The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Mirsad Ćeman, President,

Mr. Mato Tadić, Vice-President,

Mr. Zlatko M. Knežević, Vice-President,

Ms. Margarita Tsatsa-Nikolovska, Vice-President,

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić,

Mr. Giovanni Grasso

Having deliberated on the request filed by **30 delegates of the National Assembly of the Republika Srpska**, in the Case no. ***U 18/16*****,** at its session held on 6 July 2017 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request filed by **30 delegates of the National Assembly of the Republika Srpska** for the review of the constitutionality of the Law Declaring March 1 as the Independence Day of the Republic of Bosnia and Herzegovina (*Official Gazette of the Republic of Bosnia and Herzegovina*, 9/95) is hereby dismissed as ill-founded.

It is hereby established that the Law Declaring March 1 as the Independence Day of the Republic of Bosnia and Herzegovina (*Official Gazette of the Republic of Bosnia and Herzegovina*, 9/95) is consistent with the part of the Preamble of the Constitution of Bosnia and Herzegovina reading: *Bosniacs, Croats and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzegovina*, Articles I(2) and II(4) of the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1.1 and Article 2(a), (b), (c), (d) and (e) of the International Convention on the Elimination of All Forms of Racial Discrimination.

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 12 October 2016, thirty delegates of the National Assembly of the Republika Srpska ("the applicants") filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for the review of the constitutionality of the Law Declaring March 1 as the Independence Day of the Republic of Bosnia and Herzegovina (*Official Gazette of the Republic of Bosnia and Herzegovina*, 9/95; "the Law").

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court of Bosnia and Herzegovina, the House of Representatives and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina ("the House of Representatives and the House of Peoples of the BiH Parliamentary Assembly") were requested on 19 October 2016 to submit their replies to the request.

3. The House of Representatives and the House of Peoples submitted their replies on 19 January 2017 and on 18 November 2016 respectively.

4. Upon the proposal of the President Mirsad Ćeman, and pursuant to Article 90(1)(b) of the Rules of the Constitutional Court, it was decided that he would not take part in the work and decision-making in this case, as he had taken part in the passing of the law, which review of compatibility was sought.

III. Request

a) Allegations stated in the Request

5. The applicants hold that the Law is in contravention of the Constitution of Bosnia and Herzegovina and, in particular, in contravention of the tenth paragraph of its Preamble, reading: *Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzegovina*, and Articles I(2) and II(4) of the Constitution of Bosnia and Herzegovina. In addition, the applicants state that the Law is in contravention of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), Article 1 of Protocol No. 12 to the European Convention and Article 1.1 and Article 2(1) (a), (b), (c), (d) and (e) of the International Convention on the Elimination of All Forms of Racial Discrimination ("the International Convention").

6. It was indicated that the decision of the Constitutional Court in the case no. *U 5/98*, based on the cited paragraph of the Preamble of the Constitution of Bosnia and Herzegovina, established the constituent status of Serbs, Bosniacs and Croats throughout the territory of Bosnia and Herzegovina, namely in both of its Entities, as well as the obligation of the Entities to create conditions in order for that status to be exercised in full capacity.

7. In addition, the applicants underlined that the aim of the General Framework Agreement for Peace in Bosnia and Herzegovina, as well as that of the Constitution of Bosnia and Herzegovina, is to prohibit discrimination. In this connection, the applicants stated that the application of the rights and freedoms referred to in Annex I to the Constitution of Bosnia and Herzegovina, as stated in Article II(4) of the Constitution of Bosnia and Herzegovina, should be secured to all persons without discrimination. The aforementioned provisions, as indicated by the applicants, are the expression of the circumstances in which the General Framework Agreement for Peace in Bosnia and Herzegovina came about, namely, and the intention to additionally secure and protect a wide scope of rights of all persons on the territory of Bosnia and Herzegovina. As further indicated, such a constitutional solution is unique in the world as the international instruments listed in Annex I to the Constitution of Bosnia and Herzegovina make an integral part of the Constitution of Bosnia and Herzegovina and, thus, have priority over all other law, meaning that these constitutional provisions have priority over law of the State and Entities, including all the laws.

8. The applicants pointed out that in addition to the obligation to respect the constitutional norms on the constituent status of Serbs, Bosniacs and Croats in the entire territory of Bosnia and Herzegovina, i.e. in both of its Entities, and the obligation of the Entities to create conditions in order for the constituent status to be exercised in full capacity, and the constitutional principle of prohibition of discrimination, Bosnia and Herzegovina established March 1 as the Independence Day of Bosnia and Herzegovina. It was also stated that it is a well-known fact that the Independence Day of Bosnia and Herzegovina is marked on March 1 every year, the date when Bosnia and Herzegovina declared independence from the Socialist Federal Republic of Yugoslavia, which, according to the applicants, was a classic form of secession. The applicants stated that it is a well-known fact that the referendum for the independence of Bosnia and Herzegovina was held on 29 February and 1 March 1992, when the independence, as alleged, was supported mainly by Bosniacs and Croats, and boycotted by Serbs. Moreover, it was indicated that a Decree to Proclaim the Law Declaring March 1 as the Independence Day of Bosnia and Herzegovina and the national holiday was signed by the President of the Presidency of the Republic of Bosnia and Herzegovina, Alija Izetbegović, on 6 March 1995, during the tragic conflict in Bosnia and Herzegovina. Previously, as

