

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), (2) and (3) and Article 63(2) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 60/05), in Plenary and composed of the following judges:

Ms . Hatidža Hadžiosmanović, President,

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Tudor Pantiru,

Mr. Mato Tadić,

Ms. Constance Grewe,

Ms. Seada Palavrić,

Mr. Krstan Simić,

Having deliberated on the requests of **Messrs. Ivo Miro Jović and Sulejman Tihić, Members of the Presidency of Bosnia and Herzegovina at the time of lodging the request, in case no. U 6/06,**

at its session held on 29 March 2008, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The requests of **Messrs. Ivo Miro Jović and Sulejman Tihčić, Members of the Presidency of Bosnia and Herzegovina at the time of lodging the requests**, are hereby partially granted.

It is hereby established that the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 90/05) is inconsistent with Article VI(2)(b), VI(3) and Article I(2) read in conjunction with Article IX(2) of the Constitution of Bosnia and Herzegovina insofar as it relates to the Constitutional Court of Bosnia and Herzegovina.

The Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina insofar as it relates to the Constitutional Court of Bosnia and Herzegovina, is hereby quashed pursuant to Article 63(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina, insofar as it relates to the Constitutional Court, shall be rendered ineffective as of the day following the date of publication of this Decision in the *Official Gazette of Bosnia and Herzegovina* in accordance with Article 63(3) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

It is hereby established that Article 4 of the Law on Civil Service in the Institutions of Bosnia and Herzegovina, titled “Exceptions in Application”, (*Official Gazette of BiH* Nos. 19/02, 35/03, 4/04, 17/04,

26/04 and 37/04) is consistent with the Constitution of Bosnia and Herzegovina.

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

REASONING

I. Introduction

1. On 17 February 2006 and subsequently on 16 March 2006, Messrs. Ivo Miro Jović and Sulejman Tihić, Members of the Presidency of Bosnia and Herzegovina at the relevant time (“the applicants”), lodged requests with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) for a review of the constitutionality of the following provisions of the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 90/05), (“the Law on Salaries”) and Law on Civil Service in the Institutions of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* Nos. 19/02, 35/03, 4/04, 17/04, 26/04 and 37/04) (“the challenged provisions of the Laws in question”) with the provisions of Article I(2), IV(4)(a) and VI(2)(b) of the Constitution of Bosnia and Herzegovina: Article 2, Article 8 paragraph 5 in the part reading as follows: “(...) of the Constitutional Court of Bosnia and Herzegovina“, Article 14, in the part reading as follows: “As for the Constitutional Court of Bosnia and Herzegovina, these provisions are enacted by the Constitutional Court of Bosnia and Herzegovina in cooperation with the Ministry of Justice of Bosnia and Herzegovina”; Article 15 in the part reading as follows: “of the Constitutional Court of Bosnia and Herzegovina”, Article 17 item a) in the part reading as follows: “for the Secretary General of the Constitutional Court”, item b) in the part reading as follows: “For the Registrar of the Constitutional Court”, items (d),(e), (f) and (g), in the parts reading as follows: „for Heads of the Department of the Constitutional Court of Bosnia and Herzegovina“, “for Senior Legal Advisors of the Constitutional Court”, „For Legal Advisors of the Constitutional Court of

Bosnia and Herzegovina”, and “For Judicial Associates of the Constitutional Court of Bosnia and Herzegovina”, and Article 4 of the Law on Civil Service in the Institutions of Bosnia and Herzegovina, titled “Exceptions in Application”, (*Official Gazette of Bosnia and Herzegovina* Nos. 19/02, 35/03, 4/04, 17/04, 26/04 and 37/04), (“the Law on Civil Service”) in the part reading as follows: “Judges of the Constitutional Court of Bosnia and Herzegovina”.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina and House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina (“the BiH Parliamentary Assembly”) were requested on 10 May 2006 to submit their replies to the request. Again, on 7 December 2007 the Constitutional Court requested both Houses of the BiH Parliamentary Assembly to submit their replies to the request, since the BiH Parliamentary Assembly adopted the challenged Law on Salaries after the requests had been filed.

