

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) and Article 59 (1) and (3) 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

Ms. Helen Keller, Vice-President

Mr. Valerija Galić,

Ms. Seada Palavrić,

Mr. Zlatko M. Knežević,

Ms. Angelika Nußberger, and

Mr. Ledi Bianku

Having deliberated on the request filed by the **Municipal Court in Sarajevo (Judge Adnan Lokmić)**, in the case no. **U-11/22**, at its session held on 14 July 2022, adopted the following

## DECISION ON ADMISSIBILITY AND MERITS

While deciding the request of the **Municipal Court in Sarajevo** (Judge Adnan Lokmić) for the review of constitutionality of Article 3 of the Law on Amendments to the Law on Principles of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official Gazette of the Federation of Bosnia and Herzegovina*, 14/19),

it is hereby established that Article 3 of the Law on Amendments to the Law on Principles of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official Gazette of the Federation of Bosnia and Herzegovina*, 14/19), which reads, Article 18.b of the Law shall be amended and read as follows: “For the purpose of exercising the rights set forth in this Law, the persons with disability are classified according to the determined percentage of the impairment into two groups, as follows:

I group – persons with disability with 100% impairment,

II group - persons with disability with 90% impairment.”

is in conformity with Article II (4) of the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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 15 April 2022, the Municipal Court in Sarajevo (“the Municipal Court”) Judge Adnan Lokmić (“the applicant”) filed with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) a request for the review of constitutionality of Article 3 of the Law on Amendments to the Law on Principles of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official Gazette of the Federation of Bosnia and Herzegovina*, 14/19) with the Constitution of Bosnia and Herzegovina and the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”).

### II. Procedure before the Constitutional Court

2. Pursuant to Article 23 (2) of the Rules of the Constitutional Court, the House of Representatives and the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina and the Government of the Federation of Bosnia and Herzegovina (“the FBiH Government”) were requested on 19 April 2022 to submit their respective replies to the request.

3. Through the Office for Cooperation and Representation before the Constitutional Court of Bosnia and Herzegovina, the FBiH Government submitted its reply to the request on 19 May 2022.

### III. Request

#### a) Relevant facts of the case regarding which the case was filed

4. A civil procedure is pending before the Municipal Court, which was instituted by the plaintiffs as persons with the acquired disability falling within the III, IV and V disability group (“the persons with disability – PWD or the plaintiffs”), against the defendant Federation of Bosnia and Herzegovina (“FBiH or the defendant”) for the purpose of establishing discrimination and the payment. The lawsuit read that all the plaintiffs as persons with the impairment were recognised

based on the acquired disability the right to personal disability allowance in certain amounts of money, depending on the degree of the impairment. All the plaintiffs, according to their individual administrative decisions they attached as evidence to the lawsuit, were recognized the right to personal disability allowance pursuant to the Law on Principles of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official Gazette of the Federation of BiH*, 36/99, 54/04; “the basic Law on Principles of Social Protection”). The basic Law on Principles of Social Protection was amended in 2004 and had been applied in the period from 2004 to 2009. The said Law had treated equally the plaintiffs as PWD and the so-called peacetime disabled persons (disability acquired upon birth or illness not as a result of war activities) with the disabled persons (civilian victims of war) who had sustained injuries as civilians (not soldiers) during the war (“civilian victims of war – CVW”). Both groups (PWD and CVW) were classified depending on the percentage of the impairment with ranges from 60%, 70%, 80%, 90% to 100%. The difference in the name between these groups (PWD and CVW) existed because of the manner and time of occurrence of disability (circumstances related to the war or to the contrary). As further stated in the lawsuit, Bosnia and Herzegovina had ratified the Convention on the Rights of Persons with Disabilities (“the Convention on Persons with Disabilities”), which provided a definition of a person with disability, where such a person “has long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others”. Since Bosnia and Herzegovina (“BiH”) had ratified the Convention on Persons with Disabilities, it accepted that all the persons were equal before the law, that they have equal rights, without discrimination, equal protection and equal benefit pursuant to the law. Before the ratification of the Convention, the defendant had passed the disputed Law in 2009 (*Official Gazette of FBiH*, 14/09), which amended Article 18.b of the 2004 Law, according to which all persons with disabilities, PWD and CVW, were classified into groups depending on the percentage of impairment of 60%, 70%, 80%, 90% and 100%. The mentioned amendments, in Article 3, classified the persons with disabilities into two groups, according to the established percentage of impairment, namely the persons with the impairment of 100% and the persons with the impairment of 90%. Instead of previously broader range of percentage of impairment recognized by law, now that range is limited to 100% and 90% of impairment. This is only in relation to PWD whose impairment is a consequence of an illness or birth, namely it is not related to the war and wartime activities. The provisions of the Law on Principles of Social Protection remained the same for the CVW, i.e. the broader range of impairments is still prescribed for them in the percentages of 60%, 70%, 80%, 90% and 100%. The important thing is that the right to monetary allowance, i.e. to personal disability allowance, is

exercised depending on the percentage of impairment. Concerning CVW the percentage of impairment is much broader and more favourable for them now, as it includes also 60%, 70%, 80%, unlike PWD who are limited to 90% and 100%. It was emphasised that, in addition to these two groups (PWD and CVW) there is a third group, namely disabled war veterans (“DVW”), i.e. the persons who had, as soldiers during the wartime, sustained injuries from war activities, which resulted in impairments to the organism to a certain percentage. Concerning DWV’s, their rights are much broader, as the recognised impairment in that case starts already at 20%. However, the rights of DWV are not recognised under the disputed Law on Principles of Social Protection, rather they were recognised under a special law, namely the Law on the Rights of Veterans and their Families. This law is irrelevant for this case, given that the plaintiffs refer primarily to the difference between PWD and CVW made by the disputed Law on Principles of Social Protection. The lawsuit further states that amendments to the disputed Law on PWD, whose disability is lower than 90%, abolished the rights to disability allowance thereby leaving them without, thus far, recognised income – personal disability allowance.

5. The plaintiffs indicate that the provision of Article 3 of the disputed Law made the difference between the disabled persons according to the occurrence of disability, PWD and CVW, emphasising that the differential treatment was based in the law itself. PWD exercise the right to personal disability allowance only with 90% physical impairment, while CVW exercise that right with 60% physical impairment. They are of the opinion that this is a systemic discrimination, because PWD as a group of population in the territory of FBiH were placed in a more unfavourable position than CVW. They indicate that the disputed provision discriminated against them, as persons whose disability occurred upon birth or illness, when compared to CVW whose disability occurred as a result of war operations. They are of the opinion that there is no legitimate public interest for such a legal situation, as disability, irrespective of the occurrence thereof, is still disability, and all such persons have to enjoy equal protection of the society and legal order. In adopting the disputed provision, the legislator made an unjust distribution of social wealth at the expense of all PWD, disregarding the principle that all disabled persons, irrespective of the manner of occurrence of disability, are equal before the law. In this way the damage (pecuniary and non-pecuniary) was inflicted on PWD’s. Thus, they filed the statement of claim requesting the compensation for damage within the meaning of Article 154 of the Law on Obligations, and that the defendant, FBiH, removes the consequences of discrimination and restores the rights they had had before amendments to the disputed Law took place.