stated, the Assembly of the Republic of Bosnia and Herzegovina had passed the Law on 28 February 1995. It was further mentioned that based on that act, nowadays the Independence Day is celebrated only in one part of the territory of Bosnia and Herzegovina, namely the Federation of Bosnia and Herzegovina. In the opinion of the applicants, it clearly follows from the aforesaid that the intention behind the establishment of March 1 as the Independence Day of Bosnia and Herzegovina was to exclude absolutely one constituent people, *i.e.* the Serb people. As further indicated, the prescription of a holiday of the Entities symbolizing only one constituent people, or two of the three constituent peoples in Bosnia and Herzegovina, in the applicants' opinion constitutes the measures directed at distinction, exclusion, restriction or giving preference based on national or ethnic origin. It was also stated that the prescription of the mentioned holiday was aimed at disrupting or compromising the recognition, enjoyment or exercise, under equal conditions, of human rights and fundamental freedoms in all areas of life.

9. Despite the obligations arising from Article II(1) and II(6) of the Constitution of Bosnia and Herzegovina for all the participants in public life and all public authorities, irrespective of the level of the government, to refrain from, not to encourage, not to defend or support discrimination, to take efficient measures at the national or local level to amend, rescind or nullify any laws and regulations containing discriminatory provisions, to prohibit any discriminatory actions, in the applicants' opinion, the competent authorities of Bosnia and Herzegovina did not take adequate measures to fulfil the obligations committed to under Article II(1), II(4) and II(6) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1.1, Article 2(1) (a), (b), (c), (d) and (e) of the International Convention referred to in Annex I to the Constitution of Bosnia and Herzegovina, as well as the European Convention.

10. The applicants concluded that it is quite clear that March 1 is celebrated as a date related exclusively to two peoples, namely the Bosniac people and Croat people, which places the Serb people in a subordinated and discriminatory position. Regarding the Constitutional Court of Bosnia and Herzegovina as a guardian of the Constitution and upholder of the principle of the constituent status of all three peoples throughout the territory of Bosnia and Herzegovina, protecting equally the interests of all peoples, including Serbs, the applicants requested that the Constitutional Court established that the Law was in contravention of the cited provisions of the Constitution of BiH, the European Convention and the International Convention.

b) Reply to the request

11. In their reply the Constitutional and Legal Commission of the House of Peoples stated that at its session held on 17 November 2016 it considered the request of the Constitutional Court for opinion on the mentioned request for the review of constitutionality. On that occasion, the Constitutional and Legal Commission noted that the Law had been passed on 28 February 1995 by the Assembly of the Republic of Bosnia and Herzegovina and that the Decree to Proclaim the Law had been signed by the President of the Presidency of the Republic of Bosnia and Herzegovina, Alija Izetbegović, on 6 March 1995, precisely three years after the verification of the results of the referendum determining the status of Bosnia and Herzegovina by the Republic Election Commission of the Socialist Republic of Bosnia and Herzegovina. It was also noted that the Law had been published in the *Official Gazette of the Republic of Bosnia and Herzegovina*, 9/95. It was further noted that the provision of Annex II(2) of the Constitution of BiH prescribed that *all laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in force to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina*. It was stated that the Constitutional and Legal Commission of the House of Peoples, following the discussion, decided unanimously to inform the Constitutional Court of the aforementioned facts, which would decide, in accordance with its jurisdiction, on the compatibility of the Law with the Constitution of BiH.

12. In their reply the Constitutional and Legal Commission of the House of Representatives stated that the Commission had considered the relevant request for the review of constitutionality at the session held on 17 January 2017 and, following the discussion, concluded with four votes “in favour” and three votes “against” and without abstention, that it was unable to reach a consensus, or to take a unanimous position on the request for the review of the constitutionality of the Law, and that the Constitutional Court would make a final decision in accordance with the Constitution of BiH and its Rules.

IV. Relevant Law

13. The **Law Declaring March 1 as the Independence Day of the Republic of Bosnia and Herzegovina** (*Official Gazette of the Republic of Bosnia and Herzegovina*, 9/95 of 30 March 1995), as relevant, reads:

Article 1

It is hereby declared that March 1 shall be Independence Day of the Republic of Bosnia and Herzegovina.

Article 2

Independence Day of the Republic of Bosnia and Herzegovina shall be a national holiday.

Article 3

State authorities, companies and other legal persons shall not work on Independence Day.

State authorities, companies and other legal entities that are obliged to work on Independence Day as well as the scope of their work shall be determined by the Government of the Republic of Bosnia and Herzegovina.

Article 4

This Law shall enter into force on the date of its publication in the Official Gazette of the Republic of Bosnia and Herzegovina.

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

Preamble

[...]

Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows:

Article 1

Bosnia and Herzegovina

1. Continuation

The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina," shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders. It shall remain a Member State of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organizations within the United Nations system and other international organizations.

2. Democratic Principles

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

Article II

Human Rights and Fundamental Freedoms

1. Human Rights

Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina as provided for in Annex 6 to the General Framework Agreement.

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.

Article II(4)

Non-Discrimination

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

Article VI(3)

Jurisdiction

The Constitutional Court shall uphold this Constitution.

Annex II

Transitional Arrangements

2. Continuation of Laws

All laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent

not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina.

15. **Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,** reads:

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

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

Article 1

General prohibition of discrimination

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

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

17. The **International Convention on the Elimination of All Forms of Racial Discrimination** (adopted by the United Nations General Assembly at its plenary session held on 21 December 1965), as relevant, reads:

Article 1.1

In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Article 2(1) (a), (b), (c), (d) and (e)

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

V. Admissibility

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

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

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

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

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

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

19. The Constitutional Court observes that the applicants requested the Constitutional Court to take a decision on the constitutionality of the Law. Taking into account that the National Assembly of the Republika Srpska consists of 83 delegates and that the respective request was filed by 30 delegates, the Constitutional Court concludes that the request was filed by an authorised subject referred to in Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

20. In view of the above and in accordance with the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Constitutional Court's Rules, the Constitutional Court established that the request in question is admissible, as it was filed by an authorised subject, and that there is no any formal reason under Article 19 of the Rules of the Constitutional Court rendering the request inadmissible.

VI. Merits

21. The applicants held that the challenged Law is incompatible with the Constitution of Bosnia and Herzegovina and, notably, with the part of the Preamble reading as follows: *Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzegovina*, and Articles I(2) and II(4) of the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention, Article 1 of Protocol No. 12 to the European Convention and Article 1.1. and Article 2(1)(a), (b), (c), (d) and (e) of the International Convention.

22. The reason for the foregoing being the fact that the referendum on the independence of Bosnia and Herzegovina, which had been held on 29 February and 1 March 1992, was supported mainly by Bosniacs and Croats, while Serbs boycotted the referendum. Taking into account that 1 March as the Independence Day is celebrated only in one part of the territory of Bosnia and Herzegovina, *i.e.* the Federation of Bosnia and Herzegovina and that 1 March is celebrated as a day related exclusively to two peoples, the Bosniac and Croat people, in the opinion of the applicants,

the declaration of March 1 as the Independence Day placed the Serb people in a subordinated and discriminatory position compared to two other constituent peoples.

23. Furthermore, the applicants alleged that the prescription of holidays of the State and Entities symbolizing only one, or two of the three constituent peoples in Bosnia and Herzegovina constitutes measures directed at distinction, exclusion, restriction or giving preference based on national or ethnic origin. In their opinion, the competent authorities of Bosnia and Herzegovina failed to take adequate measures to amend, rescind or annul the challenged Law, which is in contravention of the mentioned provisions of the Constitution of BiH, European Convention and International Convention.

Introductory Remarks (overview of the events, which preceded the referendum and the international recognition of the Republic of Bosnia and Herzegovina)

24. The Constitutional Court notes that Bosnia and Herzegovina had been a federal unit of the Socialist Federal Republic of Yugoslavia (SFRY) before it became an independent internationally recognized State under the name of the Republic of Bosnia and Herzegovina (RBiH or Republic of BiH).

25. The fundamental principles referred to in the 1974 SFRY Constitution determined as follows: "the Peoples of Yugoslavia, proceeding of from the right of every people to self-determination, including the right to secession, (…) have united into a federal republic of free and equal nations and nationalities and have created a socialist federative community of working people – the SFRY (…)." Under the 1974 Constitution of the Socialist Republic of BiH (SRBiH) and Amendment LXVII thereto, the citizens of BiH exercised their powers through the Assembly or referendum.

26. At the beginning of the process of the dissolution of SFRY, the aim of which was a peaceful resolution of the Yugoslav crisis and the consideration of that problem from the legal point of view, two documents were adopted at the Summit of the (then) European Community, which was held in Brussels on 17 December 1991. The first document being the Declaration on the Guidelines on the Recognition of New States in the Eastern Europe and in the Soviet Union, wherein it was stated that "new States will be recognized subject to the normal standards of international practice and the political realities in each case". The second document being the Declaration on Yugoslavia, wherein the European Community expressed its readiness to recognize, as of 15 January 1992, all Yugoslav republics complying with and respecting international documents, such as e.g. the UN Charters *et al*. In this connection, the European Community formed a special Arbitration

Commission (known as the Badinter Arbitration Commission named after its President, Robert Badinter). During its work, the Arbitration Commission adopted a number of opinions on the dissolution of the SFRY.