3. On 7 January 2008, the House of Representatives of the BiH Parliamentary Assembly submitted an opinion on the request for review of the constitutionality of the Law on Salaries. The House of Peoples submitted its respective reply to the request on 23 January 2008.

4. By letter of 23 May 2006, the High Representative for Bosnia and Herzegovina (“the High Representative”) informed the Constitutional Court that the High Representative, considering the established practice, was willing to assist the Constitutional Court *as amicus curiae* in this case, for which reason the Constitutional Court, on 31 May 2006, sought from the High Representative to submit its observations as *amicus curiae* within the 20-day time limit. The High Representative submitted its observations as *amicus curiae* on 26 June 2006.

III. Request

a) Statements from the request

5. In their request, the applicants requested the Constitutional Court to review the constitutionality of several provisions of the Law on Salaries and the Law on Civil Service, as well as to review the constitutionality of the Law on Salaries as a whole and declare it unconstitutional. With regards thereto, the applicants stated that the Law on Salaries was unconstitutional for several reasons:

a) First, the applicants hold that this Law is inconsistent with the principle of independence of the Constitutional Court, which is stipulated by Article I(2) read in conjunction with Article VI of the Constitution of Bosnia and Herzegovina. To that end, the applicants allege that the Constitutional Court has a normative jurisdiction to independently decide on the salaries of the judges and other employees within the Constitutional Court, emphasizing that this constitutional principle of independence itself is the source of autonomy of the Constitutional Court and that it enables it to issue fundamental and vital norms on a certain matter.

b) Moreover, the applicants hold that the issue of salaries of the judges of the Constitutional Court cannot be governed by the so-called ordinary law, since, as they allege, the Constitution of Bosnia and Herzegovina does not provide the basis for adopting laws, regulations or general acts concerning the work of the Constitutional Court and its role laid down in the Constitution. The applicants allege that Article IV(4)(a) of the Constitution of Bosnia and Herzegovina determines the responsibility of the Parliamentary Assembly for enacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution. However, the applicants state that no single provision of the Constitution of Bosnia and Herzegovina provides for *expressis verbis* possibility of enacting laws governing the issues of work, role and other issues relating to the Constitutional Court.

c) The applicants hold that the issues concerning the Constitutional Court cannot be regulated by the law concerning the so-called ordinary courts, given that the Constitutional Court is the institution founded for the creation, stability and harmony of democratic existence, for which reason its status has to be separate from the status and jurisdictions of ordinary courts.

d) Finally, the applicants state that the BIH Parliamentary Assembly does not have the responsibility, under the Constitution of Bosnia and Herzegovina, to decide on the salaries of judges by applying the so-called ordinary law, because for that to occur it would be necessary to amend the existing Constitution of Bosnia and Herzegovina in the amendment procedure whereby these issues would be provided for in the Constitution or possibly the Parliamentary Assembly would be given the responsibility for enacting constitutional organic law which would, under the Constitution, elaborate constitutional principles and closely specify organization and functioning of the Constitutional Court.

6. In view of the aforementioned, the applicants consider that the challenged legal provisions are inconsistent with Article I(2), IV(4)(a) and VI(2)(b) of the Constitution of Bosnia and Herzegovina, and propose that the Constitutional Court should take a decision finding this inconsistency, quashing the challenged provisions which shall cease to be in force the day following the publication of the decision within the meaning of Article 63(2) and (3) of the Rules of the Constitutional Court.

7. In addition, the applicants challenged constitutionality of Article 4 of the Law on Civil Service in the Institutions of Bosnia and Herzegovina (*Official Gazette of BiH* no. 19/02, 35/03, 4/04, 17/04, 17/04, 26/04 and 37/04), invoking the same provisions of the Constitution of Bosnia and Herzegovina referred to in paragraph 7 *supra* of this Decision but failed to give any reasoning as to these allegations.