6. In the reply to the lawsuit, the FBiH Government emphasised that the compensations to CVW and DWV are considered war reparations (damages). DWV for the merits in the defence of the state, while CVW as a reparation for the denied protection of the state due to disability, which they sustained during the war and as a result of wartime activities, as civilians when the state had a positive obligation to protect them. As further elaborated, within CVW there is a separate category of persons who were singled out because they had survived sexual abuse and rape in the war. That further means that they are the persons who need not necessarily be the persons with disabilities but the state has an obligation to them to repair whatever they had survived as a result of wartime operations, since the state failed to protect them. It was emphasised that the persons with disability with the impairment degree of 90% and 100% are unable to function as persons without disability. They are unable to satisfy on their own the basic and important life needs. Therefore, the compensation is secured for them exclusively as a compensation to secure effective participation in society on an equal basis with others equal possibilities for them regarding their functioning in the society. PWD's with a percentage of impairment ranging from 60% to 80%, prior to passing the disputed Law, were subjected to the evaluation of the condition and illness, and not disability as stipulated under the Convention on Persons with Disabilities (UN). It was established in practice that this category of PWD (with body impairments in percentage ranging from 60% to 80%) is able to satisfy their life needs, to start employment and that such condition is not an impediment to their normal functioning in the society. On the other hand, allowances for CVW with impairments of 90% and 100% are partly considered war reparations and partly compensations making up for equal opportunities in the society, as the disability makes it impossible for them to function in the society in the same way as healthy individuals do. Concerning PWD with impairment of 90% and 100%, monetary compensations are considered exclusively compensations making up for the equal opportunities for the persons with disabilities with the severest degree of impairment. This is the reason why the difference exist, which is in conformity with the conclusions of the European Court in the case of *Popović v. Serbia*. The discrimination is not underlying the difference that exists, but it is the intention of the state to ensure to different groups the appertaining rights on all grounds. The recommendation of the Ombudsman, which was submitted to the defendant, implies the consideration of the reintroduction into the Law on the Principles of Social Protection of PWD with physical impairments below 90%. The competent ministry noted on that occasion that PWD's, within the meaning of the Convention on Persons with Disabilities, should be secured protection in other way, primarily by creating the conditions for employment in the labour market. Namely, the severity of their disability (apart from the percentage ranging from 90% to 100%) is not decisively limiting in their communication with the environment and in everyday functioning. The defendant

is of the opinion that the Recommendation of the Ombudsman was complied with by passing the Law on Professional Rehabilitation, Training and Employment of Persons with Disabilities (“the Law on Professional Rehabilitation”) and by setting-up the Fund for Professional Rehabilitation and Employment of PWD. This makes it possible for this population to be employed under substantially more favourable conditions when compared to the persons without disabilities in the open labour market.

7. The FBiH Government further stated that the provisions of the disputed Law still made it possible for PWD to continue using other rights. Those were permanent monetary assistance, monetary allowance for assistance and care by another person, other material assistance, training for skills and work, accommodation with another family, housing at a social protection institution, services of social and other specialised work, home care and help at home. Therefore, there is a legitimate aim in the present case and a proportionate relationship between the aim sought to be achieved and the means used. As a confirmation of the position that the provision of Article 3 of the disputed Law did not discriminate against PWD’s when compared to CVW’s, the defendant particularly pointed to the judgment of the European Court of Human Rights (“the European Court”) in the case of *Popović and Others v. Serbia*. The mentioned judgment was rendered precisely through the application of such acts that the plaintiffs referred to in the lawsuit, specifically the Convention (UN) and the European Convention when examining the well-foundedness of the different amounts of monetary compensations for disabled civilians and disabled war veterans. The European Court established in the mentioned judgment that “the fact that different categories of persons with disabilities have the right to different compensations does not constitute discrimination, particularly in the field of free margin of appreciation of states concerning the issues involving social policy”.

8. The FBiH Government (the defendant) emphasised that in the present situation the state has a free margin of appreciation regarding general issues of economic and social policy. This includes also the issue of how to best regulate the rights of social insurance for the persons with disabilities (PWD and CVW), and to secure the funds for the payment of disability allowances, which is in conformity with the positions of the European Court referred to in the judgment of *Popović and Others v. Serbia*.

**b) Allegations stated in the request**

9. The request largely interprets the allegations from the lawsuit that were stated in the previous part of the decision. Specifically, the applicant points to national and international

documents, the UN Convention, the Special Report on the Rights of Persons with Disabilities of the Ombudsman Institution, which strive to overcome any form of discrimination against persons with disabilities.

10. The applicant considers that the provision of Article 3 of the disputed Law amending Article 18b of the Law on Amendments to the basic Law (from 2004) which was in force until March 2009, the PWD were discriminated against based on the manner and time bodily injury and disability were sustained. They were also prevented from enjoying and achieving on an equal basis, the same scope of rights in relation to CVW with the same percentage of disability. In the opinion of the applicant, the provision of Article 3 of the disputed Law "introduced systemic (i.e. based on the law) discrimination, based on the manner and time of the injury." To that end, the applicant refers to the case law of the European Court, recognised by the Constitutional Court, *inter alia*, the *Belgian language case* of 9 February 1967 and *Ireland v. Britain* of 18 January 1978. It is stated that the discrimination occurs if a person or group of persons in an analogous situation is treated differently based on sex, race, colour, language, religion (...) in terms of enjoying the rights of the European Convention, while there is no objective and reasonable justification for the aim sought to be achieved as there is no proportionality between the means used and the aim sought to be achieved.

11. The applicant nevertheless considers that, according to the case law of the European Court and the Constitutional Court, public authorities have a certain margin of appreciation when deciding whether and to what extent the differences, in otherwise similar situations, justify differential treatment under law. Therefore, the applicant submitted a request for a review of the compatibility of the provision of Article 3 of the disputed Law for the Constitutional Court to assess "whether there was a reasonable and objective justification for differential treatment of persons with disabilities".

12. The applicant referred to the Constitution of BiH and its integral part, in particular, fifteen international agreements on human rights listed in Annex I to the Constitution of BiH, whereby the enjoyment of rights and freedoms provided in the mentioned international agreements is secured to all persons in BiH without discrimination. The applicant finds that the disputed provision is inconsistent with Article II(2) of the Constitution of BiH (international standards) that the European Convention and its Protocols are applied directly in BiH; Article II (3)(k) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention (right to property), Article II(4) of the Constitution of BiH and Article 14 of the European Convention (prohibition of discrimination) and Article 1 of Protocol 12 to the European Convention (general prohibition of discrimination).