27. In its Opinion No. 1 of 29 November 1991, the Arbitration Commission of the Peace Conference on Yugoslavia of the European Community indicated that "although the SFRY has until now retained its international personality, notably inside international organizations, the Republics have expressed their desire for independence; in Slovenia, by a referendum in December 1990, followed by a declaration of independence on 25 June 1991, which was suspended for three months and confirmed on 8 October 1991; in Croatia, by a referendum held in May 1991, followed by a declaration of independence on 25 June 1991, which was suspended for three months and confirmed on 8 October 1991; in Macedonia, by a referendum held in September 1991 in favour of a sovereign and independent Macedonia within an association of Yugoslav States; in Bosnia and Herzegovina, by a sovereignty resolution (memorandum of independence) adopted by the SRBiH Assembly on 14 October 1991, whose validity has been contested by the Serbian community of the Republic of Bosnia and Hercegovina". Based on the aforementioned, the Arbitration Commission found that "the Socialist Federal Republic of Yugoslavia is in the process of dissolution; that it is incumbent upon the Republics to settle such problems of State succession as may arise from this process in keeping with the principles and rules of international law, with particular regard for human rights and the rights of peoples and minorities".

28. In the Arbitration Commission's Opinion No. 4 of 11 January 1992, which was related to an application of the Minister of Foreign Affairs of the SRBiH for recognition of the SRBiH by the member States of the European Community, the Arbitration Commission established that "in the eyes of the Presidency of the SRBiH and Government of the SRBiH, the legal basis for the application for recognition is Amendment LX added to the Constitution of the SRBiH on 31 July 1990". That Amendment states that Bosnia and Herzegovina is a "sovereign democratic State of equal citizens, comprising the peoples of Bosnia and Herzegovina - Muslims, Serbs and Croats - and members of other peoples and other nationalities living on its territory". The Arbitration Commission held that the quoted provision was essentially the same as Article 1 of the 1974 SRBiH Constitution and made no significant change in the previous law. The Arbitration Commission also established that on the other hand, "outside the institutional framework of SRBiH, on 10 November 1991 'the Serbian people of Bosnia and Herzegovina' voted in a plebiscite for a 'common Yugoslav State'. On 21 December 1991 an 'Assembly of the Serbian people of Bosnia and Herzegovina'

passed a resolution calling for the formation of a “Serbian Republic of Bosnia and Herzegovina” in a federal Yugoslav State if the Muslim and Croat communities of Bosnia and Herzegovina decided to 'change their attitude towards Yugoslavia'. On 9 January 1992 this Assembly proclaimed the independence of a 'Serbian Republic of Bosnia and Herzegovina'”. Taking into account the given circumstances, the Arbitration Commission was of the opinion that “the will of the peoples of Bosnia and Herzegovina to constitute the SRBiH as a sovereign and independent State cannot be held to have been fully established but that this assessment could be reviewed if appropriate guarantees were provided by the republic applying for recognition, possibly by means of a referendum of all the citizens of Bosnia and Herzegovina without distinction carried out under international supervision”.

29. Pursuant to Article 152 of the Constitution of the SRBiH and Amendment LXXI, item 5, line 9 to the Constitution of the SRBiH, in conjunction with Articles 3 and 26 of the Law on Referendum, at the joint session of the Council held on 24 and 25 January 1992, the Assembly of the SRBiH took a decision to call a republic referendum to determine the status of BiH. The Decision was published in the *Official Gazette of the SRBiH*, 2/92. The Decision determined the date of the referendum in which citizens of SRBiH were asked to vote on the following question: “Are you for a sovereign and independent Bosnia and Herzegovina, a state of equal citizens, peoples of Bosnia and Herzegovina – Muslims, Serbs, Croats and members of other people living in it?” It was established that the referendum would be carried out by the Republic Election Commission and Municipal Election Commission.

30. Pursuant to Article 28, item 6 of the Law on Referendum (*Official Gazette of the SRBiH*, 29/77 and 24/91), at the session held on 6 March 1992, the Republic Election Commission established the results of the republic referendum to determine the status of Bosnia and Herzegovina, which was held on 29 February and 1 March 1992. They were published in the *Official Gazette of the RBiH*, 7/92 of 27 March 1992. The Republic Election Commission established that out of the total number of voters - 3,253,847, 2,073,567 of citizens with the suffrage right or 64.31% appeared and voted at the republic referendum for determining the status of Bosnia and Herzegovina. The number of valid ballots was 2,067,969 or 64.16%. Out of the total number of valid ballots, 2,061,932 were “for”, or 99.44%, and 6,037 were “against” or 0.29%. There were 5,227 invalid ballots or 0.25%. Thus, out of the total number (2,073,568) of citizens who voted at the republic referendum on 29 February and 1 March 1992 to determine the status of Bosnia and Herzegovina, “2,061,932 citizens or 99.44% voted for a sovereign and independent Bosnia and

Herzegovina, a State of equal citizens, peoples of Bosnia and Herzegovina – Muslims, Serbs, Croats and members of other people living in it".

31. The European Community and member States, at the session held in Luxembourg on 6 April 1992, recognized the legal personality of Bosnia and Herzegovina and its territorial integrity and political independence.

32. On 22 May 1992, the United Nations General Assembly adopted the Resolution No. A/RES/46/237 to admit the Republic of Bosnia and Herzegovina to membership of the United Nations.