b) Reply to the request

8. In reply to the request submitted to the Constitutional Court, the House of Representatives of the BIH Parliamentary Assembly allege that the Constitutional and Legal Commission of the House of Representatives considered the request for review of the constitutionality of the Law on Salaries and concluded that the Law on Salaries had been passed on a temporary basis by the High Representative on 9 December 2005, that the House of Representatives had adopted it on 15 March 2007 and the House of Peoples had adopted it on 30 March 2007. As the House of Representatives adopted the Law, the Constitutional and Legal Commission alleged that it “remains supportive of the adopted Law”.

c) Opinion of *amicus curiae*

9. On 27 June 2006, the High Representative, as *amicus curiae*, submitted comments of the High Representative's Legal Department to this issue. *Amicus curiae* states that the allegations of the applicants that the Parliamentary Assembly is not entitled to adopt a law concerning the Constitutional Court are unfounded. To that end, *amicus curiae* states that it is non disputable that the Constitutional Court is an institution of Bosnia and Herzegovina, and that the Parliamentary Assembly's power to approve budget includes the power to approve a budget for any such institution, including “those enjoying certain degree of independence like the Constitutional Court”. *Amicus curiae* states that the principle of independence cannot be interpreted as preventing the Parliamentary Assembly from adopting legislation regulating the salaries of judges and other employees of the Constitutional Court. In that regard, it states that the question raised in the case at

hand does not pertain to whether the Constitution of Bosnia and Herzegovina requires the principle of independence to be complied with in Bosnia and Herzegovina but to “whether this principle shall be interpreted as prohibiting the Parliamentary Assembly from adopting legislation regulating the salaries of the judiciary including those of the members of the Constitutional Court”.

10. As regards the question whether the Constitutional Court may be subject to application of the “ordinary law”, *amicus curiae* states that interpretation offered by the applicants would “necessarily result in the Constitutional Court functioning outside the general legal regime of Bosnia and Herzegovina”, stating that it would set a precedent in a democratic regime and that it finds no grounds in the BiH Constitution. Further, *amicus curiae* states that the Constitution of BiH does not entitle the Constitutional Court to regulate or otherwise determine the salaries of its judges and/or employees, and that every interpretation of the Constitution of BiH that would entitle the Constitutional Court to adopt normative rules regulating salaries of its judges and employees would be directly incompatible with Article I(2) of the Constitution of Bosnia and Herzegovina. In fact, such an interpretation, in the opinion of *amicus curiae*, would grant the capacity to non-elected public officials to adopt normative rules having direct impact on public resources which is irreconcilable with a democratic system.

11. *Amicus curiae* further states that the entitlement of the Constitutional Court to adopt Rules of Court under Article VI(2)(b) of the Constitution cannot be interpreted as allowing the Constitutional Court to regulate the salaries of its own judges and employees. Rather this provision strictly relates to matter of procedure before the Constitutional Court. Also, *amicus curiae* holds that the term *the rules of court* must be interpreted restrictively and not broadly – as encompassing the capacity for the Constitutional Court to regulate salaries of its judges and employees.

12. *Amicus curiae* also submits that the Constitution of BiH does not foresee the possibility for the Parliamentary Assembly to adopt a constitutional law which requires a qualified majority, invoking the provisions of Article IV(3)(c) of the Constitution of BiH regulating that the Parliamentary Assembly adopts all decisions in both houses by majority votes of those present and voting. If the Constitutional Court were to consider that a constitutional law can be adopted and that the salaries of judges and employees of the Constitutional Court can be regulated by such a law, *amicus curiae* respectfully submits that *as a final authority in theatre regarding interpretation of the Agreement on Civilian Implementation of the Peace Agreement pursuant to Article V of Annex 10 of General Framework Agreement the High Representative is entitled to adopt such law.*

13. Finally, *amicus curiae* submits that none of the provisions of the challenged Law on Salaries in this case are incompatible with the Constitution of BiH.

IV. Relevant Law

14. The **Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* No. 90/05), so far as relevant, reads:

Article 2

Basic Monthly Salary of Judges of the Constitutional Court of Bosnia and Herzegovina

The Basic Monthly Salary shall be as follows:

(a) *For Judges of the Constitutional Court of Bosnia and Herzegovina: 4.200 KM.*

(b) *For the President of the Constitutional Court of Bosnia and Herzegovina: 4.800 KM.*

Article 8(5)

Annual Paid Leave and Leave for Religious Purposes

(...)