**b) Response to the request**

13. As to the allegations from the request, the Government of FBiH stated: Article 3 of the disputed Law amended Article 18b, so that persons with disabilities, in order to exercise their rights, are classified into two groups. There is a group I, persons with disabilities with 100% impairment and group II, persons with 90% impairment. Furthermore, the rights of PWD and pecuniary compensation up until 2004 (when the basic Law was amended - the "basic Law" refers to the first Law on Principles of Social Protection adopted in 1999) were not covered by the legislation. The pecuniary compensation in the FBiH was provided for DWV according to the regulations governing the rights of veterans and for CVW according to the provisions of the Basic Law. The monetary compensations paid out to CVW with impairment ranging from 60%, 70% and 80% are considered exclusive compensations, i.e. reparations, the so-called "repaying the moral debt" by the state to persons who became disabled during the war. Unlike CVW who acquired disability due to the war, PWD acquired disability due to the illness or in another way that is not related to the war. The state does not have the same obligation towards them as towards the CVW. The pecuniary compensation for CVW with 90% and 100% impairment are considered partly as war reparations and partly compensation making up for the equal opportunities for the persons with disabilities with the severest degree of organism impairment as the disability makes it impossible for them to function in the society in the same way as healthy individuals do. Pecuniary compensations for PWD with 90% and 100% impairment are exclusively considered as compensations making up for the equal opportunities and making it possible for the disabled persons with the severest degree of impairment to function in the society.

14. In regards to the allegations of differential treatment of two categories of persons with disabilities, PWD and CVW, the Government of FBiH stated that differential treatment exists, but that it has an objective and reasonable justification. It reminded of the key provisions of the Convention on Persons with Disabilities (UN), pointing out that the provision of Article 3 of the disputed law provides protection to persons with the highest degree of disability (90% and 100%) because their functioning in society is permanently reduced or completely impeded due to the determined degree and severity of disability. In addition, PWD with a degree of damage to the body of 90% and 100% cannot function in society as persons without disabilities, so the compensation is paid out to them solely with the aim to make up for the equal opportunity in terms of functioning in society in the same way as healthy individuals do.

15. It is further stated that in the period from 2004 to 2009, prior to the adoption of the disputed provision, the conditions and illnesses were assessed and not disability in the case of the PWD with

impairment below 90%. In practice it has been determined that the degree of impairment below 90% in PWD is not an impediment to meet everyday life needs, get employed and work, and that the condition thus determined is not an impediment to normal functioning in society.

16. It was reiterated that providing greater benefits to the CVW was aimed at "repaying the moral debt" by the state because they became disabled during the war and the state did not have the opportunity to protect them. In addition, essential equality was achieved because the CVW were in a significantly different situation compared to all other persons.

17. It is obvious, as the FBiH Government ultimately stated, that the existing difference between PWD and CVW is not discrimination but the intent of the State to secure the rights of different groups on all grounds. In this particular case, there is a reasonable justification for differential treatment that is in line with the provisions of the European Convention and the provisions of the Law on Prohibition of Discrimination because there is a legitimate aim, a proportionate relationship between the aim sought to be achieved, and the means used. The legitimate aim is to justify the circumstances under which individual persons became persons with disabilities and who have suffered injuries, and making it possible for the persons with severest degree of disability to function and giving them equal opportunities. There is also the fact that individuals with a lower degree of disability are therefore not prevented to function normally in the society. To that end, it was referred also to the economic circumstances in BiH and the impossibility to secure all individuals the same financial compensations.

18. The so-called positive discrimination was stressed that practically allows the state authorities to take certain measures aimed at correcting existing inequalities.

19. In this regard, the FBiH Government pointed to the judgment of the European Court in case *Popović v. Serbia* of 30 June 2020. The applicants complained that they had been discriminated against as "disabled civilians" with regard to the right to peaceful enjoyment of possessions because national law provided "disabled war veterans" with the same degree of disability, with disability benefits that were up to five times higher than "disabled civilians". In the said decision, as further stated, the European Court did not find a violation under Article 14 of the European Convention as the difference in treatment between the two groups had an objective and reasonable justification. In doing so, as further stated, the European Court considered that the State had a free margin of appreciation when it came to general matters of economic and social policy, which included the issue of how best to regulate the social security entitlements of disabled persons. In relation to the above mentioned position, the Government considers that the determination of different rights for

PWD and CVW has a reasonable and objective justification, that the difference in treatment is based not only on a legally protected basis but also on objective differences and that Article 3 of the disputed Law is not discriminatory in relation to PWD. The Government further stated that PWD who do not have sufficient means of subsistence, the social protection regulations in the FBiH, allow for other entitlements. Those are permanent financial support, supplement for aid and assistance by another person, other financial support, right to professional training, skills and competencies training for life and work, placement in another family, housing in social protection institution, social and other professional work services, home care and home assistance, etc.

20. Having in mind the above, the Government of the FBiH considers that the request for review of the constitutionality of Article 3 of the disputed Law is unfounded.

#### **IV. Relevant Law**

21. In the **Constitution of Bosnia and Herzegovina**, relevant provisions read:

##### *Article II*

##### *Human Rights and Fundamental Freedoms*

###### *2. International Standards*

*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.*

###### *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.*

22. The **Convention on Protection of Human Rights and Fundamental Freedoms**, Rome, 4 November 1950 (*Official Gazette of BiH*, 6/99) as amended by Protocol No. 11 (date of entering into force on 1 November 1998), as relevant reads:

##### *Article 14*

*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.*

*Article 1 of Protocol No. 1 to the European Convention*

*Protection of property*

*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

*Article 1 of Protocol no. 12 to the European Convention*

*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 Law on Principles of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children** (*Official Gazette of the Federation of BiH*, 36/99, 54/04, 39/06, 14/09, 17/13 – Decisions of the Constitutional Court of BiH, 5/14 – Ruling of the Constitutional Court of BiH, 45/16 and 40/18). For the purposes of this Decision, the provisions of the first Law from 1999 are listed first followed by the amendments from 2004, the amendments from 2006 and disputed amendments from 2009. Other amendments that followed in 2013, 2014

and 2016 and 2018 are not relevant to this case. **Relevant provisions of the Law from 1999** (*Official Gazette of the Federation of BiH*, 36/99 of 6 September 1999) read as follows:

*Article 12*

*Beneficiaries of social protection, for the purpose of this law, shall be the persons who are in social need, as follows:*

- 1) children without parental care,*
- 2) educationally deprived children,*
- 3) educationally neglected children,*
- 4) children whose development is impeded by family circumstances,*
- 5) persons with disabilities and persons with disabilities in physical or mental development,*
- 6) persons financially not secured and incapable of work,*
- 7) elderly persons without family care,*
- 8) persons with socially negative behaviour,*
- 9) persons and families in a social need, who due to special circumstances are in need of an appropriate form of social protection.*