33. In its Opinion No. 8 of 4 July 1992, the Arbitration Commission established that "the process of dissolution of the SFRY referred to in Opinion No. 1 of 29 November 1991 is now complete and that the SFRY no longer exists". The Arbitration Commission was of the opinion that "the existence of a federal state, which is made up of a number of separate entities, is serious compromised when a majority of these entities, embracing a greater part of the territory and population, constitute themselves as sovereign state with the result that federal authority may no longer be effectively exercised. By the same token, while recognition of a state by other state has only declarative value, such recognition, along with membership of international organizations, bears witness to these states' conviction that the political entity so recognized is a reality and confer on it certain rights and obligations under international law". It also stated that "the referendum proposed in Opinion No. 4 was held in Bosnia and Herzegovina on 29 February and 1 March 1992; a large majority of the population voted in favour of the Republic's independence". It also noted that "Bosnia and Herzegovina, Croatia and Slovenia have been recognized by all the Members States of the European Community and by numerous other States, and were admitted to membership of the United Nations on 22 May 1992".

34. The Assembly of the RBiH, at the session held on 28 February 1995, adopted the challenged Law, which was promulgated by a Decree of the President of the Presidency of the RBiH on 6 March 1995.

As to the review of constitutionality of the challenged Law

35. The Constitutional Court notes that the challenged Law (which entered into force in RBiH on 30 March 1995) continued its legal existence in the present BiH in accordance with the principle of the continuation of laws under Annex II(2) of the Constitution of BiH, which stipulates that all

laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina.

36. Furthermore, the Constitutional Court observes that the republic referendum to determine the status of BiH was held after the beginning of the process of dissolution of the SFRY and after two other republics, namely Slovenia and Croatia, following the referendums, declared their independence on 25 June 1991. Furthermore, the Constitutional Court notes that the referendum "of all the citizens of the RBiH without distinction carried out under international supervision " was proposed as a solution to determine the status of BiH by the Arbitration Commission. In this connection, the Constitutional Court outlines that the referendum to determine the status of BiH was carried out throughout Bosnia and Herzegovina, that all eligible citizens of BiH were called, without distinction, that more than 64% of citizens voted of which percentage 99.44% voted for a sovereign and independent Bosnia and Herzegovina, a State of equal citizens, peoples of Bosnia and Herzegovina – Muslims, Serbs, Croats and members of other people living in it. In the opinion of the international observers, the referendum was carried out in compliance with international democratic principles.

37. The Constitutional Court further notes that after the results of the referendum had been declared, the State was internationally recognized as the Republic of Bosnia and Herzegovina based on the referendum held on 1 March 1992. Article I(1) of the Constitution of BiH prescribes that *the Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina," shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders. (...).* As it follows from the foregoing, the results of the mentioned referendum are incorporated in the Constitution of BiH, which in no way whatsoever problematizes the existence of the Republic of BiH (which was internationally recognized based on the results of the referendum held on 1 March 1992) nor does it

disregard it, but it rather emphasizes its legal continuation. Given the mentioned facts, which, in a way, form a part of the Constitution of BiH, the Constitutional Court further notes that the Constitutional Court of BiH, under Article VI(3) of the Constitution of BiH, has the jurisdiction which is defined so that the Constitutional Court *shall uphold this Constitution.* Regardless of different historical views and perspectives related to independence and international recognition of Bosnia and Herzegovina, the Constitutional Court holds that the genesis of the present Bosnia and Herzegovina is related, *inter alia*, to (i) international recognition thereof and, in that connection, (ii) referendum on independence held on 1 March 1992. Therefore, the referendum on independence of Bosnia and Herzegovina can be seen in no other way but as a part of legal continuation, which resulted in the international recognition of Bosnia and Herzegovina and the proclamation of this Constitution, which is upheld and protected by the Constitutional Court.

38. Furthermore, the Constitutional Court finds it necessary to explain the notion of constituent status (*konstitutivnost* in the B/H/S languages), notably in the context (such as this one) where the protection of the constituent status is requested in a procedure before the Constitutional Court. Constituent status implies the constituent power of the constituent peoples. The relevant part of the Preamble of the Constitution clearly prescribes that *constituent peoples (along with Others and citizens of Bosnia and Herzegovina) hereby determine that the Constitution of Bosnia and Herzegovina is as follows.* However, that right is limited by this Constitution. The Constitutional Court may examine the issue whether the constituent status of a people is violated or not only based on the provisions of the present Constitution, since this is precisely the Constitution which constitutes the expression of the joint will of the constituent peoples. Constituent status may not be understood so widely as to exceed what is determined by the Constitution. This means that the constituent peoples (through authorized representatives) cannot successfully refer to a violation of constituent status based on the something that could be described as their views

or wishes or disagreements on certain issues (political, legal, cultural, historical, economic etc.). Constituent status may be violated exclusively if a right or a provision of this Constitution is jeopardized. Turning to the present case, the fact is that the present Constitution prescribes the continuation of the Republic of Bosnia and Herzegovina, and the previous paragraphs clearly explain that the international recognition of the Republic of Bosnia and Herzegovina came after the referendum held on 29 February and 1 March 1992. On the other hand, the fact is that all constituent peoples, naturally including the Serbs, *determined that the Constitution of Bosnia and Herzegovina is as follows,* including the provisions on the continuation of the Republic of Bosnia and Herzegovina. For these reasons, the Constitutional Court holds that the constituent status of the Serb people is not jeopardized.