*The Annual Paid Leave for each Judge and Prosecutor shall be regulated in an Annual Leave Plan to be determined by the Court President or Chief Prosecutor on an annual basis in accordance with the internal regulations for the operation of the Constitutional Court of Bosnia and Herzegovina, **the Court of Bosnia and Herzegovina** and the Prosecutor's Office of Bosnia and Herzegovina respectively.*

Article 14

Travel Costs

Regulations shall be promulgated by the High Judicial and Prosecutorial Council in cooperation with the Ministry of Justice of Bosnia and Herzegovina in respect of the circumstances in which a Judge or Prosecutor shall be entitled to compensation for costs incurred for travel undertaken in the course of carrying out their official duties (per diem,

*transport and accommodation expenses) and the amount of such compensation. **For the Constitutional Court of Bosnia and Herzegovina such regulations shall be promulgated by the Constitutional Court of Bosnia and Herzegovina in cooperation with the Ministry of Justice of Bosnia and Herzegovina.***

Article 15

Compensation for Educational Expenses

*Judges and Prosecutors are entitled to compensation for educational expenses in accordance with the internal regulations for the operation of **the Constitutional Court of Bosnia and Herzegovina**, the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina respectively.*

Article 17

Basic Monthly Salary

- 1. The Basic Monthly Salary of the following professional staff shall be:*
 - a) **For the General Secretary of the Constitutional Court of Bosnia and Herzegovina and the Director of the Secretariat of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina: 3.800 KM.***
 - b) **For the Registrar of the Constitutional Court of Bosnia Herzegovina, the Registrar of the Court of Bosnia and Herzegovina and the Deputy Director of the Secretariat of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina: 3.400 KM.***
 - c) **For the General Secretary of the Court of Bosnia and Herzegovina and the Secretary of the Prosecutor's Office of Bosnia and Herzegovina and the Disciplinary Counsel of the Secretariat of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina: 3,000 KM.***
 - d) **For Heads of Departments of the Constitutional Court of Bosnia and Herzegovina: 2.800 KM.***

e) *For Senior Legal Advisors of the Constitutional Court of Bosnia and Herzegovina and Heads of Department and Senior Advisors of the Secretariat of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina: from 2.400 to 2.600 KM.*

f) *For Legal Advisors of the Constitutional Court of Bosnia Herzegovina, Assistant General Secretary of the Court of Bosnia and Herzegovina, Legal Advisors of the Court of Bosnia Herzegovina and Senior Lawyers and Deputy Heads of Department of the High Judicial and Prosecutorial Council of Bosnia Herzegovina: from 1,900 to 2,400 KM.*

g) *For Judicial Associates of the Constitutional Court of Bosnia Herzegovina, Judicial Associates and Secretaries of Departments of the Court of Bosnia Herzegovina, Prosecutorial Associates/Assistants of the Prosecutor's Office of Bosnia Herzegovina and Junior Lawyers/Professional Staff of the Secretariat of the High Judicial and Prosecutorial Council of Bosnia Herzegovina: from 1,200 to 1,800 KM.*

Article 19

Repealing of Provisions

The provisions contained in other laws, regulations or decisions at the level of Bosnia and Herzegovina that conflict with this Law shall cease to have effect on the day of the entry into force of this Law.

15. **The Law on Civil Service in the Institutions of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* No. 19/02, 35/03, 4/04, 17/04, 26/04 and 37/04), so far as relevant, reads:

Article 4

Exceptions in Application

1. *Members of the Parliamentary Assembly of Bosnia and Herzegovina (hereinafter the Parliamentary Assembly), Members of the Presidency of Bosnia and Herzegovina (hereinafter the Presidency), the Council of Ministers (hereinafter the Council of Ministers), Ministers, Deputy Ministers, Members of the Standing Committee on Military Matters, **Judges of the Constitutional Court of Bosnia and Herzegovina** (hereinafter the Constitutional Court), Judges of the Court of Bosnia and Herzegovina (hereinafter the*

Court of Bosnia and Herzegovina), Governors and Vice-Governors of the Central Bank of Bosnia and Herzegovina (hereinafter the Central Bank), the Auditor-General and the Deputy Auditors-Generals of the Supreme Audit Institution of Bosnia and Herzegovina (hereinafter the Supreme Audit Institution) are not civil servants and their legal status shall be regulated by law.