*The regulations of the canton may expand the group of social protection beneficiaries referred to in paragraph 1 of this Article in accordance with the programs for the development of social protection and specific opportunities in the canton.*

*Article 14*

*Persons with disability and persons in physical and mental development, in terms of Article 12, paragraph 1, item 5) of this Law, are children and adults, who are:*

- blind and partially sighted,*
- deaf and hard of hearing,*
- with speech and voice disorders,*
- with permanent disabilities in physical development,*
- with intellectual disabilities (mild, moderate, severe),*
- with combined disorders (multiple developmental disabilities).*

### *Article 19*

*The social protection rights, for the purpose of this law, are:*

- 1) financial and other pecuniary support,*
- 2) development of skills for life and work,*
- 3) housing in another family,*
- 4) housing in social protection institutions,*
- 5) social and other professional work services,*
- 6) home care and home assistance.*

*The cantonal regulation shall determine the amounts of pecuniary and other benefits referred to in paragraph 1 of this Article, the conditions and procedure for acquiring these rights and their use, unless regulated by this Law.*

*The regulations of the canton may determine other social protection rights in accordance with the program of development of social protection and its possibilities.*

### *Article 54*

*A civilian victim of war, for the purpose of this law, is a person who has suffered physical impairment of at least 60% due to a wound and injury (hereinafter: disabled) sustained by:*

- 1) abuse, i.e. deprivation of liberty during a state of war or imminent war danger;*
- 2) in connection with war events (bombings, street fights, explosions of war remnants, stray bullets, etc.);*
- 3) from the explosion of war remnants after the end of the war,*
- 4) in connection with sabotage, i.e. terrorist actions endangering the security and constitutional order of the Federation.*

*A disabled person is also a person who has suffered physical impairment of at least 60% due to an illness acquired, i.e. aggravated or manifested under the circumstances referred to in paragraph 1 of this Article.*

*A person who got killed, died or disappeared under the circumstances referred to in paragraph 1 of this Article shall also be considered a civilian victim of war.*

#### *Article 56*

*In order to exercise the rights established by this law for civilian victims of war, unless otherwise provided by a cantonal regulation, the disabled persons are classified according to the determined percentage of physical impairment, into six groups, as follows:*

*Group I - disabled persons with 100% physical impairment who need care and assistance by another person for a regular life,*

*Group II - disabled persons with 100% physical impairment,*

*Group III - disabled persons with 90% physical impairment,*

*Group IV - disabled persons with 80% physical impairment,*

*Group V - disabled persons with 70% physical impairment,*

*Group VI - disabled persons with 60% physical impairment.*

#### *Article 58*

*Civilian victims of war shall have, under this law, the following rights:*

*1) personal disability allowance,*

*2) allowance for care and assistance by another person,*

*3) orthopaedic aid supplement,*

*4) family disability allowance,*

*5) child allowance,*

*6) assistance in the costs of treatment and procurement of orthopaedic aids,*

*7) development of skills for work (professional rehabilitation, retraining and additional training)*

*8) priority employment.*

*The rights referred to in paragraph 1 item 1), 2), 3), 4) and 5) of this Article shall be exercised under the conditions, in the manner and according to the procedure determined by this Law.*

*The rights referred to in paragraph 1 item 6), 7) and 8) of this Article shall be exercised under the conditions, in the manner and according to the procedure determined by the cantonal regulations.*

*The Canton may establish other rights and expand the scope of rights established by this law based on its financial possibilities and other needs of civilian victims of war.*

24. **The relevant provisions of the Law on Amendments to the Law from 2004** (*Official Gazette of the Federation of BiH, 54/04 of 16 October 2004*) as relevant reads:

*Article 1*

*In the Law on Principles of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (Official Gazette of the Federation of BiH, 36/99), in Chapter II SOCIAL PROTECTION a new subchapter 2a is added entitled - "BASIC RIGHTS OF PERSONS WITH DISABILITIES" and subchapter 2.b entitled - "PROCEDURE FOR EXERCISING THE BASIC RIGHTS OF PERSONS WITH DISABILITIES" with the explanation of these rights in articles which read:*

*"2a. BASIC RIGHTS OF PERSONS WITH DISABILITIES*

*Article 18a*

*Persons with disabilities and persons impeded in physical and mental development, in terms of Article 12, paragraph 1, item 5 and Article 14 of this Law, shall have the following rights under this Law:*

- 1) personal disability allowance,*
- 2) allowance for care and assistance by another person,*
- 3) orthopaedic aid supplement,*
- 4) assistance in the costs of treatment and procurement of orthopaedic aids,*
- 5) development of skills for work (professional rehabilitation, retraining and additional training),*



6) *priority employment.*

*The rights referred to in paragraph 1 item 1), 2) and 3) of this Article shall be exercised under the conditions, in the manner and according to the procedure determined by this Law.*

*The rights referred to in paragraph 1 item 4), 5), 6) of this Article shall be exercised in accordance with the regulations on health insurance, health care and employment.*

*The canton may determine other rights and expand the scope of rights determined by this law based on its financial possibilities and other needs of persons with disabilities.*

#### *Article 18.b*

*In order to exercise the rights determined by this law, persons with disabilities are classified according to the determined percentage of impairment into five groups, as follows:*

*Group I - persons with disabilities with 100% impairment,*

*Group II - persons with disabilities with 90% impairment,*

*Group III - persons with disabilities with 80% impairment,*

*Group IV - persons with disabilities with 70% impairment,*

*Group V - persons with disabilities with 60% impairment.*

#### *Article 18.c*

*Personal disability allowance is determined proportionate to the degree of impairment, based on the findings and opinion of the medical commission in accordance with the International Classification of Impairments, Disability, and Handicaps of the World Health Organization. The monthly amount of personal disability allowance is determined as a percentage of the base defined in Article 18.f, as follows: Group Percentage: I 70%, II 50%, III 39%, IV 28% and V 20%.*

#### *Article 18.f.*

*The basis for determining the monthly cash allowance, according to this law, is BAM 213. According to this law, the basis and monthly amount of cash allowance shall be adjusted at the beginning of each budget year by order of the Federal Minister of Labour and Social Policy, in accordance with the gross domestic product per capita according to the Federal Office of Statistics (FBiH).*

25. The relevant provisions of the Law on Amendments from 2006 (*Official Gazette of the Federation of BiH*, 39/06 of 26 July 2006) read as follows:

*Article 6*

*Article 54 is amended to read as follows:*

*For the purposes of this law, a civilian victim of war is a person who was inflicted physical impairment, during the war or imminent danger of war, due to injury or some other form of war torture, which includes mental impairment or significant impairment to the health or in fact disappearance or death of that person.*