39. With regards to the applicant' allegations that the challenged Law placed Serbs as the constituent people in a subordinated and discriminatory position compared to Bosniac and Croats as two other constituent peoples, the Constitutional Court notes that, according to the case-law of the Constitutional Court based on the case-law of the European Court, discrimination occurs if a person or a group of persons who are in an analogous situation are treated differently without providing an objective and reasonable justification for such a treatment. Furthermore, it is irrelevant whether discrimination is the consequence of difference permitted by legal treatment or application of the mere law (see ECtHR, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, paragraph 226). According to the case-law of the European Court of Human Rights, an act or a regulation is discriminatory if it differentiates between individuals or groups in similar situations without objective and reasonable justification, i.e. if there was no reasonable proportionality between the means used and the aim sought to be achieved (see, Constitutional Court, First Partial Decision *No. U 4/04* of 31 March 2006, paragraph 109, available on the website of the Constitutional Court www.ustavnisud.ba).

40. In the case No. *U 3/13*, having referred to its own case-law, the Constitutional Court concluded that the holidays cannot be regulated so as to give preference to any of the constituent peoples i.e. that this will be the case if regulated so as to reflect history, tradition, customs, religion

and other values of only one people (see Constitutional Court, Decision *No. U 3/13* of 26 November 2015, paragraph 90, available on the website of the Constitutional Court www.ustavnisud.ba). In the mentioned case, the Constitutional Court concluded that the contested Article 3(b) of the Law on Holidays of the Republika Srpska, by designating the Day of Republic to be observed on 9 January, places the members of the Serb people in the privileged position when compared to Bosniacs and Croats, Others and citizens of the Republika Srpska, for the fact that this date represents a part of the historical heritage of only Serb people. For that reasons, the Constitutional Court found that the contested Article was incompatible with Article I(2) of the Constitution of Bosnia and Herzegovina, Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1.1. and Article 2 (a) and (c) of the International Convention and Article 1 of Protocol No. 12 to the European Convention (*op. cit. U 3/13,* paras 97 and 101).

41. Taking into account the aforesaid, and starting from the facts that all citizens of Bosnia and Herzegovina, without distinction on the ground of national or ethnic affiliation, were called to vote at the referendum, that they answered the question whether they were for a sovereign and independent Bosnia and Herzegovina, a State of equal citizens, peoples of Bosnia and Herzegovina – Muslims, Serbs, Croats and members of other people living in it and that the Republic of Bosnia and Herzegovina continued its legal existence as the State of Bosnia and Herzegovina where Bosniacs, Croats and Serbs are equal constituent peoples, the Constitutional Court cannot conclude that the challenged Law, wherein 1 March (as the date when the referendum was held) is determined as a holiday marking the Independence Day of BiH, discriminates against Serbs when compared to two other constituent peoples. In particular, the Constitutional Court holds that the challenged Law does not put any of the constituent peoples in a different position, including the Serb people when compared to two other constituent peoples. Therefore, the Constitutional Court does not hold that the challenged Law, which is related to 1 March as the Independence Day, places Serbs in a subordinated and discriminatory position when compared to Croats and Bosniacs as two other constituent peoples.

42. Therefore, the Constitutional Court concludes that the challenged Law is not in violation of the part of the Preamble of the Constitution reading as follows: *Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzegovina*, Article I(2) and Article II(4) of the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention, Article 1 of Protocol No. 12 to the

European Convention and Article 1.1. and Article 2 (1) (a), (b), (c), (d) and (e) of the International Convention.

VII. Conclusion

43. The Constitutional Court concludes the challenged Law is compatible with the tenth line of the Preamble reading *Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzegovina*, Article I(2) and Article II(4) of the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention, Article 1 of Protocol No. 12 to the European Convention and Article 1.1. and Article 2 (1) (a), (b), (c), (d) and (e) of the International Convention.

44. Pursuant to Article 59(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this decision.

45. Pursuant to Article 43 of the Rules of the Constitutional Court, a separate dissenting opinion of Vice-President Zlatko M. Knežević makes an annex to this decision.

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

Zlatko Knežević
Vice-President
Constitutional Court of Bosnia and Herzegovina

SEPARATE DISSENTING OPINION OF VICE-PRESIDENT ZLATKO M. KNEŽEVIĆ, JOINED BY JUDGE MIODRAG SIMOVIĆ

I note with regret that I disagree with the opinion of the majority in this case following the request of a group of delegates of the National Assembly of the Republika Srpska for the review of the constitutionality of the provisions of the Law Declaring March 1 as the Independence Day for the following reasons:

The first group of reasons is related to the procedural aspect, which is equally important for the equal treatment of the applicants. Namely, the Constitution of Bosnia and Herzegovina, unlike the majority of contemporary, and some historical constitutions, substantially narrows the circle of authorized applicants for the review of constitutionality. Obviously the author of the constitution, in addition to other reasons that are less relevant for this opinion, wished to treat the request for the review of constitutionality as the most serious act by means of which a part of the state system expresses doubt about the constitutionality of a provision and/or the law that is important for the functioning of the entire system. At the same time, that implies an equal treatment of all the authorized applicants addressing the Constitutional Court with a request for review.