2. *Secretaries of two Chambers of the Parliamentary Assembly of Bosnia and Herzegovina and Secretary of the Common Services of the Parliamentary Assembly of Bosnia and Herzegovina are not civil servants.*

3. *Individuals employed as Advisors to the Members of the Parliamentary Assembly, the Members of the Presidency, the Chair of the Council of Ministers, the Ministers and the Deputy Ministers, the Governor and Vice Governors of the Central Bank are not civil servants*

16. **Article I(2) of the Constitution of Bosnia and Herzegovina:**

Democratic Principles

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

Article VI

Constitutional Court

1. Composition

The Constitutional Court of Bosnia and Herzegovina shall have nine members.

a. Four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska. The remaining three members shall be selected by the President of the European Court of Human Rights after consultation with the Presidency.

b. Judges shall be distinguished jurists of high moral standing. Any eligible voter so qualified may serve as a judge of the Constitutional Court. The judges selected by the President of the European Court of Human Rights shall not be citizens of Bosnia and Herzegovina or of any neighboring state.

c. The term of judges initially appointed shall be five years, unless they resign or are removed for cause by consensus of the other judges. Judges initially appointed shall not be eligible for reappointment. Judges subsequently appointed shall serve until age 70, unless they resign or are removed for cause by consensus of the other judges.

d. For appointments made more than five years after the initial appointment of judges, the Parliamentary Assembly may provide by law for a different method of selection of the three judges selected by the President of the European Court of Human Rights.

2. Procedures

a. A majority of all members of the Court shall constitute a quorum.

b. The Court shall adopt its own rules of court by a majority of all members. It shall hold public proceedings and shall issue reasons for its decisions, which shall be published.

3. Jurisdiction

The Constitutional Court shall uphold this Constitution.

a. 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 neighboring 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.

b. The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.

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.

4. Decisions

Decisions of the Constitutional Court shall be final and binding

Article IX(2) of the Constitution of Bosnia and Herzegovina

Compensation for persons holding office in the institutions of Bosnia and Herzegovina may not be diminished during an officeholder's tenure.

V. Admissibility

17. The requests for review of constitutionality were signed by Messrs. Ivo Miro Jović and Sulejman Tihčić, members of the Presidency of Bosnia and Herzegovina, which implies that the requests were lodged by authorized persons as set forth in Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. In addition, the requests are related to the review of constitutionality of the challenged provisions of the laws in question, in which case the Constitutional Court is competent to take decisions, as referred to in Article VI(3)(a) line 2 of the Constitution of Bosnia and Herzegovina.

18. Taking into account the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of Constitutional Court, the Constitutional Court has established that the requests are admissible as they were filed by authorized persons and as there is not a single formal reason under Article 17(1) of the Rules of the Constitutional Court, which would render the requests inadmissible.

VI. Merits

19. The applicants allege that the challenged provisions of the Laws in question are inconsistent with the provisions of Articles I(2), IV(4)(a) and VI(2)(b) of the Constitution of Bosnia and Herzegovina.

20. The Constitutional Court, however, notes that the applicants by stating that “the Constitution of Bosnia and Herzegovina does not provide the basis for adopting laws, regulations and general acts relating to the work of the Constitutional Court and its role laid down by that Constitution”, and for it to be possible, “it is necessary to amend the existing Constitution of Bosnia and Herzegovina in the amendment procedure” are challenging the constitutionality of the Law on Salaries in its entirety.