*In accordance with paragraph 1 of this Article, the status of a civilian victim of war is recognized as follows:*

*1) a person who has suffered impairment to the body of at least 60% or significant damage to health due to torture, inhuman and degrading treatment, illegal punishment, unlawful deprivation of liberty, imprisonment, concentration camp, internment, forced labour during war or imminent danger of war,*

*2) a person who has suffered damage to the body of at least 60% in connection with war events (bombing, street fighting, explosion of war remnants, stray bullet, etc.),*

*3) a person who has suffered damage to the body of at least 60% from the explosion of war remnants after the end of the war,*

*4) a person who has suffered damage to the body of at least 60% in connection with sabotage, terrorist actions that endanger the security and constitutional order of the Federation,*

*5) family members of the missing person, if the missing person was a civilian or was not a member of the armed forces,*

*6) family members of a person who died in connection with war events (bombing, street fights, explosion of war remnants, stray bullets, etc.).*

*A special category of civilian victims of war is considered to be survivor of sexual abuse and rape.*

*The status of a civilian victim of war is recognized to persons who have subsequently sustained impairment - manifested and aggravated disease, long incubation period, loss of limbs and vision of both eyes due to deterioration of general health, mental impairment and other impairments referred to in paragraphs 1 and 2 of this Article.*

*The status of a civilian victim of war, for the purpose of paragraph 1 and 2 of this Article, is also recognized to civilians and members of the forces of the former so-called "Autonomous Province of Western Bosnia", if they do not exercise the appropriate rights under the Law on the Rights of War Veterans and Members of their Families (Official Gazette of the Federation of BiH, 33/04 and 56/05).*

*In accordance with this law, in order to exercise certain rights, the status of a civilian victim of war is recognized to a person who has sustained impairment below 60% or significant impairment of health.*

#### *Article 7*

*In Article 56, in the introductory sentence, the words: "unless otherwise provided by a cantonal regulation" shall be removed.*

*After paragraph 1, a new paragraph 2 is added, which reads:*

*When determining the percentage of impairment for persons who under the circumstances referred to in Article 54 of this Law, sustained impairment due to illness acquired or aggravated under those circumstances, the appropriate percentage of the total impairment shall be taken, while the established percentage of the impairment cannot amount to higher than 80% on those grounds.*

#### *Article 8*

*Article 58 is amended to read as follows:*

*Civilian victims of war have, under this law, the following rights:*

- 1) personal disability allowance or personal monthly allowance,*
- 2) allowance for care and assistance by another person,*
- 3) orthopaedic aid supplement,*
- 4) family disability allowance,*

- 5) *assistance in the costs of treatment and procurement of orthopaedic aids,*
- 6) *developing skills necessary for work (professional rehabilitation, retraining and additional training),*
- 7) *priority employment,*
- 8) *priority housing,*
- 9) *psychological assistance and legal assistance.*

*Civilian victims of war referred to in Article 54, paragraph 6 of this Law shall exercise their rights in accordance with paragraph 1, item 5), 6), 7), 8) and 9) of this Article.*

*The rights referred to in paragraph 1 items 1), 2), 3) and 4) of this Article shall be exercised under the conditions, in the manner and according to the procedure determined by this Law.*

*The rights referred to in paragraph 1 items 5), 6), 7), 8) and 9) of this Article shall be exercised in accordance with the regulations on health insurance, health care, protection of families with children and employment.*

*The Canton, in accordance with the Program for Resolving Priority Housing Care based on the relevant law, decides on priority housing care for persons referred to in Article 54 of this Law, and especially persons involved as witnesses-victims in the court proceedings.*

*The canton may establish other rights and expand the scope of rights established by this law, in accordance with its possibilities and needs of civilian victims of war.*

26. **The relevant provisions of the Law on Amendments from 2009 – disputed Law** (*Official Gazette of the Federation of BiH, 14/09 of 11 March 2009*) reads as follows:

*Article 3*

*Article 18b of the Law is amended to read as follows:*

*"In order to exercise the rights determined by this Law, persons with disabilities are classified according to the determined percentage of impairment, into two groups, as follows:*

*Group I - persons with disabilities with 100% impairment,*

*Group II - persons with disabilities with 90% impairment”.*

27. **The Law on Professional Rehabilitation and Employment of Disabled Persons** (*Official Gazette of FBiH*, 9/10) as relevant reads:

*Article 1*

*This Law regulates professional rehabilitation, training and employment of persons with disabilities with reduced working capacity (hereinafter: persons with disabilities), establishment and activity of institutions, companies and other legal entities engaged in professional rehabilitation and employment of persons with disabilities, establishment and the work of the Fund for Professional Rehabilitation and Employment of Persons with Disabilities (hereinafter: the Fund) and other issues related to vocational rehabilitation, training and employment of persons with disabilities.*

*Article 2*

*Professional rehabilitation, training and employment of persons with disabilities is of special public interest and falls within the field of social protection.*

*Article 3*

*A person with a disability, in terms of this Law, is a person who has a physical, sensory or mental impairment that results in permanent or temporary and reduced ability to work and meet personal needs in everyday life for a period of at least 12 months.*

*A person with a disability referred to in paragraph 1 of this Article is a person whose disability in relation to the abilities of a person without a disability, equal or similar age, equal or similar education, in the same or similar working conditions, on the same or similar jobs - results in permanent or temporary reduced possibility of job training and employment on the labour market under general conditions, as well as job retention and job advancement for a period of at least 12 months.*

*Article 4*

*A person with a disability, in terms of this Law, is also:*

- 1. a person with a disability, a beneficiary of allowance until employment who has exercised this right based on the social protection regulations;*
- 2. a person with a changed working capacity according to the regulations on pension and disability insurance;*
- 3. a person who has exercised the right to professional rehabilitation according to the regulations on the protection of disabled war veterans and war-related disabled civilians;*
- 4. a student with developmental difficulties and a student with greater developmental difficulties according to the regulations on secondary education;*
- 5. a person with a disability older than 21 years of age who cannot exercise the right to professional rehabilitation or work according to the previous items of this Article.*

#### *Article 7*

*A person with a disability contributes to his/her professional rehabilitation and employment:*

*by education and professional training, depending on the abilities, preferences and skills,*

*by applying for a job through public vacancy announcements, for which he/she meets the prescribed conditions and which he/she is able to perform and by accepting the offered employment for such jobs,*

*by accepting the conditions during the professional training and work,*

*by cooperation on issues of professional training with a doctor, defectologist, psychologist, social worker, law graduate, technologist, (...)*

28. Having regard to Article V(3)(d) of the Constitution of Bosnia and Herzegovina and under approval by the Parliamentary Assembly of BiH (Decision of the Parliamentary Assembly of BiH, 454/09 of 15 December 2009), the Presidency of Bosnia and Herzegovina at its 39<sup>th</sup> urgent session held on 18 December 2009, adopted the following

### **DECISION**

***ON THE RATIFICATION OF THE CONVENTION ON THE RIGHTS OF  
PERSONS WITH DISABILITIES AND THE OPTIONAL PROTOCOL***

*Article 1*

*Convention on the Rights of Persons with Disabilities and the Optional Protocol shall hereby be ratified.*

*Texts of the Convention and Optional Protocol as translated shall read:*

***CONVENTION ON THE RIGHTS OF PERSONS  
WITH DISABILITIES***

*Article 1 - Purpose*

*The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.*

*Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.*

*Article 2 - Definitions*

*For the purposes of the present Convention:*

*(...)*

*"Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.*

## V. Admissibility

29. 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.