There is no possibility to discuss or decide this case without making comparisons with the recent case of the Constitutional Court no. U 3/13 wherein the Constitutional Court decided on the request for the review of constitutionality of the provision of the Law Declaring January 9 the Day of the Republika Srpska.

Right away, in this procedural part, I point to obvious unfairness – I would almost say unfairness of procedure, to refer to the standard referred to in the Preamble of the Constitution – the standpoint of the majority in the Constitutional Court when it comes to these two requests. In one (U 3/13) the procedure was respected in the part relating to the public hearing as a form of democratic inclusion of not only applicants and other party but also of the public at large in the discussion on the issue of national equality; also, a respectable number of public workers was engaged to, if they wished so, give their respective opinion; the relevant international elements in Bosnia and Herzegovina were invited to state their opinion as *amicus curiae* and, eventually, not as the least important though, the opinion of the Venice Commission was sought. This afforded the significance to the case it merits as the issue being decided, as well as to the applicant.

In this case, unfortunately, everything is different.

Requests were denied to seek the opinion from the Venice Commission, to schedule a public hearing, no *amicus curiae* were invited, and that "indecent speed", to use an expression of a poet, indicates that the majority either did not want to allow an equal treatment, or had a serious fear to answer the questions asked in the request.

Regretful lack of knowledge about the Bosnia-Herzegovina's society, historical mentalities and inappropriate comparison of individual appeals with requests for the review of constitutionality are indicative of unpreparedness of a part of "compact majority", that always expresses its opinion in the same way, to venture into consideration and decision-making at the level required when working at the Constitutional Court. However, that is the problem of this society, which tolerates such existence and two different approaches in the entrusted trust to decide in the name of the society, one with the full competence and responsibility that all domestic judges meet irrespective of differing opinions or positions and different approach!, which changes are not in the hands of the Constitutional Court.

Both these cases concern an almost identical request – the review of constitutionality of a date declared a holiday and whether that disrupts the status/perception that one constituent people has in a sense that it was discriminated against. And the approach is, as I have already mentioned it, contrary to "the fair procedure"!, which brings us to the second reason.

Deeply dreading the effects of the decisions of the Constitutional Court I had to state this in the introduction, as unfair procedure in identical requests is not a matter of a changed case-law, but of a direct caving-in of the authority of the Constitutional Court. Unfortunately, we are gliding towards the social refusal of the implementation of our decisions and, irrespectively of a substantially minor number of decisions not implemented – only a few, their significance is substantial for the society as a whole and key political and human rights (to address only the fate of the case "Mostar") and that practice is not only the burden of the ones failing to implement it but also of the Constitutional Court itself which MUST take an equal approach in every case thereby dismissing any objection whatsoever of unfairness. The decision always constitutes the position of the majority and it may be in keeping with or against the request and is final as such and MUST be implemented, however if the society or a part of the society has a perception that the Constitutional Court approaches differently equal or similar requests, then the implementation of decisions comes down to the discussion on the fairness of procedure, and not on the merits of the request.

To point out right away: in the Case no. U 3/13 I pointed out the danger for the Constitutional Court to address the assessment of perceptions, I pointed out the danger of introducing the Constitutional Court into the assessment of historical facts, I pointed out the danger of putting emphasis of differences as problems, and not as the riches of this society, I pointed out the danger of caving in the authority of the Constitutional Court when speaking about the mentioned historical facts from the constitutional/legal/social and political level (social and political in terms of creating the social system, and not primitive supporters-like discussion in favour or against political parties). I am by no means happy that my fears are materialising, or that I am seeing it and, for the peace of my conscience, I am saying that the authority of the Constitutional Court is still, unfortunately, being caved in. As a citizen of this society whom the society has bestowed the right and obligation to do this job, I am obliged to speak irrespective of whether I am the majority or minority. That, in my deep conviction, is the purpose of the constitutional obligation to uphold this Constitution.

When we speak about the merits itself, the reasons for the decision were obviously written for some other request. Namely, the reasons for the decision, to bring it down to the basic categories with a danger to oversimplify it, discuss the independence of Bosnia and Herzegovina.

The independence of Bosnia and Herzegovina, namely the autonomous state existence as an internationally recognised state within the existing boundaries and with the internal structure defined by the Constitution (to rephrase the provisions of the Constitution of Bosnia and Herzegovina), is an indisputable fact that has been indisputable at least since the entry into force of the Constitution, for more than twenty years now that is. The filed request for the review of constitutionality does not problematize the independence of the *state* of Bosnia and Herzegovina and the switch of thesis in the reasons for the decision is either a professional failure or an attempt to obscure the different decision-making in similar or identical requests.