21. The applicants allege that the challenged provisions of the Law in question are inconsistent with Articles I(2), IV(4)(a) and VI(2)(b) of the Constitution of Bosnia and Herzegovina. However, Constitutional Court notes that, although it is not explicitly alleged in the requests, the essence of the applicants’ complaints relates to the reduction of salaries of the Constitutional Court’s judges during their tenure. Being mindful of the general requirement of respect for the rule of law principle enunciated in Article I(2) of the Constitution of Bosnia and Herzegovina, the Constitutional Court must analyze the issues put before it in the light of Article IX(2) of the Constitution of Bosnia and Herzegovina, which, in its view, is the appropriate authority in the instant case. In so doing, the Constitutional Court stresses that it is the master of the characterization to be given in law to the facts of the case, and that it is not bound by the characterization given by the applicants (see, among other authorities, *Guerra and Others vs. Italy*, Judgment of 19 February 1998, paragraph 44). Having this in mind, the Constitutional Court finds that the applicants’ allegations should be examined separately also in relation to the inconsistency of the Law on Salaries in respect to Articles I(2) and IX(2) of the Constitution of Bosnia and Herzegovina.

22. The principle of the rule of law enunciated in Article I(2) of the Constitution of Bosnia and Herzegovina implies that the State of Bosnia and Herzegovina operates in compliance with the applicable laws and, primarily, in compliance with the Constitution of Bosnia and Herzegovina. This obligation equally relates to the legislative, executive and judicial powers of Bosnia and Herzegovina. This means that the internal organization of Bosnia and Herzegovina is based, *inter alia*, on the principle of separation of powers, which is essential for the concept of the rule of law, with an emphasis on the independence of courts before which the principle of political authority control is effectuated through law. According to the Constitution of Bosnia and Herzegovina, the BiH Parliamentary Assembly is a legislative body of Bosnia and Herzegovina and, based on its powers under Article IV(4) of the Constitution of Bosnia and Herzegovina, it determines legal framework for the activities of other state bodies, which is a traditional function of Parliament as a

legislative body. Although it has a rather complex constitutional function, the Presidency of BiH is an executive branch. Though the Constitution of Bosnia and Herzegovina does not provide for judicial branch at the State level, as a third branch, it provides for the existence of the Constitutional Court as a separate and specific State institution performing its constitutional-judicial function. After a thorough reading of the constitutional powers related to the aforementioned bodies, as stipulated by the Constitution of Bosnia and Herzegovina, it clearly follows that there are the mechanisms of mutual control and balance of powers, which is the core of the principle of separation of powers, as the requirement of the rule of law.

23. In this respect, the Constitutional Court notes that the principle of independence of the Constitutional Court, though it is not explicitly enunciated in the Constitution of Bosnia and Herzegovina, represents a general principle which must be complied with even when not explicitly enunciated in the constitutional text, since, as stated above, it is inseparable from the principle of the rule of law laid down in Article I(2) of the Constitution of Bosnia and Herzegovina. However, the independence of judiciary, as its inseparable part, and, in particular, the principle of separation of powers, by no means imply that the legislator cannot regulate the issues important for functioning of the State institutions, even when relating to the Constitutional Court, though only as provided for by and in accordance with the Constitution of Bosnia and Herzegovina.

24. The Constitution of Bosnia and Herzegovina does not explicitly provide that the issues which are essential for the work of the Constitutional Court shall be regulated by a separate law. The only reference point related to the legislative solutions of the issues essential for the Constitutional Court are provided for in: (1) Article VI(1)(d) of the Constitution of BiH, which stipulates that for appointments made more than five years after the initial appointment of judges, the Parliamentary Assembly may provide by law for *a different method of selection of the three judges selected by the President of the European Court of Human Rights*; and (2) Article VI(2)(b) of the Constitution of BiH, which stipulates that the Court shall adopt its own *rules of court* by a majority of all members. The fact that the framer of the Constitution has provided for the rules of court as a constitutional category leads to the conclusion that the allegations of *amicus curiae* that *there is nothing in the Constitution that justifies any significant difference in interpretation between rules of procedures adopted by the Court and those adopted by the Presidency and the Parliamentary Assembly*. Quite the contrary, the fact that under Article VI(2)(b) of the Constitution of Bosnia and Herzegovina the authorization for adoption of own rules of procedure has been placed within the exclusive jurisdiction of the Constitutional Court, shows the intent of the framer

of the Constitution to secure the independence of the Constitutional Court by way of enabling the court to prescribe its own rules of procedure and thereby to prevent any interference with the exercise of its assigned responsibilities, which also indicates that the Constitutional Court has a special position according to the Constitution of Bosnia and Herzegovina.

