women, required for the elimination of such discrimination in all its forms and manifestations. The European Charter of Social Rights being not incorporated in Annex I will not be examined by the Constitutional Court.

24. The Constitutional Court will examine the case at hand under Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 of Protocol No. 12 to the European Convention as well as with the other mentioned international agreements.

According to the case-law of the European Court of Human Rights discrimination exists if a person or group of persons in an analogous situation are differently treated and if there is no objective or reasonable justification for such differential treatment (see, the European Court of Human Rights, *Belgian Linguistic Case*, the judgment of 23 July 1968, Series A, No. 6). It is of no relevance whether discrimination arose from a difference of treatment that is expressly permitted by legislation or from the mere application of laws (see, the European Court of Human Rights, *Ireland vs. the United Kingdom*, judgment of 18 January 1978, Series A, No. 25, paragraph 226). The European Court of Human Rights has applied this approach to questions of discrimination in relation to political participation in Bosnia and Herzegovina under both Article 14 of the European Convention and Article 1 of Protocol No. 12 to the European Convention: see *Sejdić and Finci v. Bosnia and Herzegovina*, Application Nos. 27996/06 and 34836/06, judgment of 22 December 2009 [GC].

25. The Constitutional Court considers that this approach is equally appropriate in relation to the application of Article II(4) of the Constitution of Bosnia and Herzegovina in combination with Article 26 of the International Covenant on Civil and Political Rights, with Article 10 of the International Covenant on Economic, Social and Cultural Rights and with Articles 1, 2 and 11 of the Convention on the Elimination of All Forms of Discrimination against Women. In accordance with that approach, for a difference in treatment to be objectively and reasonably justified two conditions must be fulfilled - the principle of differential treatment may be applied for the purpose of achieving a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

26. The first question the Constitutional Court has to answer is whether there has been a differential treatment. *Prima facie*, this does not seem to have occurred in the case at hand since Article 35, regulating maternity leave, refers to all women working in State institutions. However, it should be noted that this provision refers to the place of payment of maternity leave benefits. Also, the applicants consider that the women employees in the institutions of Bosnia and Herzegovina who reside in the Federation of Bosnia and Herzegovina are discriminated against on grounds of place of payment when it comes to the enjoyment of their right to maternity leave benefits. Namely, the applicants consider that the women employees

in the institutions of Bosnia and Herzegovina whose place of residence is in the Federation of Bosnia and Herzegovina are discriminated against when compared with women employees whose place of residence is in the territory of the Republika Srpska or with those whose place of residence is in the Federation of Bosnia and Herzegovina depending on the canton they reside in.

27. In doing so, the challenged provision refers to the Entities' legislation on social policy. Whereas in the Republika Srpska women are guaranteed to receive their whole salary, in the FBiH, this issue is ruled by the Federation authorities as well as by the cantons or even the municipalities and results in important differences, with some cantons completely lacking any payment of benefits (see also the special report of the BiH Ombudsman of 12 May 2009). Thus it is clear that Article 35 treats differently a group of persons – the women working in State institutions – who, as women employees of a State institution, are in the same legal situation. Therefore, this differential treatment needs to be justified.

28. The second problem to be resolved concerns the legitimate aim pursued by Article 35. The Constitutional Court finds that the challenged provision is contained in the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina and thus aimed at guaranteeing the same social rights to the employees of the same institutions. This objective appears clearly in the light of Article 4 of this law and corresponds namely to the international obligations of BiH as recently specified in the framework Law on Prohibition of Discrimination of BiH (*Official Gazette of BiH*, No. 59/09). The Constitutional Court must examine whether this differential treatment could be justified by the division of responsibilities between the State and the Entities. Namely, the issue of social policy falls under the competence of the Entities and not under the competence of the State of Bosnia and Herzegovina. In this respect, the Constitutional Court holds that the exclusive competence of the Entities does not take into account the fact that maternity leaves are not only a matter of social policy but also part of human rights and their protection.