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.*

30. The request for constitutional review was submitted by the Municipal Court in Sarajevo (Judge Adnan Lokmić), which means that the request was submitted by an authorized person under Article VI(3)(c) of the Constitution of Bosnia and Herzegovina (see Constitutional Court, Decision on Admissibility and Merits, *U-5/10* of 26 November 2010, paragraphs 7-14, published in the *Official Gazette of Bosnia and Herzegovina*, 37/11).

31. Having regard to the provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina and Article 19 paragraph (1) of the Rules of the Constitutional Court, the Constitutional Court considers that this request is admissible as it was submitted by an authorized person. There is no formal reason from Article 19, paragraph (1) of the Rules of the Constitutional Court for which the request would be rendered inadmissible.

## VI. Merits

### Introductory remarks

32. The Constitutional Court emphasises that in its Decision on Admissibility and Merits, *U-9/12* of 30 January 2013, it decided on the harmonization of the provision of Article 18(d) paragraph 4 of the same Law (which reads: “The persons with disabilities acquired after the age of 65 and regarding whom, in accordance with the Institute assessment, the need is established to exercise the right to allowance for care and assistance by another person, shall exercise this right under the cantonal regulations”). It established that this provision is in contravention of Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 of Protocol No. 12 to the European Convention. The said provision covered persons who acquired disability after the age of 65. The Federation of BiH enforced the aforementioned decision of the Constitutional Court, and



the unconstitutional provision was deleted by the amendments to the Law on Principles of Social Protection (*Official Gazette of the Federation of BiH*, 17/03 of March 4, 2013).

### **Disputed provisions of the Law on Principles of Social Protection**

33. The Constitutional Court notes that it considers the review of constitutionality in a general sense (*erga omnes*) and not in relation to a specific case (*inter partes*) which is the reason for filing a request (see the Constitutional Court's decision in the case no. *U-15/11* of 30 March 2012, paragraph 63). The applicant request the Constitutional Court to examine whether the provision of Article 3 of the disputed Law is compatible with Articles II(2), II(3)(k) and II(4) of the Constitution of BiH, and with Article 1 of Protocol No. 1 to the European Convention, Article 14 of the European Convention and Article 1 of Protocol No. 12 to the European Convention.

34. The request for constitutional review, as well as the case before the Municipal Court in Sarajevo, regarding which the request for constitutional review was filed, is based on the allegation that discrimination occurred based on the Law on Principles of Social Protection. The relevant provisions of the said Law prescribe the rights - privileges to certain categories of people, in this particular case the PWD - persons with disabilities and CVW - civilian victims of war. The right prescribed by the above categories (PWD and CVW), which is relevant for this case, is the right to financial compensation, i.e. the right to personal disability allowance, as this right is named in all amendments to the Law on Principles of Social Protection that followed after 1999). The right to personal disability allowance, as prescribed by the relevant provisions of the Law on Principles of Social Protection, is exercised depending on the percentage of impairment to the body. The disputed amendments to the Law on the Principles of Social Protection stipulate that PWD can exercise the right to personal disability benefits only if they have impairment in the percentage of 90% and 100%. However, the Law has not changed in this part in relation to CVW, which still have the prescribed right to personal disability benefits depending on the degree of impairment, but in a much wider range, i.e. from 60% to 100%. Therefore, the relevant provisions of the Law first prescribe the right (right to personal disability allowance). However, other relevant provisions of the same Law restrict the exercise of that right, depending on the circumstances under which certain persons became persons with disabilities and those who have sustained injuries (disabilities in the case of PWD are not related to the war while disabilities in the case of CVW are related to the war). The applicant sees in this the discrimination as prohibited by the relevant provisions of the Constitution of BiH and the European Convention.

35. From the applicant's allegations and the case, in regards to which the request was filed, it follows that PWD were discriminated against in relation to CVW as to the right to property. The property is considered to be the right to personal disability allowance prescribed by the relevant provisions of the Law on Principles of Social Protection. However, it is indisputable that the right to personal disability benefits is not an existing (acquired) right. The Law on the Principles of Social Protection prescribes the conditions under which certain groups of people (PWD and CVW) can exercise (acquire) the right to personal disability benefits. The plaintiffs, in the case, which is the subject of the request for constitutional review, have lost the right to the personal disability allowance they had received, in 2009 (by adoption of the disputed Law). The plaintiffs did not appeal against the individual decisions on the loss of the right to personal disability benefits to the second-instance administrative body, nor did they initiate an administrative dispute before the competent court. In fact, the aim of the lawsuit in question is for the plaintiffs to regain property (personal disability allowance) they were deprived of, due to amendments to the law. However, Article 1 of Protocol No. 1 to the European Convention protects only existing property (see European Court of Human Rights, *Marckx v. Belgium*, judgment of 13 June 1979, Series A [1] 31, § 50), and not right to acquire property (see *Slivenko and Others v. Latvia* (dec.) [GC] no. 48321/99, ECHR 2002-II, § 121 and *Kopecký v. Slovakia* [GC], 44912/98, ECHR 2004-IX, § 35) (b)). The disputed provisions of the disputed Law determine exclusively the conditions (a certain degree of impairment) under which PWD can exercise (acquire) the right to a personal disability allowance. Therefore, the disputed provisions of the disputed Law do not determine the property right, but, as it was said, the conditions for acquiring the property right. Therefore, the disputed provisions do not raise the issue of incompatibility with the provisions of Article II(3)(k) of the Constitution of BiH as well as Article 1 of Protocol No. 1 to the European Convention.

36. Therefore, the Constitutional Court considers that the provisions of the disputed Law should be examined primarily from the aspect of Article 1 of Protocol No. 12 to the European Convention, considering it is alleged that the violation of the right to non-discrimination occurred based on law by denial of the rights provided for by law.

### **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.*

37. The Constitutional Court emphasizes that Article 1 of Protocol No. 12 to the European Convention contains the general principle of non-discrimination and guarantees the enjoyment of all rights provided by law, without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, belonging to a national minority, property, birth or other status. Furthermore, Article 1 of Protocol No. 12 to the European Convention implies that public authorities may not discriminate against anyone on any grounds, so the basic principle of non-discrimination is extended to national law and not only to the rights guaranteed by the European Convention, as provided for by Article 14 of the European Convention.

38. In *Sejdić and Finci v. BiH*, the European Court of Human Rights emphasized: “The notion of discrimination has been interpreted consistently in the Court’s jurisprudence concerning Article 14 of the Convention. In particular, this jurisprudence has made it clear that “discrimination” means treating differently, without an objective and reasonable justification, persons in similar situations (see paragraphs 42 to 44 above and the authorities cited therein). The authors used the same term, “discrimination”, in Article 1 of Protocol No. 12. Notwithstanding the difference in scope between those provisions, the meaning of this term in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 (see paragraph 18 of the Explanatory Report to Protocol No. 12). The Court does not therefore see any reason to depart from the settled interpretation of “discrimination”, noted above, in applying the same term under Article 1 of Protocol No. 12 (as regards the case-law of the United Nations Human Rights Committee on Article 26 of the International Covenant on Civil and Political Rights, a provision similar – although not identical – to Article 1 of Protocol No. 12 to the Convention, see Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary, N.P. Engel Publishers, 2005, pp. 597-634)”, (see decision of the European Court in the case *Sejdić and Finci against BiH* of 22 December 2009, item 55).

39. Accordingly, following the principles set out in Article 14 of the European Convention that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations (see *DH and Others v. The Czech Republic* [GC], no. 57325/00, paragraph 175, ECHR 2007-IV). However, only those differences based on an identifiable, objective or personal characteristic, or “status”, by which individuals or groups are distinguishable from one another may raise issue of discrimination (see *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15, § 45). ECHR 2017). The European Court has consistently stated in its decisions that such a difference of treatment is discriminatory if it has no objective and reasonable

justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 76, ECHR 2013 (excerpts).

40. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a differential treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background. A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 61, ECHR 2010 and *Stec and Others v. the United Kingdom* [GC], Nos. 65731/01 and 65900/01, § 52, ECHR 2006-VI).

41. The European Court has consistently held in its case law that the European Convention does not include a right to acquire property (which is described in more detail in this decision in paragraph 36). In so doing, it places no restriction on the Contracting States to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If a State does decide to create a benefits scheme, it must do so in a manner which is compatible with Article 14 (see *Stec and Others v. The United Kingdom*, cited).

42. In the present case, it is undisputed that the Law on the Principles of the Social Protection prescribes a "benefit scheme" for certain categories of people (PWD and CVW) if they meet the conditions prescribed by that same Law<sup>1</sup>. Thus, the State "established a system of benefits" (right to personal disability benefits) by the Law on Principles of the Social Protection, which further means that this law prescribes "enjoyment of rights determined by law". By the same Law, the state prescribes a restriction on enjoyment of these rights, and it is therefore the task of the Constitutional Court to examine whether this complies with Article 1 of Protocol No. 12 to the European Convention. The basic question to be answered is whether the public authority could have prescribed different conditions for exercising the prescribed benefits, depending on the circumstances under which certain persons (PWD and CVW) became persons with disabilities.

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<sup>1</sup> See relevant regulations, items 23, 24, 25 and 26 of this decision. Article 18a of the Law stipulates rights for PWD (personal disability allowance) and Article 18b which is finally amended by disputed Article 3 of the same Law, stipulates restrictions (conditions) for PWD for exercising these rights (degree of impairment). Article 8 of the Law stipulates rights for CVW (personal disability allowance) and Article 56 of the same Law stipulates restrictions (conditions) for exercise of these rights (degree of impairment) for CVW.

43. The Constitutional Court recalls that the European Court in *Popović v. Serbia* examined whether there had been a violation of the right to non-discrimination because the Republic of Serbia had prescribed different rights (benefits) for disabled civilians and disabled war veterans. Following the approach of the European Court in this case, the Constitutional Court considers that in the present case it can be recognized that "circumstances under which certain persons became disabled" may constitute "other status" within the meaning of Article 1 of Protocol No. 12 to the European Convention.

44. For a differential treatment to be objectively and reasonably justified, two conditions must be met: a) the principle of differential treatment can be applied in order to achieve a legitimate aim and b) there must be a reasonable relationship of proportionality between the means employed and the aim pursued. However, the Constitutional Court must first determine whether there is a difference in treatment between PWD and CVW based on the circumstances under which certain persons became persons with disabilities and sustained injuries.

**Article 3 of the disputed Law reads:**

*Article 18b of the Law is amended to read as follows:*

*"In order to exercise the rights determined by this Law, persons with disabilities are classified according to the determined percentage of impairment into two groups, as follows:*

*Group I - persons with disabilities with 100% impairment,*

*Group II - persons with disabilities with 90% impairment"*

**Existence of differential treatments**

45. In response to the request, the FBiH Government stated that differential treatment existed and that a distinction had been made between PWD and CVW in terms of the enjoyment of certain rights. The difference was made based on the time and manner of occurrence of disability, i.e. based on the circumstances under which certain persons became persons with disabilities and sustained injuries. For PWD, these circumstances are not related to war and war activities, while for CVW they are. Of course, the Government claims that there is a legitimate aim for the differentiation being made, i.e. reasonable and objective justification. This will be discussed in more detail in the next part of the reasoning.

**A legitimate aim**

46. It follows from the FBiH Government's reply that one of the basic objectives for a differential treatment of the two categories of PWD and CVW is to "repay the moral debt" of the CVW as persons who became disabled during the war and to achieve substantial equality for certain group of persons who found themselves in a significantly different situation in relation to the other. According to the FBiH Government, protection under Article 3 of the disputed Law provides protection to all persons with disabilities of 100% and 90% (i.e. PWD and CVW) because their communication with the environment is permanently reduced or impeded because of the degree and severity of disability. On the other hand, PWD with a degree of impairment below 90% does not represent an impediment to satisfying everyday life needs, entering into employment and working. The degree of disability ranging from 60% to 80% for PWD does not represent an impediment to normal functioning in the society. In addition to the right to personal disability benefits, there are other rights of PWD prescribed by the Law on Principles of the Social Protection. Those are: allowance for care and assistance by another person, orthopaedic aid allowance, assistance in the costs of treatment and procurement of orthopaedic aids,, development of skills for work (professional rehabilitation, retraining and additional training) and priority employment<sup>2</sup>. In addition to the aforementioned rights under the Law on the Principles of the Social Protection, the legislator, having in mind that the training and employment of PWD is of a special public interest, has also passed the Law on Professional Rehabilitation. This law prescribes in detail various types of assistance for PWD with a disability percentage below 90% in order for them to participate the labour market. The main goal of the Law is to enable persons with the highest degree of disability (90% and 100%) to function and to give them equal opportunities. This includes both groups - PWD and CVW. In addition, the financial support for PWD is considered social assistance (based on the principle of solidarity). The financial support for CVW, with a percentage of impairment ranging from 60% to 80%, is considered reparation by the state (repaying moral debt) in addition to being considered social assistance.

47. In response to the request, the Government referred to the decision of the European Court in the case of *Popović and Others v. Serbia* (applications nos. 26944/13 and 3 others) of 30 June 2020, holding that the case was very similar. In that case, the European Court examined the allocation of social benefits based on the disability and the difference in treatment between "disabled civilians and disabled war veterans" (analogous to PWD and CVW in the present case), according to national legislation. The European Court did not consider it necessary in these circumstances of the case to examine whether „disabled civilians and disabled war veterans“ can be considered two groups in “analogous or relevantly similar situations” and did not find it necessary to adopt a firm view on

<sup>2</sup> See relevant regulations, item 24 of the reasoning, Article 18a of the Law on Principles of Social Protection.

this matter, because in any event the impugned difference in treatment had an objective and reasonable justification. Since the applicants complained of inequalities in a welfare system, the Court underlines that the Convention does not include a right to acquire property. It places no restriction on the Contracting States' freedom to decide whether to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a State does decide to create benefits or pension scheme, it must do so in a manner, which is compatible with Article 14 of the Convention (see *Stec and Others v. the United Kingdom*). Turning to the present cases, the Court notes that it transpires from the respondent State's legislation that disabled civilians lacking means might have been entitled to a number of benefits to which certain war veterans might not, and that, taking that into account, the real difference in treatment between the two groups might have been less than alleged. The Court also reiterates that since the national authorities make the initial assessment as to where the fair balance lies in a case before a final evaluation by this Court, a certain margin of appreciation is, in principle, accorded by this Court to those authorities as regards that assessment. The breadth of this margin varies and depends on a number of factors, including the nature of the restrictions and the aims pursued by them (see, for example, *Dickson v. the United Kingdom*, paragraph 77). When it comes to general measures of economic or social strategy in particular, because of their direct knowledge of their society and its needs, the national authorities are in principle better placed, than the international judge, to appreciate what is in the public interest. The Court is of the opinion that the differential treatment in pecuniary social benefits between disabled civilians and disabled war veterans was not lacking such a reasonable foundation and was based on relevant and sufficient grounds (paragraphs 74 to 80).

48. Having in mind the above, the Government's response as well as the decision of the European Court in *Popović v. Serbia*, where the situation was indeed very similar to the present case, the Constitutional Court considers that the differential treatment prescribed by the disputed Law, was based on legitimate aim, as well as that the difference in treatment has a reasonable justification. The disputed Law prescribes various conditions for the use of social protection benefits, i.e. conditions for exercising the right to personal disability benefits. Thus, it is a sphere of social and economic policy and the competent public authority has a wide margin of appreciation. The public authority is certainly in a better position, than the judges of the Constitutional Court, to resolve issues related to who will receive social protection benefits, what will be the amounts paid, and, as in this case, to prescribe the conditions under which certain persons may exercise their social protection rights. In this case, the public authority prescribed a different degree of impairment

as a condition for the use of social protection rights, specifically the right to personal disability benefits. The justification is that the difference in the degree of impairment in the percentage ranging from 60% to 80% refers to the "moral debt" or "war reparation" that the state has towards CVW, because it could not protect them during the war. In addition, it is considered that PWD with a degree of impairment in the percentage ranging from 60% to 80% can work, though with certain difficulty. This is why the Law on Professional Rehabilitation of the Disabled was passed. In addition, it was for economic reasons that it is not possible to provide all necessary funds so that everyone (PWD and CVW) would be paid the same amount of benefits. These reasons indeed fall within the free margin of appreciation, and there is no reason for the Constitutional Court not to accept that in the specific case, the difference in treatment had a reasonable justification, i.e. that differential treatment is based on a legitimate aim.

### **Proportionality**

49. When considering the rights of PWD and CVW in terms of the relevant provisions of the Law on Principles of the Social Protection, in the opinion of the Constitutional Court it follows that the difference between these two categories is not as great as indicated by the submitted request for review of constitutionality. It is obvious that the state considers both of these categories by prescribing a number of benefits for all. The fact is that CVW have a greater possibility of access in relation to the exercise of the right to personal disability benefits. However, PWD with a degree of impairment below 90% are entitled to the benefits prescribed by the Law on Professional Rehabilitation and Training of the Disabled. It is also taken into account that public authorities in this area enjoy a wide margin of appreciation and are in a better position to assess issues of social public and economic interest such as this case, the Constitutional Court considers that Article 3 meets the principle of proportionality, because it strikes a fair balance between the public interest and the protection of the rights of the individual. The disputed provision does not impose an excessive burden on PWD in relation to CVW, because both categories with a determined degree of disability ranging from 100% to 90% as the most vulnerable groups are entitled to personal disability benefits.

50. Therefore, the Constitutional Court concludes that Article 3 of the impugned Law is in accordance with Article 1 of Protocol No. 12 to the European Convention.

### **Other rights**

51. The applicant alleged that the provisions of the disputed Law were inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina, as well as with Article 14 of the European



Convention. However, everything that has been said in relation to Article 1 of Protocol No. 12 to the European Convention can also be applied to these articles. Therefore, the provisions of the disputed Law are in compliance with Article II(4) of the Constitution of Bosnia and Herzegovina, as well as Article 14 of the European Convention.

52. The Constitutional Court has given more detailed explanation in paragraph 35 of the reasoning as to Article II(3)(k) of the Constitution of Bosnia and Herzegovina as well as Article 1 of Protocol No. 1 to the European Convention, emphasizing that the right to property does not include the right to acquire property. In fact, it protects only existing property. Therefore, the applicant's allegations of this right are manifestly ill founded.

53. As the applicant alleges a violation of the provisions of the European Social Charter, the Constitutional Court notes that the European Social Charter is not listed in the Constitution of Bosnia and Herzegovina or in Annex I of the Constitution of Bosnia and Herzegovina as an additional human rights agreement to be applied in Bosnia and Herzegovina. This is why the Constitutional Court is not competent to decide on the alleged violation of the provisions of the European Social Charter (see Constitutional Court, Decision on Admissibility and Merits, No. *AP-765/20* of 8 July 2021, item 30, available at website [www.ustavisud.ba](http://www.ustavisud.ba)).

## **VII. Conclusion**

54. The Constitutional Court concludes that the provision of Article 3 of the Law on Amendments to the Law on the Principles of the Social Protection, Protection of Civilian Victims of War and Protection of Families with Children is in compliance with Article II(4) of the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention and Article 1 of the Protocol No. 12 to the European Convention.

55. Pursuant to Article 59 (1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this decision.

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