25. In addition, Article IV(4)(b) of the Constitution of Bosnia and Herzegovina provides that the Parliamentary Assembly “shall decide upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina”, which includes the Constitutional Court, as well. In the present case, the applicants hold that a lack of an explicit constitutional provision means barring the state legislature from defining and stipulating any important issues concerning the Constitutional Court, including the salaries and other remunerations of the judges and employees of the Constitutional Court, by law, as that infringes upon the independence and autonomy of the Constitutional Court.

26. In this respect, the Constitutional Court underlines that the principle of the rule of law and the independence of judiciary, as its inseparable part, and, in particular, the principle of the separation of powers, by no means imply that the legislator cannot regulate the issues important for functioning of the state institutions, even when relating to the Constitutional Court, by-laws and regulations, as noted by *amicus curiae*. An opposite interpretation would be contrary to the rule of law, which also entails an exclusion of wide margin of appreciation by the state authorities, and equality before the law for all citizens, and, consequently, it would be contrary to the principle of separation of powers, which entails the existence of the mechanisms of mutual control over the authorities and a balance of powers. Therefore, the issues important for the existence and functioning of the Constitutional Court must be regulated so as to be in accordance with the Constitution of Bosnia and Herzegovina and so as to preserve its independence and autonomy.

27. The Constitutional Court holds that the independence of the Constitutional Court constitutes a principle which must be secured by the legislator, taking account of the special position and role of the Constitutional Court in the Constitution of Bosnia and Herzegovina. The Constitutional Court finds it necessary to emphasize that this implies full financial independence reflected in autonomous planning and proposal of court budget, as well as in autonomous allocation of approved budget, which amount must be subject to appropriate control of a competent authority.

28. The Constitutional Court of Bosnia and Herzegovina, beyond its specific features, is associated with the general institution of constitutional justice. In Europe, the latter was first

developed in Federal States - in Germany and Austria – particularly in relation to the distribution of competencies between the central State and federal entities. This issue perceived as eminently political for a long time and as such inaccessible to the judicial settlement, acquired an increasingly legal dimension by the end of 19th and at the beginning of 20th century, justifying in this way the assignment of this particularly contentious matter to a special court. It became possible from then on to extend the notion and to assign to a Constitutional Court the competence to sanction any infringement of the Constitution and to entrust it in particular with the control of the constitutionality of laws. These federal origins and the contribution of Mr. Hans Kelsen to the concept of constitutional justice characterize constitutional courts even today. They explain the very special status of constitutional courts, based on their special functions. That status is that of an independent and autonomous body which, even though entrusted with jurisdictional functions, is placed outside the judicial mechanism and hierarchy.

29. The Constitution of Bosnia and Herzegovina has been inspired by that idea. It establishes the Presidency, the Parliament, the Council of Ministers, the Central Bank and the Constitutional Court as constitutional bodies. It confers to the latter the general task to “uphold the Constitution” (Article VI(3)) as well as wide competencies of control of constitutionality. These functions which are exercised vis-à-vis the other constitutional bodies, particularly vis-à-vis the legislator, and which are reflected in the final and binding decisions with regard to all public authorities, clearly imply solid guarantees of independence and autonomy of Constitutional Court. It is therefore that in this way the Constitution of Bosnia and Herzegovina prescribes the election of judges by Parliament and provides for the adoption by the Constitutional Court of its own rules (Article VI(2)(b)). Although it does not go further into specifying those guarantees, it is nonetheless clear that in this regard it refers to the European tradition and aims at rendering the Constitutional Court fully independent. This conclusion asserts itself very particularly in the institutional context of Bosnia and Herzegovina, marked by the predominance of the Entities and the relative weakness of the central State. The central institutions of Bosnia and Herzegovina and the integrity of its Constitution would be jeopardized without a strong and independent Constitutional Court.