Let me go back to the Case no. U 3/13. In that case the Constitutional Court decided that the enactment of the Law on the Day of the Republika Srpska was in a legal procedure before the National Assembly of the Republika Srpska; that no discriminatory treatment occurred in the procedure of enactment, as it was mentioned when the law was enacted, its amendments, the implementation of the earlier decisions of the Constitutional Court in this matter and everything that was necessary for the history of decision-making.

In this case everything is different.

The Decree Promulgating the Law had been adopted in 1995 and, without any euphemisms, amidst tragedy and war. Is it necessary now for me to explain who waged war against whom, and there was no legality, at least when it comes to one people at a minimum, to take decisions in their name during that period. The Decision on the Referendum on the Independence was adopted and implemented with the refusal of one people to take part in the referendum.

Now I only wish to refer to the positon in the Decision no. U 3/13, which I convey here:

Therefore, the Constitutional Court holds that the selection of 9 January as the day observing the Day of the Republic does not symbolize collective, shared remembrance contributing to strengthening the collective identity as values of particular significance in a multi-ethnic society based on the respect for diversity as the basic values of a modern democratic society. In this connection, the selection of 9 January to mark the Day of the Republic as one of the holidays of the Entity which constitutes a constitutional category and, as such must represent all citizens of the Republika Srpska, who have equal rights according to the Constitution of the Republika Srpska, is not compatible with the constitutional obligation on non-discrimination in terms of the rights of groups as it privileges one people only, namely the Serb people, whose representatives have adopted on 9 January 1992, without participation of Bosniacs, Croats and Others, the Declaration Proclaiming the Republic of the Serb people of Bosnia and Herzegovina, that represents a unilateral act.

Therefore, the questions that the Constitutional Court was supposed to answer in this case are rather simple, by following its case-law in the Case no. U 3/13, which I was against at the time, by the way, due to the fear of everything we are talking about today.

Namely: *Does the choice of March 1 as the date for marking a holiday has the symbolism of collective shared remembrance that may contribute to the strengthening of collective identity as the values of special significance in a multi-ethnic society based on the consideration and respect for differences as the basic values of a modern democratic society?*

Next, *does the choice of March 1 as one of the holidays of the Entity, which is a constitutional category and, as such, have to represent the citizens of that Entity?*

Next, *is the legal provision about the choice of March 1 as a holiday in conformity with the constitutional obligation of non-discrimination in terms of the right of groups and whether it establishes a privileged position of only one or two constituent peoples, for it is indisputable that on*

the relevant day the members of two people, without the participation of the Serb people, adopted a decision on independence, which is a unilateral act in relation to the members of the Serb people?

Next, *was the enactment and promulgation of the law in a procedure of accommodating and considering interests other than those of the issuer of the Decree of Promulgation*?

And, finally: *In terms of historical evaluation (which the reasoning in the Decision no. U 3/13 deals with in detail) can we speak in terms of the choice of the date (as March 1, and not the expression of the independence of Bosnia and Herzegovina) in a constituent people (Serbs) as being indicative of tragic events ensuing after that day, including the event taking place on that very day, and how it led to the perception of that people about discrimination*?

Here, we have come to an end of the comparison of two decisions on identical causes – the days chosen to mark historical events, which were accepted negatively in the perception of *etnos*.

As much as I have held, for the reasons already mentioned, which were elaborated on here, and much more so in the Decision no. U 3/13, that the assessment of the *perception* was not in the hands of the Constitutional Court, we are in a different situation now. The majority that adopted the Decision no. U 3/13 faces the most important legal postulate – the issue of legal certainty. Legal certainty, which is oftentimes referred to as the rule of law (not as the rule of the laws, for the laws may be enacted also in an unconstitutional procedure, or contrary to constitutional provisions), imposes as *conditio sine qua non* for identical requests to be decided identically. And if a different decision is made, that change of position must be deeply based on new needs or interpretations of the norm in the broadest Kelsenian sense as the pure norm or pure law. The philosophy of law does not answer the questions of an individual request or interpretation, but it surely does answer all the questions of the essence of social existence and prevents unfairness or inequality. The constitutional law does not amount to copying the decisions of ordinary courts and the obscurity of the responsibilities of this Constitutional Court to decide the violations of individual rights guaranteed under the Constitution does not rule out – on the contrary – it orders the consideration in key social processes and guarantees of the essence of social behaviour with possibilities to enhance or to aggravate social development. That is the task of the Constitutional Court, not participating in the role of a Supreme Court, not justice in terms of ordinary courts, but creating interpretations of the Constitution that is neither a check, nor an obstacle, but a text affording sufficient room for fairness and equity. If fairness and equity are wanted.

And, finally, to whom it may concern:

The decision in this case failed to answer positively the already asked questions, neither did it discuss these questions at all, thus introducing an additional problem in the functioning of our society, for there is no more important concern than that of the rule of law as a condition for the social system in the broadest sense, particularly so the constitutional system.

Therefore, I was against the position of the majority in this case.