29. Taking into account the aforementioned, the Constitutional Court recalls that maternity leave concerns especially the right for women not to be discriminated against and to enjoy decent conditions of work, the right to health, the right to private and family life and the

children's rights. Thus the report of Bosnia and Herzegovina of January 2004 addressed to the Committee charged with monitoring the Convention on the Elimination of All Forms of Discrimination against Women asserts that : *According to the applicable laws in the area of labor in Bosnia and Herzegovina, every type of discrimination on the basis of right to labor and employment is forbidden. Bosnia and Herzegovina is the signee of more than 66 Conventions from the area of labor (MOR), so that it had passed new laws in the previous period, harmonizing them for the most part with the MOR Conventions. International labor standards that ensure complete Equality of all persons at work and in the approach to employment have been built into the new legislature, any type of discrimination is forbidden, and rights that are economically and financially sustainable, taking in mind the state of the Bosnia and Herzegovina's economy, are determined. All benefits on the basis of labor are equal for men and women (paragraph 157).* However, these assertions are not yet completely realized as the same report admits: *At the time of pregnancy, birth, and childcare, a woman has the right to maternity leave in the duration of one straight year. At the time she uses her maternity leave, the employee has the right to a salary reimbursement. In RS the reimbursement amounts to the average of the last three received salaries, and in FBiH this amount is determined by the provisions made by the canton, so there are differences in the amounts paid (paragraph 186).*

30. Furthermore, the Constitutional Court recalls that previous maternity benefits were linked to health care and social insurance. The Insurance Agency has competence to harmonize this part of legislative activities of the Entities to meet the requirements for integration into the European Union. The obligation to comply with the requirements needed for integration into the European Union exists also with respect to maternity benefits. Indeed, the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina aims at non discriminatory work conditions pursuant to Article II(4) of the Constitution in conjunction with Article 1 of Protocol No. 12 to the European Convention on Human Rights. Also, the aforementioned Law must also respect the right to free movement of persons according to the European Economic Community Regulation (EEC) No. 1408/71 of 14 June 1971) on the application of social security schemes to employed persons and to members of their families moving within the Community. The Constitutional Court refers to its Decision No. *U-68/02* stating that the substantive contents of a single market (Article I(4) of the Constitution of

Bosnia and Herzegovina) were clearly defined by the European Court of Justice, which provided guidelines to the European countries on the constitutional development of this important aspect (see Decision of the Constitutional Court of Bosnia and Herzegovina, U-68/02 of 25 June 2004, paragraph 41, published in the *Official Gazette of Bosnia and Herzegovina*, No. 38/04). Therefore, the principle of single market, as interpreted by the European Court of Justice, has interpretative power for the constitutional principle of a single market under Article I(4) of the Constitution of Bosnia and Herzegovina. Pursuant to this principle, social benefits like maternity leave for employees of State institutions should not depend on the residence of the person in question given that the idea of a Single Market implies that the State makes an employment opportunity equally attractive to all citizens of Bosnia and Herzegovina, notwithstanding the Entity boundaries, Entity citizenship, or place of residence. Supporting the present scheme as provided for in the challenged provision,, the State has made employment opportunities within State institutions more attractive to those citizens who reside in the Entity that provides greater benefits. Furthermore, the free movement of persons, as with the other freedoms contained in the principle of a Single Market, comes under the principle of non-discrimination.

31. Since the remuneration of maternity leave arises from the employment of women in the institution concerned and not from their place of residence, the difference made by the challenged provision pursuant to the place of payment is not a proper way to achieve the highest level of human rights. The Constitutional Court holds that the competence of the Entities to regulate social policy is not appropriate to the aim sought to be achieved with regard to social protection and equal remuneration. Therefore, it must be taken into account that the women concerned are working in a State institution and not in the Entities' institutions and that Article 4 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina provides that *Funds for salaries and other compensations of the employees in the BiH Institutions shall be secured solely from the Budget of the BiH Institutions*. Pursuant to Article I(1) of the Constitution of BiH, *Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms*. Thus the State and the Entities have the joint obligation not only to ensure the highest level of protection of human rights but also to guarantee an equal implementation of these rights. According to the observations of the CEDAW-Committee -

15. *The Committee is concerned that the adoption of the Law on Gender Equality has not yet led to a harmonization, as required, of existing legislation with this law, although a large number of amendments have been formulated.* 16. *The Committee recommends that the State party speed up the process of law harmonization in order to comply with its obligations under the Law on Gender Equality (Article 30, paragraph 2), and under all articles of the Convention and that it put in place procedures for the effective implementation and enforcement of these laws.*

32. In view of the above, the Constitutional Court considers that the challenged provision does not pursue a legitimate aim.

33. Thirdly, the Constitutional Court has to answer the question of proportionality. Regarding this principle, the Constitutional Court observes that the same aim (*i.e.*, providing social protection and equal remuneration for maternity leave) could be achieved through other means and not only by strict reliance on local regulations. The Law on Prohibition of Discrimination obliges all competent authorities in the State and in the Entities to harmonise all regulations in order to establish non discriminatory conditions of political, economic and social life in Bosnia and Herzegovina. The Constitutional Court does not see any reason why the State institutions are not able, according to their own financial possibilities, to directly pay this benefit to employees in order to avoid any discriminatory treatment, since the State is obliged to finance, *inter alia*, payments to employees of the institutions of Bosnia and Herzegovina, and since this particular payment has no impact on any other ancillary benefits provided to employees by the Entities.

34. Furthermore, the Constitutional Court points out that, even though Bosnia and Herzegovina has a complex structure (*U-5/98*, paragraph 13) and without classifying its constitutional-legal order, in the Federal states at the European level there is no maternity benefits scheme similar to the one here at issue. In all of the Federal states (*e.g.*, Austria, Germany, Switzerland and Russia), maternity leave is equal for all employees, regardless of their place of residence. The only exception is Switzerland, where employees residing in the Geneva Canton receive two additional weeks of maternity leave as compared to those residing in other Cantons; however, the Federal government has set minimum standards that all Cantons must meet, ensuring that there are no great disparities between employees with

regards to maternity benefits. This example typifies the notion that additional rights can be made available at the local level so long as minimum standards are guaranteed by the Federal government (compare *U 3/08*, paragraphs 73 ff). On the one hand, the Constitutional Court respects the particularities of the constitutional order of Bosnia and Herzegovina; however, the common constitutional standards of complex states – especially at the European level – must be taken into account, and deviations therefrom should only occur when there is sufficient justification. In the present case, the Constitutional Court finds no reason for any deviation from common European standards.

35. Therefore, the Constitutional Court holds that the challenged provision is not proportionate to the aim sought by the Law on Salaries and Remuneration in the Institutions of BiH. Considering the difference of remuneration in the Republika Srpska and in the Federation, especially in the cantons where no benefit is accorded for maternity leave, the challenged provision contains a discrimination which is in itself disproportionate, the disproportion being still increased by the differences in the regulations in the FBiH.

36. Given the aforementioned, the Constitutional Court concludes that Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina is discriminatory and in contravention of Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 of Protocol No. 12 to the European Convention, Articles 1, 2 and 11 of the UN Convention on the Elimination of All Forms of Discrimination Against Women as well as Article 26 of the International Covenant on Civil and Political Rights and Article 10 of the International Covenant on Economic, Social and Cultural Rights.

37. While considering the present request regarding the challenged decision of the Council of Ministers, the Constitutional Court finds that Article 1 of the mentioned decision prescribes that it regulates the manner and procedure of realisation of the right to remuneration during maternity leave of the employees in the Institutions of Bosnia and Herzegovina in accordance with Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina and Article 50(1) of the Law on Labour in the Institutions of BiH. Thus it follows that the mentioned decision of the Council of Ministers was adopted also on the basis of the challenged provision of the Law on Salaries and Remunerations in the Institutions of BiH. Since the Constitutional Court has concluded, as stated in the previous paragraphs of this

decision, that the challenged provision of the Law on Salaries and Remunerations in the Institutions of BiH is discriminatory, and that it is not consistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction namely with Article 1 of Protocol No. 12 to the European Convention, it follows that once the challenged legal provision ceases to be in effect, the legal grounds for taking the challenged decision of the Council of Ministers ceased to exist.

VII. Conclusion

38. The Constitutional Court holds that the challenged provision of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina is inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 of Protocol No. 12 to the European Convention, Articles 1, 2 and 11 of the UN Convention on the Elimination of All Forms of Discrimination Against Women as well as Article 26 of the International Covenant on Civil and Political Rights and Article 10 of the International Covenant on Economic, Social and Cultural Rights since it leads to a differential treatment of women employees in the institutions of Bosnia and Herzegovina and the Constitutional Court finds no objective and reasonable justification for such differential treatment. As a result of the aforementioned, the Constitutional Court concludes that the legal grounds for taking the challenged decision of the Council of Ministers ceased to exist as it was adopted on the basis of the challenged provision of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina.

39. Having regard to Article 61(1) and (2) and Article 63(2) and (3) of the Constitutional Court's Rules, the Constitutional Court decided as set out in the enacting clause.

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

Prof Dr Miodrag Simović
President