30. The independence of the Constitutional Court implies that it is governed by specific rules which are also imposed on the legislator; and these rules should therefore have a constitutional value. In the absence of constitutional laws, the Constitutional Court must be able to decide independently on its internal organization and functioning. The Parliamentary Assembly has the power to establish the budget of the institutions of Bosnia and Herzegovina, but it can do this only

in compliance with the Constitution of Bosnia and Herzegovina. The Constitution of Bosnia and Herzegovina obliges the legislator not to infringe upon the independence of the Constitutional Court. The fact that the challenged law was adopted as such shows the extent to which the Constitutional Court needs to be protected from pressures which may be exercised by other public authorities. As stated above, the respect for the financial independence of the Constitutional Court requires as a minimum that the Constitutional Court proposes its own budget and the manner of use of its own budget to the Parliamentary Assembly to adopt it.

31. In view of the aforesaid, the Constitutional Court holds that the challenged Law on Salaries is in violation of Article VI(2)(b) and VI(3) of the Constitution of Bosnia and Herzegovina.

32. Furthermore, Article IV(4)(a) of the Constitution of Bosnia and Herzegovina provides that the Parliamentary Assembly shall have the responsibility of “approving the budget for the institutions of Bosnia and Herzegovina.” This clearly includes the right of the Parliamentary Assembly to approve the budget for the Constitutional Court of Bosnia and Herzegovina as well.

33. However, while approving the budget for the Constitutional Court, the Parliamentary Assembly, through the challenged Law on Salaries, reduced the salaries of the judges of the Constitutional Court. Therefore, in order to observe the principle of the rule of law, the Parliamentary Assembly was obliged to consider the constitutional provision set forth in Article IX(2) of the Constitution of Bosnia and Herzegovina which, in an imperative form, reads that “compensation for persons holding office in the institutions of Bosnia and Herzegovina may not be reduced during an office holder’s tenure”.

34. It is indisputable that the Constitutional Court is an institution at the level of Bosnia and Herzegovina and that the judges of the Constitutional Court are “persons holding office in the institutions of Bosnia and Herzegovina”.

35. The Constitutional Court holds that economic situation of Bosnia and Herzegovina may indeed require a salary adjustment for all, including the salaries for the persons referred to in Article IX(2) of the Constitution of Bosnia and Herzegovina. However, such legislative action cannot be implemented without appropriate amendments to the Constitution of Bosnia and Herzegovina, since the explicit provision of Article IX(2) of the Constitution of Bosnia and Herzegovina prevents the legislator either from reducing or from allowing the possibility of reducing the salaries for the persons holding offices within the institutions of Bosnia and Herzegovina.

36. In view of the above, the Constitutional Court infers that the Law on Salaries is inconsistent with Article I(2) read in conjunction with Article IX(2) of the Constitution of Bosnia and Herzegovina in its entirety.

Other allegations

37. In view of the findings relating to Articles VI(2)(b) and VI(3) and Article I(2) read in conjunction with Article IX(2) of the Constitution of Bosnia and Herzegovina, the Constitutional Court considers it unnecessary to examine other allegations regarding the inconsistencies of certain provisions of the Law on Salaries in relation to Articles IV(4)(a) of the Constitution of Bosnia and Herzegovina.

38. In addition, the Constitutional Court finds that a part of the request challenging constitutionality of Article 4 of the Law on Civil Service in the Institutions of Bosnia and Herzegovina is ill-founded. Indeed, the applicants completely failed to substantiate their allegations, and the Constitutional Court could not find anything that would indicate unconstitutionality of the particular legal provision which provides, *inter alia*, that judges of the Constitutional Court are not civil servants. Indeed, such provision is in no way inconsistent with the Constitution of Bosnia and Herzegovina which certainly does not provide the judges of the Constitutional Court of BiH with the status of civil servants.

VII. Conclusion

39. Pursuant to Article 61(1),(2) and (3) and Article 63(2) and (3) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this decision.

40. Pursuant to Article VI(4) of the Constitution of Bosnia and Herzegovina, the decisions of Constitutional Court shall be final and binding.

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina