

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 (2), Article 61(4) and Article 63(1)(d) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 94/14 – Revised text), in Plenary and composed of the following Judges:

Mr. Mirsad Ćeman, President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Constance Grewe,

Ms. Seada Palavrić,

Having deliberated on the request of **Mr. Bakir Izetbegović, a Member of the Presidency of Bosnia and Herzegovina**, in the case no. **U 3/13**, at its session held on 26 November 2015, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request for review of constitutionality of Article 3(b) of the Law on Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska*, 43/07) lodged by **Mr. Bakir Izetbegović, a Member of the Presidency of Bosnia and Herzegovina**, is granted.

It is hereby established that Article 3(b) of the Law on Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska*, 43/07) is not in conformity 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 on the Elimination of All Forms of Racial Discrimination and Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Pursuant to Article 61(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the National Assembly of the Republika Srpska is ordered to harmonize Article 3(b) of the Law on Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska*, 43/07) with the Constitution of Bosnia and Herzegovina within a time limit of six months from the date of delivery of this Decision.

Pursuant to Article 72(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the National Assembly of the Republika Srpska is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within the time limit given in the previous paragraph, of the measures taken to enforce this Decision.

The proceedings upon the request for review of constitutionality of Article 2(b) of the Law on Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska*, 43/07) lodged by **Mr. Bakir Izetbegović, a Member of the Presidency of Bosnia and Herzegovina**, are terminated as the applicant has withdrawn the request.

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 January 2013, Mr. Bakir Izetbegović, a Member of the Presidency of Bosnia and Herzegovina ("the applicant"), lodged a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for review of constitutionality of Article 2(b) and Article 3(b) of the Law on Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska*, 43/07; "the Law on Holidays").

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the National Assembly of the Republika Srpska ("the National Assembly") was requested on 30 January 2013 to submit its reply to the request.

3. Pursuant to Article 15(3) of the Rules of the Constitutional Court, the European Commission for Democracy through Law (Venice Commission) was requested on 20 June 2013, and the Bosniac, Croat, Serb, and "Others" Caucuses in the Council of Peoples of the Republika Srpska and the Legal Department of the Office of the High Representative in BiH were requested on 7 April 2015 to submit their respective written expert opinions on the request in question.

4. The National Assembly submitted its reply to the request on 12 February 2013.
5. The Venice Commission submitted its written expert opinion on 18 October 2013.
6. The Bosniac, Serb, Croat and “Others” Caucuses in the Council of Peoples of the Republika Srpska submitted their respective expert opinions in writing on 11 May 2015.
7. The Legal Department of the High Representative in BiH informed the Constitutional Court on 11 May 2015 that it would not participate in the proceedings before the Constitutional Court.
8. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the request were delivered to the applicant on 16 April 2013.
9. At the plenary session held on 22 January 2015, the Constitutional Court decided to hold a public hearing in this case.
10. The public hearing was held on 29 September 2015.

III. Request

a) Allegations from the Request

11. The applicant holds that Article 2(b) and Article 3(b) of the Law on Holidays, which stipulates that one of the republic holidays is the Day of the Republic marked on 9 January, are not in conformity with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”), Article 1 of Protocol No. 12 to the European Convention, and Article 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 on the Elimination of All Forms of Racial Discrimination (“the International Convention”).
12. The applicant claims that the Day of the Republic, which is marked on 9 January, had been instituted as a holiday by “the Assembly of the Serb People of Bosnia and Herzegovina” as far back as 1992 without Bosniacs and Croats taking part in its composition, which undoubtedly shows that Bosniacs and Croats in the Republika Srpska, as well as Others, that is, other citizens of Bosnia and Herzegovina, are treated differently when compared to the Serbs in the Republika Srpska, contrary to Article 1(1) and Article 2(a) and (c) of the International Convention. The applicant particularly points to Article 2(d) and (e) of the mentioned Convention, which, in his opinion, prescribe that effective measures of “national and local policies” must be taken to quash or annul any laws and regulations which objective is unequal or discriminatory treatment.

13. The applicant further notes that the Assembly of the Serb People in Bosnia and Herzegovina adopted on 9 January 1992 a Declaration Proclaiming the Republic of the Serb People of Bosnia and Herzegovina (“the Declaration”), which provided for the “territorial demarcation between them and political communities of other peoples of Bosnia and Herzegovina”. In his opinion it clearly follows from this document that the intent was to establish a state of predominantly one people - the Serb people, thereby absolutely excluding and discriminating against all other people and denying their rights. According to the allegations of the applicant, that would be proven later during “[...] the aggression against BiH, when a systemic and planned ethnic cleansing had been conducted on that territory against all those who were not Serbs, along with a number of other violations of international humanitarian law, which culminated in a genocide committed against the Bosniacs in Srebrenica”.

14. The applicant holds that any stipulation of holidays in the Entities, which symbolize only one, or only two out of the three constituent peoples in Bosnia and Herzegovina, constitutes the measures aimed at differentiating, excluding, restricting or giving priority, on the grounds of ethnic or national origin and their goal is to violate or compromise recognition, enjoyment or exercise of human rights and fundamental freedoms in all areas of life under equal conditions.

15. Further, the applicant indicates that the Republika Srpska, by adopting on 30 March 2007 the Law on Holidays, which determined 9 January as the Day of the Republic, “got around” the Decision of the Constitutional Court on Admissibility and Merits no. *U 4/04* (Second partial decision). In that respect, he noted that the Constitutional Court established in the mentioned decision that the provisions of the Law on the Family Patron-Saint’s Days and Church Holidays of the Republika Srpska (“the Law on the Family Patron-Saint’s Days and Church Holidays”) which, among other things, was stipulated as a holiday and the Day of the Republic, which was marked on 9 January, are not in conformity with the Constitution of Bosnia and Herzegovina. The applicant points out that during the course of the adoption of the Law on Holidays in 2007, which provisions he challenges, the Bosniac Caucus in the Council of Peoples of the National Assembly raised an objection in respect to the vital national interest, but the Constitutional Court of the Republika Srpska rejected the objection because it did not contain any arguments for such allegations. The applicant alleges that despite that, the National Assembly persevered in promoting the date which is not and never will be the date to be accepted by all citizens of the Republika Srpska. In that respect he noted that according to the census in 1991 (in the area of the present day Republika Srpska) there

were 43% of non-ethnic Serb population, including Bosniacs and Croats, but also the other citizens of the Republika Srpska.

16. The applicant holds that January 9th cannot even in formal and legal terms be determined as the Day of the Republic. In this respect he notes that the Constitutional Court of the Republic of Bosnia and Herzegovina, as a court of the then already internationally recognized state, by its decision from October 1992, established that the Assembly of the Serb People in BiH constituted an illegal and informal body, annulled all acts issued by such a body, including the Declaration and the Constitution of the Republika Srpska, as well as all implementing regulations. The applicant holds that the Declaration and the Decision of the Constitutional Court of the Republic of Bosnia and Herzegovina must be viewed in correlation with Article I(2) of Annex 2 to the Constitution of Bosnia and Herzegovina. In view of the aforementioned, the applicant alleged that it holds that the Republika Srpska had not even existed before the date of the signing of the General Framework Agreement for Peace, which established that Bosnia and Herzegovina is composed of two Entities: the Federation of Bosnia and Herzegovina and the Republika Srpska.

17. Further, the applicant points to the discriminatory character of the challenged Article as it is impossible, for the members of non-Serb peoples, to celebrate the day when the bodies of the Republika Srpska, which not only committed the Srebrenica genocide but also other war crimes on the territory of Bosnia and Herzegovina with the aim of destroying the non-Serb population, had been instituted. The applicant alleges that the Judgment of the International Court of Justice in The Hague, following a lawsuit of Bosnia and Herzegovina against Serbia and Montenegro over a genocide in Bosnia and Herzegovina, established that the armed forces of the Republika Srpska, which had been formed on 9 January 1992, according to the applicant's allegations, had committed the actions of genocide in Srebrenica, and that the function of the RS Army officers was to act in the name of the authorities of the Bosnian Serbs, especially of the Republika Srpska. In this respect he pointed also to the judgments of the International Criminal Tribunal for the former Yugoslavia, which also point to the human rights violations and war crimes committed, and to the UN Resolutions, which on a number of occasions condemned the actions of the official military and police bodies of the Republika Srpska on the territory of Bosnia and Herzegovina, pointing to violations of the wartime and humanitarian law and the complete abolishment of any rights whatsoever of the members of non-Serb peoples.

18. The applicant indicates that following the adoption of the Decision of the Constitutional Court no. *U-5/98-III* of 1 July 2000, Article 1 of the Constitution of the Republika Srpska determined that the Republika Srpska is one of the two equal Entities in BiH, and that the Serbs, Bosniacs and Croats, as constituent peoples, Others and citizens, equally and without discrimination shall participate in exercising the authority in the Republika Srpska. On the basis of the aforementioned, the applicant concludes that the Republika Srpska is not “a state of the Serb people and citizens living in it” as written in “the 1992 Constitution of the Republic of Srpska”, which was based on the Declaration dated 9 January 1992, rather it is an Entity wherein all three constituent peoples, Others and citizens of BiH, must be equally represented. The applicant concluded that on the basis of the aforementioned it follows clearly that Articles 2(b) and 3(b) of the Law on Holidays brought about discrimination against non-Serbs in the Republika Srpska.

19. The applicant also cited the position of the Constitutional Court in the Decision on Admissibility and Merits no. *U-4/04* of 31 March 2006, which was taken while reviewing the constitutionality of the Entities’ laws on the flag, coat of arms and anthem (paragraph 131), according to which the official symbols of an Entity must reflect its multi-ethnic composition. In this respect, the applicant claims that the same approach must be applied also to holidays, which, in his opinion, also have a symbolic meaning. The applicant noted that one must bear in mind that this is the holiday marked as the Day of the Republic which applies to all citizens, bodies, organizations, local self-government units, enterprises, institutions and organizations and persons who perform professionally service-related and product-related activities, as prescribed in Article 1 of the challenged Law on Holidays.

20. The applicant indicates that this date (9 January) is celebrated in the Republika Srpska as the date exclusively tied to the Serb people. In this respect he noted that they organize church festivities to mark this holiday, that on that date they also celebrate the Patron Saint of the Republika Srpska – Saint Archdeacon Stefan, which all clearly points to the official connection and attitude of the Republika Srpska towards exclusively one religious group – Orthodox Christian, thereby neglecting all other groups and individuals living in the Republika Srpska. Also, it was noted that the Orthodox priests actively participate in the ceremonies marking this holiday, and that the religious ceremonies give additional weight to this date thereby letting the members of other peoples know that this is not their holiday, rather that this is solely the holiday of the members of the Serb people. In support of the aforementioned, the applicant attached an official invite for the celebration of the Day of the

Republic on 9 January, wherefrom it follows that the ceremony marking the holiday consists of the church and secular festivities.

21. The applicant concludes that it would be much more appropriate that the date of the Republika Srpska be celebrated on some of the dates which are tied to the formal and legal recognition of the Republika Srpska, and that by adopting 9 January as the Day of the Republic, all other peoples in the Republika Sprska were put in an inferior and discriminatory position. Thereby, in his opinion, one should particularly bear in mind the events that followed after 9 January 1992, which brought no good whatsoever to any single citizen of Bosnia and Herzegovina, especially not so to non-Serbs.

22. The applicant requested that the Constitutional Court adopts a decision establishing that Article 2(b) and Article 3(b) of the Law on Holidays are not in conformity with the Protocol No. 12 to the European Convention, with 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 that the National Assembly be ordered to bring the challenged provisions in line with the Constitution of Bosnia and Herzegovina.

b) Reply to request

23. Pointing to the case-law of the European Court in the cases of *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, *Petrović v. Austria*, and *Sahin v. Germany*, the National Assembly emphasized that the respective case cannot be about the applicability of Article 14 of the European Convention, given that the mentioned article serves only for the establishment of discrimination in relation to the rights and freedoms protected by the rest of articles of the European Convention and Protocols thereto.

24. Further, the National Assembly noted that the respective request constitutes the abuse of the right to address the Constitutional Court. According to the assessment of the National Assembly, the applicant claims that the Day of the Republic represents a day when the bodies of the Republika Srpska were founded, which committed not only the genocide in Srebrenica but also other serious war crimes on the territory of Bosnia and Herzegovina with the aim of destroying the non-Serb population. According to the National Assembly, the offensiveness of the indicated allegation is reflected in the fact that genocide, in the Convention on the Prevention and Punishment of the

Crime of Genocide, and in theory in general, in the legislation of Bosnia and Herzegovina, and in the case-law of the Tribunal for the former Yugoslavia, constitutes an individual criminal offence and the bodies of the Republika Srpska, particularly in its present multi-ethnic composition (which adopted the Law on Holidays) could not commit it collectively.

25. The National Assembly holds that the part of the request concerning the harmonization with the European Convention and the International Convention is unacceptable and *ratione materiae*. In this respect it was indicated that the right to celebrate holidays, *per se*, in the broader theoretical concept, could be considered one of the human rights, but as such it has not been regulated either in the European Convention or its Protocols, or in the International Convention, as one the fundamental rights.

26. Finally, the National Assembly notes in relation to the admissibility of the request that the respective request is manifestly ill-founded. The National Assembly noted that it is indisputable that January 9th is celebrated as a religious holiday and St. Stefan's Day, but that the rest of the Republic Holidays (New Year, May 1st, the Day of the Victory over Fascism, and the Day of the [General Framework Agreement](#)) also coincide with religious holidays from the Orthodox and Catholic calendar. Finally, it was indicated that the Law on Holidays does not specify the Day of the Republic (January 9th) as a religious holiday, that is that finding a date on which no religious holiday is marked would actually be impossible, given their great number in religious calendars.

27. As to the merits of the request, the National Assembly stated that the request does not contain the legal reasons, or an answer to the question as to what constitutes the interference or discrimination against an individual in the exercise of rights by way of marking January 9th as the Day of the Republic. The National Assembly holds that the applicant failed to offer any reasoning whatsoever or a proof that the marking of the Day of the Republic, which coincides with a religious holiday, establishes a differential treatment, which accordingly threatens anyone's rights, that is, that it amounts to discrimination on any ground.

28. The National Assembly indicates that the applicant claims that that the celebration of the Republic Day on 9 January (which is at the same time the religious holiday of Eastern Orthodox believers) leads to the discrimination of the other two constituent peoples, that is that it follows from the request that there is no discrimination against the members of other ethnicities, or atheists and agnostics. In this respect the following was noted: "The applicant's frustration and his very

subjective perception that the Republic Day is celebrated according to the religious or philosophical convictions of whosoever is not understandable and even if it was understandable [...] ‘the subjective perception in itself is not sufficient to establish a breach of the rights provided for in the European Convention’” (see the European Court, *Lautsi v. Italy*, the judgment of 18 March 2011, paragraph 66).

29. Furthermore, the National Assembly pointed out that, under Article 1 of Protocol No. 12 to the European Convention it is necessary that the right in respect of which the alleged discrimination has occurred should be provided for in the law, and that the same solution be followed by the International Convention. According to the assessment of the National Assembly, the applicant believes that the case relates to the right to observe the Republic Day, which, according to his understanding, is enjoyed only by Serbs who are Eastern Orthodox Christians. According to the National Assembly, there is no right provided for by law in respect of which the alleged discrimination is carried out, and accordingly there is no differential treatment, which is the basis of all international documents on the prohibition of discrimination.

30. The National Assembly noted that the Law on Holidays, which provisions are challenged by the applicant, was passed after the implementation of Decision no. *U-5/98*, that it was passed by the National Assembly which composition reflected the changes which occurred following the mentioned decision, i.e. it was multi-ethnic, that Bosniac Caucus in the Council of Peoples initiated a mechanism for the protection of the vital national interest, and that the Constitutional Court of the Republika Srpska (the Council, the composition of which was multi-ethnic, was presided over by a representative of the Bosniac people from among the judges of the Constitutional Court of the Republika Srpska), in a ruling dated 10 May 2007 declared the request inadmissible, because it did not specify what the violation of the vital national interest of the Bosniac people in the Law on Holidays consisted of, and that it was mentioned in general that the issue of protection of the vital national interest of the Bosniac people in the respective Law was initiated. According to the National Assembly, the same is reiterated in the respective request which does not state what discrimination consisted of, that is there is no legally relevant reasoning.

31. Furthermore, the National Assembly found the applicant’s allegation to be inappropriate in that the Republic Day is celebrated as the date exclusively tied to the Serb people, whereby they organize church festivities to mark this holiday, and that on that day the Patron Saint of the Republika Srpska is celebrated. In this respect it was noted that the Republic Day was not marked as a religious holiday in the Law on Holidays, and that the ceremonial part of the holiday is not

determined in the text of the law, and therefore it cannot be designated as “legal” or “illegal”, i.e. “lawful” or “unlawful”. In this respect it was indicated that the Law on Holidays particularly regulated religious holidays which respect the three leading religious groups, or other religions. Finally, it was indicated that the Republika Srpska Government can determine, by a decision, the marking of other dates as well, considering historical, cultural and traditional heritage of the constituent peoples of the Republika Srpska. Accordingly, it was concluded that the applicant did not establish the legal connection between the state and religious holidays and thereby reasoned the alleged discrimination.

32. Finally, the National Assembly proposed that its preliminary objections be granted and that it be established that Article 14 of the European Convention is not applicable to the present case, and that the remainder of the request be found inadmissible. If, however, the Constitutional Court decides to consider the merits of the request with regards to the application of Article 1 of Protocol No. 12 to the European Convention, and Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1(1) and (2)(a) and (c) of the International Convention, it was proposed that the request be dismissed, i.e. that a decision be adopted reading that there is no discrimination with regards to the application of the challenged provisions of the Law on Holidays.

c) The Venice Commission *Amicus curiae* Opinion

33. The Venice Commission articulated a stance that in the specific circumstances of BiH and taking into account the case-law of the Constitutional Court of BiH, the challenged provisions may give rise to discrimination within the meaning of Article 1 of Protocol 12 to the European Convention and Article 2(a) and (c) of the International Convention on the Elimination of All Forms of Racial Discrimination in conjunction with Article II(4) of the Constitution of BiH. The Venice Commission emphasized that, irrespective of the initial intention of the creators of the Law on Holidays, it seems that both in and outside the Republika Srpska, 9 January is perceived as a holiday connected to two events: the adoption of the Declaration of the Republic of the Serb people of Bosnia and Herzegovina, and that the Day of the Republic is observed on 9 January, as well as St. Stefan Day, Orthodox Patron Saint which, unlike religious holidays stipulated by the same Law in respect of three denominations, has no counterbalance in similar holidays of other constituent peoples. The Venice Commission indicated that, although the Law on Holidays applies to all the citizens and in those terms, it is not ostensibly discriminatory, two factors must be taken into account. The first is the text of the Law itself, which proclaims the Republic Day a holiday solely

associated with one constituent people, while at the same time imposing a sanctioned obligation on legal entities not to work on this day. The second factor is the specific situation of BiH after a civil war of the early 1990s, i.e. that one of the five main holidays of the Entity is a day so closely linked to the unfortunate events of the early 1990s and that as such invokes uncomfortable and humiliating sentiments among some inhabitants. Furthermore, it is noted that although no obligation to take part in formal celebrations of the Republic Day is imposed upon citizens, it is imposed as a non-working day, in case of failure to comply with it.

d) Written opinions of the Caucuses in the Council of Peoples of the Republika Srpska

34. The Caucus of Others in the Council of Peoples of the Republika Srpska, in its expert opinion in writing, which the Caucuses of Croats and Serbs agreed with in entirety, primarily noted that the request in question was not admissible.

35. In this connection, it noted that, under Article 19(1)(4) of the Rules of the Constitutional Court, the request did not contain allegations, evidence and facts on which the request was based and, under Article 32 of the Rules of the Constitutional Court, the nature of the violation to which the applicant referred in the request was neither defined nor specified, nor were the allegations of the applicant substantiated by any evidence and adequate explanation for the violation of rights referred to. Therefore, they are of the opinion that the feeling of being endangered and the feeling of indignation because of unfortunate events of the recent common past could not be, within the meaning of the cited provisions of the Rules of the Constitutional Court, the basis for challenging the act adopted in accordance with democratic principles and procedures provided for in the Constitution and prescribed by the law. Also, a stance was voiced that the Constitutional Court, bearing in mind that the request was not substantiated, by entering in the merits, it would, in a way, give the priority to political arguments, on which the legally valid request for review of constitutionality should not be based, as opposed to legal arguments, evidence and facts.

36. As to the merits of the request, it was indicated that it was not possible to conclude which rights and freedoms a possible discrimination was related to as established in the Law on Holidays, and what persons, groups or peoples it was related to, which is necessary within the meaning of Article 1 of Protocol No. 12 to the European Convention and within the meaning of the International Convention on the Elimination of All Forms of Racial Discrimination.

37. It was indicated that all citizens and representatives of all constituent peoples and Others, political, religious and other communities in the Republika Srpska were invited to observe and

celebrate that holiday. Given that the Law on Holidays made a clear distinction between the Republic and religious holidays, and that everyone, without discrimination, had a possibility to celebrate religious holidays according to their own choice, it was unfounded to claim that the Republic Day was celebrated as a religious holiday of the Eastern Orthodox Christians, who are not only of the Serb origin, so that it amounted to discrimination.

38. Accordingly, the Caucuses of Others, Croat and Serb Peoples hold that Articles 2(b) and 3(b) of the Law on Holidays were compatible with the Constitution and the highest principles of the protection of human rights and fundamental freedoms and that they do not discriminate in any way whatsoever against the citizens from among constituent peoples and Others.

39. The Bosniac Caucus in the Council of Peoples of the Republika Srpska expressed its expert opinion in writing in that 9 January, as the date of the celebration of the Republic Day, would never be accepted. They stated as the reason that on 9 January 1992, the Assembly of the Serb People in Bosnia and Herzegovina adopted the Declaration on the Proclamation of the Republic of the Serb people in Bosnia and Herzegovina, wherefrom clearly followed the intention to form the state of predominantly one – Serb people with absolute exclusion of and discrimination against all other peoples, which proved, as explicitly stated: “[...] also during the aggression on BiH when a systematic and planned ethnic cleansing of all non-Serbs on that territory took place, by means of numerous other breaches of the international humanitarian law, which culminated in the genocide of Bosniacs in Srebrenica”. Also, it pointed to the opinion of the Venice Commission which concluded, according to this Caucus, that the celebration of 9 January as the Republic Day was an act of discrimination against other peoples in that part of BiH. Finally, this Caucus noted that it had invoked the mechanism of the protection of vital national interest on several occasions and proposed amendments to that Law on Holidays, and that the Constitutional Court of Republika Srpska, in its ruling of 17 May 2007, had rejected the request as it did not contain arguments to substantiate the existence of the vital national interest of the Bosniac People. Therefore, the Caucus of Bosniacs holds that the request was founded and that Articles 2(b) and (3)(b) of the Law on Holidays are not compatible with Article 1 of Protocol No. 12.

IV. Public hearing

40. Pursuant to Article 46 of the Rules of the Constitutional Court, at its session held on 22 January 2015, the Constitutional Court decided to hold a public hearing to discuss this request. Pursuant to Article 47(3) of the Rules of the Constitutional Court, at the plenary session held on 27

March 2015, the Constitutional Court decided to invite to the public hearing the applicant, the National Assembly, the Organization for Security and Co-operation in Europe, Mission to BiH (“the OSCE Mission to BiH”), the Helsinki Committee for Human Rights in Republika Srpska (“the Helsinki Committee”) and one expert from each of the Law Schools in Sarajevo, Mostar and Banja Luka respectively.

41. On 29 September 2015, the Constitutional Court held a public hearing, which was attended by the representatives of the applicant, the representatives of the National Assembly and the representatives of the OSCE Mission to BiH.

42. At the public hearing, the applicant withdrew the request for review of constitutionality in the part relating to Article 2(b) of the Law on Holidays reasoning that the right of the Entity or any other administrative unit to have its own day was not essentially contested by the request.

43. At the public hearing, the applicant remained supportive of the request for review of constitutionality of Article 3(b) of the Law on Holidays. In his opinion, the challenged provision was incompatible with, as he alleged, “lines 3 and 10 of the Preamble of the Constitution of BiH, Article 1 of Protocol No. 1 to the European Convention, Article I(2) in terms of the violation of the principle of democracy and the rule of law, Article I(2) of the Constitution of BiH in terms of the violation of the principle of secularism as an element inherent to a legal state, and Article 9 of the European Convention, and Article II(4) of the Constitution of BiH, in conjunction with Article 1.1 and 2(a) and (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. The applicant requested that Article 3(b) of the Law on Holidays be rendered ineffective the day following the date of the publication of the decision in the *Official Gazette of BiH*.

44. The applicant alleged that it clearly followed from the definition and the notion of state symbols that it was not only about the right of the Entity, but also about the right of citizens and collectivity to state holidays. In support of the submission that 9 January marks a historic moment of only one, the Serb people in the Republika Srpska, he presented the shorthand transcript made at the session of the National Assembly of 30 March 2007, when the Law on Holidays was adopted, and pointed to the Declaration of the National Assembly with regards to the request for review of constitutionality of the Law on Holidays before the Constitutional Court of Bosnia and Herzegovina in the case no. *U-3/03 (Official Gazette of the Republika Srpska, 46/15)*, and public appearances by the political officials from the Republika Srpska. In his opinion, all the aforesaid indisputably leads

to a conclusion that 9 January, as referred to in the contested Article 3(b) of the Law on Holidays, refers to 9 January 1992 when the Assembly of the Serb People in BiH had adopted the Declaration Proclaiming the Republic of the Serb People in BiH. Further, it was indicated that the Declaration was defined as the result of the right of the Serb people to self-determination, self-organization and association, and that territorial separation from other peoples was sought. As such, according to him, it constitutes a unilateral act, which was not supported by other peoples living in the Republika Srpska, as also noted in the opinion of the Venice Commission. Also, the applicant claims that the Declaration was perceived negatively by “non-Serbs” in BiH living in the Republika Srpska, because it reflects the philosophy of identity, territory and nation, i.e. ethno-nationalism, the exclusion of others and different ones from the process, the denial of pluralism and tolerance and the organization of the State in accordance with the principle dating from the Middle Ages, *cuius region, eius religio*. In his opinion, the date so selected is contrary to the principle of pluralism ordering the public authority to be guided by the values and principles, which are of essential importance to a free and democratic society that embodies, *inter alia*, the respect for inherent dignity of a human, the need for accommodating different beliefs, the respect for cultural identity and groups identity, the trust in social and political institutions promoting the participation of an individual and groups in the society.

45. The applicant indicated that that a seemingly neutral and secular date is celebrated as a religious traditional day, in the celebration of which the Serb Orthodox Church takes active and formal part. In this respect, the applicant pointed to the Invitation by the President of the Republika Srpska to a central celebration of 9 January. As the invitation reads, firstly the Liturgy and Patron Saint Ritual of breaking up the “slava cake” (*slavski kolač*) take place at the Orthodox Church, which is led by the high ranking officials of the Serbian Orthodox Church. It was indicated that the perception by the public and media was that the Patron Saint’s Day of the Republika Srpska was celebrated on this day, in support of which it was pointed to reporting by the RTRS, the public broadcaster. Further, the applicant pointed to the official greetings by the political officials from the Republika Srpska, high ranking officials of the Serb Orthodox Church, as well as congratulations from the political officials from the Republic of Serbia, wherefrom it follows that 9 January is the day when congratulations are sent to the Republika Srpska on the Republic Day and the Patron Saint’s Day St. Stefan. It was stated that the Patron Saint’s Day was a specific feature only of the Saint Sava Orthodoxy preached by the Serb Orthodox Church, which is most frequently represented among the members of the Serb people. According to the applicant, such a practice of the implementation of the contested Article 3(b) of the Law on Holidays, despite its neutral wording, is

unacceptable from the aspect of the principle of secularism as an inherent element of any republican and law-abiding state organisation. In this respect, it was indicated that Article 14 of the Law on Freedom of Religion and Legal Position of Churches and Religious Communities in BiH (*Official Gazette of BiH*, 5/04; “the Law on Freedom of Religion”), stipulated, *inter alia*, that churches and religious communities are separated from the state and that, therefore, the Republika Srpska violated this principle by establishing such a practice of celebrating this holiday. According to the applicant, it is clear that Orthodox Serbs have been placed in a privileged position by the celebration of a secular holiday of the Entity in a religious manner.

46. The applicant alleged that, despite the fact that this date was unacceptable for the aforementioned reasons, it was imposed on everyone by means of the Law on Holidays, under a threat of a sanction in case of a failure to comply with it.

47. Finally, the applicant requested the Constitutional Court to decide whether the practice of the implementation of the contested Article 3(b) of the Law on Holidays and the historic symbolism of the contested provision correspond to the present-day values of the libertarian, democratic constitutional system and order of BiH.

48. The National Assembly indicated that it had expressed the will and want, in the Declaration, to have its Constitution, to have its personality and to guarantee full equality of peoples and citizens before the law and protection against any form of discrimination by the Constitution as the highest legal act of the community. It was indicated that this will and want had received the confirmation of the national and international subjects alike, upon the signing of the General Framework Agreement for Peace, which accepted, *inter alia*, the Agreed Basic Principles of 8 September 1995. The National Assembly recalled that the aforementioned principles determined, *inter alia*, that BiH was composed of two Entities, namely the Federation of Bosnia and Herzegovina, established by the Washington Agreement, and the Republika Srpska, and that each Entity would continue its existence in accordance with its respective Constitutions at the time (as amended so as to be compatible with the aforementioned Basic Principles). Furthermore, it was indicated that this continuity was confirmed in Article 2 of Annex II to the Constitution of BiH, and that the Declaration Proclaiming the Republic of the Serb People of Bosnia and Herzegovina, as adopted on 9 January 1992, had never been the subject-matter of decision-making by any authority in BiH in terms of the cited constitutional provision. Finally, it was noted that the Declaration was incorporated in the Constitution of the Republika Srpska and that its Article 5 was preserved in its

original form in Article 10 of the Constitution of the Republika Srpska, reading as follows: “The Constitution of the Republika Srpska shall guarantee full equality of peoples and citizens equal before the law and protection against any form of discrimination.” According to the opinion of the National Assembly, the obligation of all is, in terms of the events before the General Framework Agreement, to comply with that Agreement. Finally, according to the National Assembly, 9 January, as the date of the creation of the Entity of the Republika Srpska, has the legitimacy and confirmation in Article I(3) of the Constitution of BiH, prescribing that BiH is composed of two equal Entities, namely the Federation of BiH and the Republika Srpska.

49. It was also indicated that the Law on Holidays particularly regulated the holidays of the Entity, notably the religious holidays in the manner respecting the religious affiliation of all those living in the Republika Srpska, without discrimination. It further indicated that the Serb Orthodox Church was separated from the public authority both in accordance with the law and the Constitution, and that the representatives of any of the religious communities had not participated in drafting the Law on Holidays, nor did they participate in its implementation. In the opinion of the National Assembly, entering into discussion as to who may celebrate a religious holiday, as the issue of exclusive competence of religious institutions, would constitute a violation of Article 14 of the Law on Freedom of Religion and the interference with the issues in the exclusive competence of the church authorities.

50. Further, it was indicated that the Patron Saint’s Day of the Republika Srpska was not prescribed by any law whatsoever, i.e. that it was not determined either by the Law on the Family Patron-Saints’ Days and Church Holidays, which had been the subject-matter of consideration in the Second Partial Decision of the Constitutional Court, no. *U 4/04*. Finally, it was noted that the Declaration did not mention that it had been adopted on the St. Stefan’s Day. Accordingly, the fact that the Invitation by the President of the Republic read that the Patron-Saint’s Day of the Republika Srpska was also on 9 January constituted the conduct, which was not in accordance with the Constitution and the laws of the Republika Srpska, i.e. the conduct which could not be the subject of the proceedings concerning the review of constitutionality of a law provision. In this connection, it was indicated that the celebration of the Republic Day starts in mid-December, by a series of meetings with the representatives of different institutions, and national and international organizations, and representatives of all religious communities, and that it ends on 9 January, when the Solemn Academy is organized in the Cultural Center, which is exclusively of secular character where only the President of the Republic has a speech, followed by a solemn reception in the

building of the Government. It was indicated that the organization of the celebration of the Republic Day is within the scope of responsibilities of the Office of the President of the Republic and that the Vice-President from among the Croat people participates in it, whereas the whole event is boycotted by the Vice-President and some of the political representatives from among the Bosniac people, although the Solemn Academy and the reception are attended by the Ministers in the Government of the Republika Srpska from among this people, as well as other personalities from the public and political life from among all three constituent peoples, Others and citizens, the representatives of diplomatic corps and international organizations in BiH.

51. Finally, it was indicated that the Law on Holidays did not impose on anyone the obligation to celebrate any of the holidays of the Entity. The purpose of prescribing breaches and fines for physical and legal persons engaging in business activities and working on any of the holidays of the Entity is to ensure the right of employees to a paid leave during the days of state holidays, as regulated by the Law on Labour of the Republika Srpska.

V. Relevant Law

52. The **Law on Holidays of the Republika Srpska** (*Official Gazette of the Republika Srpska*, 43/07), in its relevant part, reads as follows:

Article 1

The Law on Holidays of the Republika Srpska ("the Law") shall determine the holidays of the Republika Srpska, the manner in which they are marked and celebrated by citizens, republic bodies, organizations and institutions, enterprises and other organizations performing activities or services.

Article 2

The Holidays in the Republika Srpska, as holidays of the Republic, shall be the following:

- a) New Year's Day;*
- b) Day of the Republic;*
- v) International Workers' Day;*

g) *Day of Victory over Fascism;*

d) *Day of the General Framework Agreement for Peace in Bosnia and Herzegovina.*

Article 3

Holidays referred to in Article 2 of this law shall be celebrated as follows:

a) *New Year's Day, January 1 and 2;*

b) *Day of the Republic, January 9;*

v) *International Workers' Day, May 1 and 2;*

g) *Day of Victory over Fascism, May 9;*

d) *Day of the General Framework Agreement for Peace in Bosnia and Herzegovina, November 21.*

Article 5

(1) During the holidays of the Republic, the republic bodies and organizations, the bodies of local self-government units, companies, institutions and other organizations and persons whose professional business relates to service and production activities shall not work.

(...)

Article 9

(1) By its decision, the Government may also determine observance of other dates, showing consideration for historic, cultural and traditional heritage of the constituent peoples of the Republika Srpska.

Article 10

Legal entities, persons responsible in legal entities and persons whose business relates to service and production activities shall be deemed to have committed a misdemeanour if they work on the days of the holidays of the Republic.

Article 11

Punishment for the misdemeanour referred to in Article 10 of this Law shall be as follows:

A fine ranging from KM 2,000 to KM 15,000 for legal entities;

A fine ranging from KM 150 to KM 2,000 for persons responsible in legal entities;

A fine ranging from KM 500 to KM 1,500 for persons whose business relates to service and production activities.

53. The **Law on Freedom of Religion and Legal Position of Churches and Religious Communities in Bosnia and Herzegovina** (Official Gazette of BiH, 5/04), in its relevant part, reads as follows:

Article 14

Churches and religious communities are separate from the state and that means:

- 1. The state may not accord the status of state religion nor that of state church or religious community to church or any religious community.*
- 2. The state shall not have the right to interfere in the affairs and internal organization of churches and religious communities.*
- 3. Subject to clause 4) below of this Law, no church or religious community and their officials may obtain any special privileges from the state as compared with any other church or religious community or their officials, nor participate formally in any political institutions.*
- 4. The state may provide material assistance for health-care activities, educational, charitable and social services offered by churches and religious communities, solely on condition that the said services be provided without discrimination on any grounds, in particular on the grounds of religion or belief, by the said organizations.*
- 5. Churches and religious communities may perform functions relating to the field of family law and the rights of the child in the form of aid, upbringing or education, in conformity with the relevant laws on the said rights and domains of law.*
- 6. The public authorities shall not have any involvement in the election, appointment or dismissal of religious dignitaries, the establishment of the structures of churches and religious communities, or of organizations performing religious services and other rituals.*

7. *Freedom to manifest religion or belief may be subject only to such limitations as are prescribed by law and in accordance with international standards when it is shown by the competent authorities to be necessary in the interests of public safety, to protect health, public morals, or for the rights and fundamental freedoms of others. Churches and religious communities shall have the right of appeal against such decisions. Prior to the decision on appeal the appellate body must request from the Ministry of Human Rights and Refugees of BiH an opinion relating to such case of limitation of the freedom to manifest religion or belief.*

VI. Admissibility

54. In examining the admissibility of the request the Constitutional Court invoked the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 63(1)(d) of the Rules of the Constitutional Court.

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 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.

Article 63 (1)(d) of the Rules of the Constitutional Court read as follows:

- (1) The Constitutional Court shall take a decision to terminate the proceedings when, during the proceedings:*

(...)

- d) the applicant/appellant has withdrawn the request/appeal;*

(...)

55. At the public hearing held on 29 September 2015, the applicant withdrew the part of the request seeking the review of constitutionality of Article 2(b) of the Law on Holidays.

56. Having in mind the provision of Article 63(1)(d) of the Rules of the Constitutional Court, under which the Constitutional Court shall take a decision to terminate the proceedings, if the applicant has withdrawn the request during the proceedings, the Constitutional Court decided as stated in the enacting clause of this decision.

57. Bearing in mind the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Rules of the Constitutional Court, the Constitutional Court established that the present request in the part contesting Article 3(b) of the Law on Holidays is admissible as it was lodged by an authorized entity, and that there is not a single formal reason under Article 19 of the Rules of the Constitutional Court rendering this request inadmissible.

58. The Constitutional Court will examine the objections raised by the National Assembly relating to *ratione materiae* admissibility of the request in relation to the European Convention and the International Convention and in relation to the obvious ill-foundedness of the request, within the merits.

VII. Merits

59. The applicant claims that Article 3(b) of the Law on Holidays is inconsistent with lines “3 and 10” of the Preamble of the Constitution of BiH, Article 1 of Protocol No. 1 to the European Convention, Article I(2) in terms of the violation of principle of democracy and the rule of law, Article I(2) of the Constitution of BiH in terms of violation of principle of secularism as an inherent element in the rule of law and Article 9 of the European Convention, Article II(4) of the Constitution of BiH, in conjunction with Article 1(1) and Article 2(a) and (c) of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 14 of the European Convention and Article 1 of Protocol No. 12 to the European Convention.

60. The **Constitution of Bosnia and Herzegovina** reads in its relevant part as follows:

Article I(2)

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

Article II(4)

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

Article III(3)

(...)

b) The Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and Herzegovina. The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities.

(...)

61. **Article 1 of Protocol No. 12** to the European Convention reads as follows:

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.

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

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

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;

(...)

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;

(...)

63. The Constitutional Court will first consider the issue of applicability of Article 1 of Protocol No. 12 to the European Convention, and Article 1(1) and Article 2(a) and c) of the ICERD.

64. The Constitutional Court indicates that the stipulation by the public authorities of a holiday celebrated by the social community at large, under the domestic and comparative law, falls in the domain of public law, wherein, according to the stance taken by the European Court and the Constitutional Court, the public authorities enjoy a broad margin of appreciation. Article 1 of the Constitution of the Republika Srpska stipulates that the Serbs, Bosniacs and Croats, as constituent

peoples, Others and citizens, equally and without discrimination shall participate in exercising the authority in the Republika Srpska. This provision is further affirmed in Article 33 of the Constitution of the Republika Srpska (the Constitution of the Republika Srpska, II - Human Rights and Freedoms) which, among other things, stipulate that citizens shall have the right to participate in the management of public affairs. Thereby, the term citizens refers to the constituent peoples, Others and citizens of the Republika Srpska.

65. The Constitutional Court observes that the Law on Holidays (Article 1) stipulates holidays of the Republika Srpska, the manner of observing and celebrating thereof by citizens, bodies and institutions, wherefrom it follows that this concerns the issue falling within the domain of public law which concerns the interests of all in the Republika Srpska. Further, the mentioned law had been passed by the National Assembly, as a legislative authority, in accordance with the authorization to pass laws referred to in Article 70(1)(2) of the Constitution of the Republika Srpska. Accordingly, and within the meaning of Article 1 of the Constitution of the Republika Srpska the participation in regulating this issue falls within the scope of the constitutional right to exercise power, that is, within the meaning of Article 33 of the Constitution of the Republika Srpska the constitutional right to exercise public affairs. In that sense the stipulation of holidays and days of their observance falls under “the right explicitly guaranteed under the domestic law” within the meaning of Article 1 of Protocol No. 12 to the European Convention, regarding which the public authorities have committed themselves not to discriminate against anyone.

66. The Constitutional Court recalls that the ICERD, in relation to other international documents protecting and guaranteeing human rights and in relation to discrimination, sets a wider scope of protection as it is not limited to specific rights and freedoms contained in the instrument itself. The fact that Article 5 of the ICERD enumerates civil, political, economic, social and cultural rights which enjoyment the state is obliged to secure before the law without discrimination, cannot be construed so that this article establishes civil, political, social and cultural rights, rather in the manner that it presumes the existence of these rights and the recognition thereof (see the Committee on the Elimination of Racial Discrimination, General Recommendation no. XX, Non-Discriminatory Implementation of Rights and Freedoms (Article 5), adopted at the Forty Eighth Session, 1996).

67. The Constitutional Court notes that in the First Partial Decision no. *U-4/04* of 31 March 2006 (published in the *Official Gazette of BiH*, 47/06), and in the Second Partial Decision no. *U-4/04* of 18 November 2006 (published in the *Official Gazette of BiH*, 24/07), while examining the

constitutionality of the then legal solutions on the flag, coat of arms and anthem, and the stipulation of holidays, it took a position that the ICERD was applicable. This conclusion was based on the fact that the ICERD was stated in Annex I to the Constitution of BiH, as one of the additional agreements which are applied in Bosnia and Herzegovina, and that the obligations under the international agreements, stated in Annex I to the Constitution of Bosnia and Herzegovina, in accordance with Article II(1) and Article II(6) of the Constitution of Bosnia and Herzegovina refer also to the entities.

68. Accordingly the Constitutional Court could not accept the objection of the National Assembly in relation to the applicability of Article 1 of Protocol No. 12 to the European Convention, and Article 1(1) and Article 2(a) and (c) of the ICERD.

69. In the instant case, the applicant's allegations on the discriminatory character of the contested Article 3(b) of the Law on Holidays or giving priority to the Serb people over the other two constituent peoples and Others, contrary to the principle of equality of constituent peoples, are essentially based on two arguments.

70. The first argument is that the Day of the Republic, which is celebrated on 9 January, is linked to the Declaration Proclaiming the Republic of the Serb People of Bosnia and Herzegovina, which was adopted by the Assembly of the Serb People in Bosnia and Herzegovina on 9 January 1992 and without participation of Bosniacs, Croats and Others. Therefore, in his opinion, 9 January represents a historical moment of exclusively Serb people as the Declaration is defined as the result of the right of the Serb people to self-determination, self-organisation and association, demanding territorial demarcation with other peoples. Finally, the applicant presented a claim that this date has also encountered a negative perception with all non-Serbs in RS because it reflects the philosophy of the identity of territory and nations, i.e. ethnic nationalism, exclusion of others and those who are different from all decision making, denial of pluralism and tolerance, multiculturalism and promotion of the medieval principle *cuius regio, eius religio*.

71. The second argument is that the Patron Saint's Day of the Republika Srpska – St. Stefan – is also observed on that same day so that the public authorities started to observe a secular date as “a religious Orthodox holiday or as a traditional Orthodox custom” that belongs exclusively to the Serb people. The applicant emphasized that the Patron Saint's Day represents a specific feature of only St. Sava's Orthodoxy (*Svetosavlje*) that is preached by the Serb Orthodox Church not evident with any other Orthodox church. Further, it was indicated that the central celebration of observing 9

January begins with the Liturgy and Patron Saint's Day Ritual with breaking the traditional bread *slavski kolac* ("Slava cake"). It was also indicated that this ritual, in general, is led by the highest church officials of the Serb Orthodox Church. In this part of the request, the applicant emphasized that the perception of the public and media, political officials in the Republika Srpska, as well as officials from the Republic of Serbia, and the representatives of the Serb Orthodox Church, is that both the Patron Saint's Day of the Republika Srpska and the Day of the Republic are celebrated on the same day. In this manner, in his opinion, a seemingly neutral secular day is celebrated as a religious traditional day, while the Serb Orthodox Church takes both active and formal participation in its celebration. This, in fact constitutes a violation of the principle of secularism by the public authorities as stipulated by Article 14 of the Law on Freedom of Religion.

72. In the reply to the first argument of the applicant, the National Assembly emphasized that 9 January 1992 is the date when the Republika Srpska was created and that, by the Declaration, the Republika Srpska expressed its will and desire to have its own Constitution, to have personality and to guarantee, by its Constitution, full equality to all peoples and citizens before the law and protection against all forms of discrimination as stated in Article 5 of the Declaration, which was included in Article 10 of the Constitution of the Republika Srpska in original form. In that regard, it was stated that this continuity has a confirmation in the Preamble of the General Framework Agreement for Peace, with the Constitution as its integral part, in which *inter alia*, it was stated that the signatory parties affirm, *inter alia*, their commitment to the Agreed Basic Principles issued on 8 September 1995, according to which BiH shall consist of two entities, i.e. of the Federation of BiH, which was established by the Washington Agreement, and the Republika Srpska, and that each entity shall continue to exist in accordance with its Constitution (amended so as to be in compliance with the Basic Principles). Finally, in the opinion of the National Assembly, 9 January, as the date of the genesis of the entity of the Republika Srpska, has its legitimacy and confirmation in Article I(3) of the Constitution of BiH that stipulates that BiH shall consist of the two equal Entities, the Federation of BiH and the Republika Srpska.

73. In the reply to the second argument of the applicant, the National Assembly indicated that the Declaration did not state whatsoever that it was adopted on the day of St. Stefan nor was that day referred to as the Patron Saint's Day of the Republika Srpska. Also it was indicated that the Patron Saint's Day of the Republika Srpska was not determined by any regulation of the Republika Srpska whatsoever. In addition, the Patron Saint's Day of the Republika Srpska was not established either by the Law on the Family Patron-Saint's Days and Church Holidays, which was the subject-

matter of review in the Second Partial Decision of the Constitutional Court no. *U 4/04*, or the Law on Holidays (Article 3(b)), which was the subject-matter of this review. Considering that the Patron Saint's Day does not exist in the law, or in any other norm, the issue as to who and how can observe it is in the exclusive competence of the Serb Orthodox Church. Pursuant to Article 14 of the Law on Freedom of Religion, the public authorities cannot give their opinion about it. The National Assembly believes that this cannot be the issue the Constitutional Court can decide on. Also, it was indicated that the Law on Holidays regulates the holidays of the entities independently from religious holidays, while recognizing all three biggest religious groups, as well as that the Serb Orthodox Church is separate from the state (the entity) by the constitution, law and conduct. In the opinion of the National Assembly, the fact that some of the persons organizing the program of observing the Day of the Republic have arbitrarily stated that the Patron Saint's Day is observed on that day as well, represents actions inconsistent with the Constitution and the Republika Srpska laws, which cannot be the subject-matter of the proceedings before the Constitutional Court as in that manner the Constitutional Court would enter into qualification and review of the case-law and not the norm and its compliance with the Constitution.

74. Having in mind the arguments presented by the applicant and the National Assembly, in answering the question whether the choice of 9 January for the observance of the Day of the Republic has discriminatory consequence for the Bosniacs and Croats, as constituent peoples, Others and citizens of the Republika Srpska, i.e. whether it results in giving privilege to the members of the Serb people in relation to the other two constituent peoples and Others, which is contrary to the principle of equality of constituent peoples, the Constitutional Court should take into account: a) whether 9 January represents a historical heritage of only one people in the Republika Srpska and b) whether the practice of observing the holiday on 9 January represents a privilege of only one people.

a) January 9th as part of the history of only one people

75. The Constitutional Court recalls that, while assessing the constitutionality of the entity's laws on the coat of arms, flag and anthem, it stated in the First Partial Decision no. *U-4/04* that (see paragraph 131): "(...) As to the symbols of the Republika Srpska, the Constitutional Court points to the fact that the symbols in question are the official symbols of a territorial unit which has the status of an 'Entity', that they constitute a constitutional category and as such must represent all citizens of the Republika Srpska, who have equal rights as recognized by the Constitution of the Republika Srpska. These symbols appear on all features of the public institutions in the Republika Srpska, that

is the National Assembly of the Republika Srpska, public institutions etc. They are not the local symbols of one people, which are to reflect the cultural and historical heritage of that people only, but the official symbols of the multinational Entity, which, therefore, must reflect the character of the Entity”. The Constitutional Court concluded in the mentioned decision that the challenged entity’s laws are not in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1(1) and Article 2(a) and (c) of the ICERD.

76. Further, the Constitutional Court emphasizes that the subject-matter of assessment in the Second Partial Decision no. *U-4/04* were the provisions of Articles 1 and 2 of the Law on the Family Patron-Saints’ Days and Church Holidays, which designated as the holidays of the Republic the following: Christmas, Day of the Republic, New Year (*14 January*), Epiphany, St. Sava, First Serb Uprising, Easter, Whitsuntide, May 1st Day – Workers’ Day and St. Vitus’s Day, and their observance dates (the Day of the Republic was observed on 9 January). The Constitutional Court concluded that the challenged legal provisions (see paragraph 70): “are not in conformity with the constitutional principle of equality of the constituent peoples, citizens and Others in Bosnia and Herzegovina, and have a discriminating character, thus they are not in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1 and 2 (a) and (c) of the ICERD. The Constitutional Court concluded that the challenged provisions of the Law on the Family Patron-Saints’ Days and Church Holidays include the holidays “which only reflect and exalt the Serb history, tradition, customs and religious and national identity”. Further, the Constitutional Court stated in the cited decision (see paragraph 70) that the Serb people in the Republika Srpska have the legitimate right to preserve its tradition and identity through legislative mechanisms, but an equal right must be given to other constituent peoples of the Republika Srpska and to other citizens of the Republika Srpska”.

77. In the opinion of the Venice Commission, it was noted that the selection of 9 January for the observance of the Day of Republic as the holiday of an entity may raise difficulties, *inter alia*, due to the fact that the Declaration represents a unilateral act not supported by other, non-Serb peoples living in the Republika Srpska.

78. It is undisputable that the selection of 9 January to observe the Day of the Republic in the contested Article 3(b) of the Law on Holidays is inspired by 9 January 1992 when the Assembly of the Serb People in BiH was held, without participation of Bosniacs, Croats and Others. At that time, the Declaration had been adopted as an expression of political will of only one people, Serb people.

79. 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 multiethnic 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. As such, in the opinion of the Constitutional Court and according to the position of the Venice Commission it can hardly be seen as compatible with the basic values declared in the Constitution of the Republika Srpska, namely with respect for human dignity, freedom and equality, national equality, with democratic institutions, rule of law, social justice, pluralistic society, guarantees for and protection of human freedoms and rights as well as the rights of minority groups in line with the international standards, prohibition of discrimination (Preamble)’’.

b) Practice of observing holidays

80. The Constitutional Court observes that the Law on Holidays or, for that matter, any other regulation in the Republika Srpska, failed to regulate the Patron Saint’s Day either as a religious or a secular holiday. It did not define that the Patron Saint’s Day of the Republika Srpska is indeed St. Stefan’s day. This provision was not included in the Law on the Family Patron-Saint’s Days that was the subject of review in the Second Partial Decision no. *U 4/04*. Also, the Declaration did not contain any details as to being adopted on the day of St. Stefan i.e. that the St. Stefan is proclaimed as the Patron Saint’s Day of the Republika Srpska. Finally, the Law on Holidays, or any other regulation in the Republika Srpska, failed to regulate the manner of observing or the ceremony of celebration of any single holiday (secular or religious alike) that it recognizes.

81. Under the case-law of the Constitutional Court based on the case-law of the European Court, the discrimination occurs when a person or a group of persons who are in an analogous situation are treated differently and there is no objective or reasonable justification for such treatment. In addition, it is of no relevance whether the discrimination arose from the differential lawful

treatment or from the application of the law itself (see, the European Court of Human Rights, *Ireland vs. Great Britain*, judgment of 18 January 1978, Series A, No. 25, paragraph 226).

82. Constitutional Court observes that the holiday is manifested in the public life of a community through activities undertaken by the public authority for the purpose of reminding the public of the values of significance for the community as a whole and through representation of the community towards others, from outside of the community itself. Therefore, the manner of observance of the holidays assumes a character of exercising the public authority although, as such, it is not regulated by legal or any other norm.

83. Therefore, the argument of the applicant that the public authorities, through consistent practice of observance of the holiday, began to see a secular date as a religious Orthodox holiday or as a traditional Orthodox custom raises an issue of existence of administrative practice incompatible with the Constitution of BiH, which, according to the claims of the applicant, has a discriminatory effect.

84. The European Court of Human Rights defines the notion of “administrative practice incompatible with the Convention” as accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to represent not merely isolated incidents (exceptions), but also a pattern (system) (see European Court, cited above, *Ireland vs. Great Britain*, *Cyprus v. Turkey*, judgment of 10 May 2001, paragraph 115).

85. The Constitutional Court finds that in defining the notion of “administrative practice incompatible with the Constitution of BiH”, it may be guided by the referenced definition, and the interpretation of the notion of discrimination referred to in the First Partial Decision no. *U 4/04*. In the referenced decision, the Constitutional Court took a position that the legal order of BiH, due to the existing Article II(4) of the Constitution of BiH that includes a general clause on non-discrimination, affords a greater protection against discrimination than the European Convention i.e. a constitutional obligation of non-discrimination in terms of a group right.

86. Considering that each holiday is observed on an annual basis (see Opinion of the Venice Commission, paragraph 32 - annual recurrent opportunity“) the practice of observance of one holiday falls under the system, and not an isolated incident for the purpose of referenced definition of administrative practice.

87. The Constitutional Court observes that the manifestation of a holiday in a private life of an individual is connected to free time and does not obligate or impose any public or private participation in the very observation of the holiday. Thus, the practice of the observation of a holiday in principle could not result in discrimination in exercising one's individual rights and obligations. However, non-discrimination of individuals is not the same as the equality of groups (see, Constitutional Court, Third Partial Decision No. *U 5/98*, paragraph 70). Therefore, the principle of collective equality of constituent peoples imposes an obligation on the entities not to discriminate, primarily, against those constituent peoples who are, in reality, a minority in that particular entity.

88. The Constitutional Court notes that both the Day of the Republic and the Patron Saint's Day are congratulated on 9 January in the Republika Srpska by the political officials from among the Serb people in BiH and the Republika Srpska, and by political officials from the Republic of Serbia. In his address, at the Solemn Academy of 9 January 2015, the President of the Republika Srpska emphasized that both the Day of the Republic and the Patron Saint's Day are celebrated. The Patron Saint's Day of the Republika Srpska is congratulated by the high church officials of the Serb Orthodox Church that lead the liturgy and break the traditional bread *Slavski Kolac* ("Slava cake") in the Orthodox Church and who are also present at the Solemn Academy in the Cultural Center and reception in the building of the Government of the Republika Srpska. The media report on the celebration of 9 January as the day of celebration of both the Day of the Republic and the Patron Saint's Day in the Republika Srpska.

89. The aforementioned is in support of the argument taken by the Venice Commission (see Opinion, paragraph 38) that it seems that both in the Republika Srpska and outside, the Day of the Republic of 9 January is perceived as a holiday connected with the two events at the same time: the Day of the Republic, classified as a secular and not religious holiday, and St. Stefan.

90. In its Second Partial Decision no. *U 4/04*, the Constitutional Court concluded that the holidays cannot be regulated so as to prefer 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. The Constitutional Court considers that there is no reason to depart from such a position in relation to the practice of observing entity holidays as one segment of exercising the public authority.

91. It is undisputable that the Eastern Orthodox Christianity is predominant with the members of the Serb people and that the Patron Saint is a specific and unique feature of the St. Sava's Orthodoxy (*Svetosavsko pravoslavlje*) that is preached by the Serb Orthodox Church. Therefore, the practice of observation of Patron Saint's Day of the Republika Srpska without a doubt gives superior prominence to the Eastern Orthodox Christianity as a religion of majority in the Republika Srpska and to the Serb Orthodox Church i.e. the Serbs as people who recognize this religion as the most dominant. In that regard, the Constitutional Court indicated in the Second Partial Decision no. *U 4/04* that it is a legitimate right of the Serb people in the Republika Srpska to preserve its tradition and identity, but that an equal right must be given to other constituent peoples and other citizens of the Republika Srpska.

92. Therefore, it follows that through the well-established practice of observance of the holiday on 9 January, when both Patron Saint's Day of the Republika Srpska and the Day of the Republic are observed, notwithstanding whether it is a separate or a single celebration of these two events, the public authorities in the Republika Srpska created a public atmosphere in which the system of values and beliefs is obviously such that a priority is given to the religious heritage, tradition and customs of only the Serb people, placing it into a privileged position in relation to all three constituent peoples in the Republika Srpska who exercise their rights and obligations under equal terms and in an equal manner. Thus, the public authorities of the Republika Srpska are in violation of the constitutional obligation of non-discrimination in terms of a group right. Indeed, religious convictions and consequently tradition and rituals make a part of identity of each of the constituent peoples in BiH and it is a legitimate right of each of them to preserve it. It is an obligation of the public authorities to secure the exercise of this right equally for everyone. The practice of the observance of 9 January as a religious holiday that represents a part of identity of only one constituent people is inconsistent with this obligation of the public authority.

93. Further, the Constitutional Court shall not enter into evaluation as to who may observe the religious holiday nor bring into question the right of anyone, including persons who take part in exercising public authority in the capacity of elected and appointed representatives, to express their religious or other affiliation or conviction individually and/or in community with others in private and public life. These rights may only be subject to limitations as necessary in a democratic society for the purpose of exercising a legitimate aim. Having this in mind, the Constitutional Court finds that this public atmosphere, in which the system of values and beliefs is obviously such that a priority is given to a religious heritage, tradition and customs of only one people, is not in

compliance with the obligation of the public authority to secure, in the exercise of its functions in a neutral and unbiased manner, a manifestation of different religions, faiths and beliefs as well as religious compatibility and tolerance in a democratic society. Namely, the atmosphere so created, as promoted by the political officials of the Republika Srpska who should be particularly cautious in promoting democracy and its principles while bearing in mind that other religions and churches, such as Catholicism or Islam, in addition to the Orthodox Church and Eastern Orthodox Christianity, have always made an integral part of the multi-religious life in BiH in terms of pluralism that the Constitution of BiH and the European Convention require as a necessary prerequisite for a democratic society.

94. Also, the established practice and the created public atmosphere of the system of values and beliefs is inconsistent with the principle of secularism proclaimed by Article 14 of the Law on Freedom of Religions, which in terms of Article III(3)(b) of the Constitution of BiH represents a “decision of the institutions of BiH”. The entities and all their respective administrative units are obligated to uphold it as it is in compliance with democratic principles set out in Article I(2) of the Constitution of BiH. Namely, in exercising its functions, the public authority established the practice of the observance of holiday on 9 January when both the Day of the Republic and the Patron Saint’s Day of the Republika Srpska are observed. Regardless of the fact whether it involves a separate or a single celebration, it includes liturgy and breaking the traditional bread *slavski kolac* (“Slava cake”) in the Orthodox Church led by high church officials of the Serb Orthodox Church and the presence of the church officials during the rest of the ceremony of observance of the holiday are not in compliance with the proclaimed principle of the separation of the church from the state. Namely, under this principle, *inter alia*, the public authorities may not accord the status of state religion nor that of state church or religious community to any church or any religious community and no church or religious community and their officials may be granted special privileges when compared to any other church or religious community, and not a single church or religious community or their officials may participate formally in the work of political institutions.

95. Finally, the Constitutional Court recalls that the Venice Commission, in support of the reasons for which the selection of January 9 as the day of observance of the Day of the Republic may be problematic, among other things, indicated that, although no obligation has been imposed on persons to participate in the formal celebration of the Day of the Republic, the very fact that that law imposes the celebration on all the inhabitants by introducing it as a day off, namely for them to refrain from work on that day, under a threat of sanction of a relatively high fine, may be

problematic, and the application thereof may result in disproportionate impact on individuals/members of certain ethnic communities living in the Republika Srpska, and the communities concerned (see the Opinion, paragraph 55).

96. Therefore, the Constitutional Court holds that the practice of observance of 9 January and the Patron Saint's Day of the Republika Srpska as an Orthodox Religious Holiday afforded a preferential treatment to Serbs as one constituent people in relation to Bosniacs and Croats as constituent peoples, Others and citizens of the Republika Srpska. The public authorities of the Republika Srpska are therefore in "violation of the constitutional obligation of non-discrimination in terms of the rights of groups".

97. The Constitutional Court concludes that the contested Article 3(b) of the Law on Holidays, 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, and on account of the observance of the Saint Patron's Day of the Republika Srpska being connected to the tradition and customs of only Serb people.

98. The Constitutional Court concludes that the contested Article 3(b) of the Law on Holidays is inconsistent 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 ICERD and Article 1 of Protocol No. 12 to the European Convention.

99. The Constitutional Court re-emphasizes that this decision in no way brings into question the right of the citizens of Bosnia and Herzegovina of Orthodox religion (or similar rights of citizens of any other religious community in Bosnia and Herzegovina) to freely, in a traditional fashion, or any other appropriate fashion, observe their holidays, including the Patron Saint's Day of St. Stefan. According to the position of the Constitutional Court, such freedoms and rights, especially their free manifestation, only confirm the multi-confessional and multi-cultural character of Bosnia and Herzegovina as a state and society. Therefore, such a decision of the Constitutional Court in that context can in no way be understood differently.

Other allegations

100. Given the conclusions relating to Article II(4) of the Constitution of Bosnia and Herzegovina, Article 1 of Protocol No. 12 as well as Article 1(1) and Article 2(a) and (c) of the

ICERD, the Constitutional Court does not find it purposeful to examine the challenged Article (3)b of the Law on Holidays in conjunction with lines “3 and 10” of the Preamble of the Constitution of BiH, Article II(3)(g) of the Constitution of Bosnia and Herzegovina and Article 9 and Article 14 of the European Convention and Article 1 of Protocol No. 1 to the European Convention.

VIII. Conclusion

101. The Constitutional Court concludes that Article 3(b) of the Law on Holidays (*Official Gazette of the Republika Srpska*, 43/07) is inconsistent 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 ICERD and Article 1 of Protocol No. 12 to the European Convention.

102. Pursuant to Article 59(1) and (2) and Article 61(4) and Article 63(1)(d) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this decision.

103. Pursuant to Article 43(1) of the Rules of the Constitutional Court, Separate Dissenting Opinions of the Vice-President Zlatko M. Knežević and Judge Miodrag Simović make an annex of this Decision.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

Separate Dissenting Opinion of Judge Miodrag Simović

Unfortunately, I cannot agree either with the reasoning or with the conclusions of the majority decision of the Constitutional Court regarding the unconstitutionality of Article 3(b) of the Law on Holidays of the Republika Srpska. My reasons are as follows:

(1) The mentioned Law, in Article 8 paragraph 4, recognizes that right to every citizen as the right to “a paid leave from work, up to two days of one’s own choice during the calendar year, on the days of their respective religious holidays”. That right, however, is not regulated by the European Convention and its protocols, or by the International Convention on the Elimination of All Forms of Racial Discrimination. Therefore, the specific request, in the segment of references to the violation of the European Convention and its protocols and the International Convention on the Elimination of All Forms of Racial Discrimination, is inadmissible *ratione materiae*.

(2) If that request were admissible, the Constitutional Court should then declare it unconstitutional, as the observance of religious holidays as state, or non-working days, is a practice that exists in a great many states throughout the world and, as such, represents a part of the tradition and civilizational development. In that respect, the European Court of Human Rights voiced its stance that the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State, and that the Court must moreover take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development (see paragraph 68 of the Judgment of the Grand Chamber of the European Court of Human Rights in the case of *Lautsi and others v. Italy* of 18 March 2011).

The Judgment in the case of *Lautsi and others v. Italy* drew major attention of the public worldwide. It concerned a national of Italy whose children attended a state school in Italy, which classrooms had a crucifix displayed. The applicant complained that her right was violated for her children to be educated in accordance with the religious and philosophical beliefs of the parents, as provided for by the European Convention, namely Article 2 of Protocol No. 1 to the Convention, and the right to the freedom of religion under Article 9 of the Convention. The European Court of Human Rights accepted that mandatory display of crucifix on the walls of classrooms of the Italian public schools does not constitute an attack on the right of parents to secure education and

upbringing of their children in accordance with their respective religious and philosophical beliefs, and that right is guaranteed under Article 2 of the First Additional Protocol to the European Convention. The Court, further, for the reasons stated as part of the research of the rights of parents, appraised that the issues are not any different in the context of Article 9 that defends the freedom of speech, or Article 14 prohibiting discrimination in enjoying the rights guaranteed by the Convention.

Thus the European Court of Human Rights acknowledged that in the countries of Christian tradition Christianity has a specific social legitimacy that differs it from other philosophical and religious beliefs, and therefore justifies the fact that a differentiated approach can be adopted. Since Italy is a country of Christian tradition, a Christian symbol may have specific dominant visibility in the society. The Court reached a similar conclusion in other cases as well. It justified for instance the fact that Turkish schools national programs “give greater priority to knowledge of Islam than they do to that of other religions (...) this itself cannot be viewed as a departure from the principles of pluralism and objectivity which would amount to indoctrination having regard to the fact that, notwithstanding the State's secular nature, Islam is the majority religion practiced in Turkey.” (European Court of Human Rights, 28 November 2004, *Zengin v. Turkey*, no. 46928/99, paragraph 63).

Therefore it is unacceptable to assess in the procedure of this constitutional case historical and political events due to which January 9th was determined as the Day of the Republika Srpska. The reason being particularly the fact that no consensus has been reached still regarding the cause, character and consequences of all the developments in the territory of BiH from 1992 to 1995. Therefore, the Constitutional Court, by entering into the merits of the decision-making on the particular request, in a way gave the primacy to political over legal arguments, evidence and facts, on which the decision on the review of constitutionality should not be based.

(3) The Law on Holidays does not mention at all the Patron Saint's Day of St. Stefan, or other Patron Saint's Days for that matter. Since only written provisions can be the subject-matter of the constitutional dispute, a question arises as to the competence of the Constitutional Court.

(4) The challenged law separated secular and religious holidays, by stipulating as republic holidays certain historical events of relevance for the Republika Srpska, and as religious holidays the most significant religions of three religions: Orthodox Christianity, Islam and Catholic Christianity. Religious holidays are celebrated for two days each, and the believers of Orthodox, Islam and

Catholic religion have the right to a paid leave from work on those days. The members of other religions are given the right to a paid leave from work of their own choice, up to two days during the calendar year, on the days of their respective religious holidays. In addition, the Government of the Republika Srpska can, by its respective decision, determine the observation of other dates, considering historical, cultural and traditional heritage of peoples living in the Republika Srpska. Therefore, religious sentiments of the members of not only constituent peoples but also of members of other peoples and religions are regulated in an identical manner.

(5) If January 9th is disputable as the Day of the Republic, then the rest of the republic holidays could be regarded as disputable as well. In essence, any date marking a holiday could be disputed by means of arguments that the date coincides with some event or personality from the calendar of religious communities in BiH.

(6) The Constitutional Court dealt with the constitutionality of holidays in the Republika Srpska in the case no. *U 4/04* of 18 November 2006, appraising the provisions of the then applicable Law on Patron Saint's Days and Church Holidays. In a certain manner and in the context of the well-known rule of *res iudicata*, the Constitutional Court dealt again with the same constitutional issue in the case no. *U 3/13*.

(7) The Law on Holidays was the subject-matter of the assessment by the Council for the Protection of the Vital Interest of the Constitutional Court of the Republika Srpska, which, by its ruling of 10 May 2007, declared as inadmissible the request filed by the Bosniac Caucus in the Council of Peoples of the Republika Srpska for the initiation of the proceedings for the establishment of existence of a vital national interest of the Bosniac people in that law. The Council for the Protection of Vital National Interest established that the applicant failed to specify what constituted a violation of the vital national interest of the Bosniac people in the Law on Holidays of the Republika Srpska. The same situation repeated itself in the request of the applicant before the Constitutional Court of BiH.

In view of the aforementioned reasons, I hold that the Constitutional Court of BiH should have dismissed the request of the applicant, and adopt a decision on lack of discrimination in relation to the disputable provision of the Law on Holidays of the Republika Srpska.

Separate Dissenting Opinion of Vice-President Zlatko M. Knežević

As, contrary to the majority opinion, I was against granting the request for review of the constitutionality of Article 3(b) of the Law on Holidays of the Republika Srpska and against the reasoning of the Decision adopted by the Court, I hereby submit my separate dissenting opinion for the following reasons.

My separate opinion is not different, but on the contrary it is in accord with the separate opinion of Judge Miodrag Simović; however, it contains distinct emphases placed on, in my opinion, key arguments and I certainly join and support the Judge's position on inadmissibility.

Introductory remarks

1. The request for review of the constitutionality filed by an authorised applicant ("request"), having been specified, *i.e.* after the applicant has withdrawn part of the original request, and following the public hearing held in the present case, amounts to an assertion that the Republic Day (January 9th) is in violation of the norms of constitutional nature (Article 14 of the European Convention, Article 1 of Protocol No. 12 to the European Convention, and 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 on the Elimination of All Forms of Racial Discrimination, "International Convention"), because it symbolizes only one people (Serbs) and was instituted without participation of the other two peoples (Bosniacs and Croats) and because the norms, by their compulsory nature, indicate "compulsion" in relation to the observance of the holiday in issue.
2. The applicant particularly emphasises in the request, as expressly pointed out at the public hearing before the Court, that January 9th is also a religious holiday – Saint Archdeacon Stefan, which was proclaimed as the Patron Saint's Day of the Republika Srpska, and that, as pointed out in the request, the "practice" of simultaneous observance of the holiday, by itself, creates "exclusion" and "discrimination".

Particular emphasis is placed on a historical component of the origin of January 9th as holiday and Day of the Republika Srpska, as regards the historical fact on the point in time when the Assembly of the Serb People in Bosnia and Herzegovina declared and proclaimed the Republic of the Serb People in Bosnia and Herzegovina and, according to the applicant's opinion, negative value qualifications of that historical fact linked to the emergence of the war in Bosnia and

Herzegovina, war crimes, all the way to the opinion about a date that would be “more appropriate” as the Day of the Republika Srpska.

Finally, it all comes down to the assertion that Bosniacs in the Republika Srpska and the Bosniac People in Bosnia and Herzegovina (including Croats and Others, too) experience the existence of the Day of the Republika Srpska (January 9th) as discrimination in relation to their rights of the constituent peoples.

In its introductory part, the Decision mentions the detailed allegations stated in the request, a reply by the National Assembly of the Republika Srpska, a summary of the presentations given at the public hearing, the participation of the Venice Commission of the Council of Europe, as well as all other documents obtained and the relevant provisions of the Constitution of Bosnia and Herzegovina, the European Convention and other international documents, and the Law on Holidays of the Republika Srpska.

As to the Admissibility of the Request

A fundamental issue that should have been taken as a starting point in consideration of the request, in my view, is the issue of admissibility.

It is not about the admissibility in formal sense, as the request was undisputedly filed by an authorised applicant under the Constitution, but it is about the admissibility in essential sense or, more precisely, whether it involves a review of constitutionality that falls within the scope of jurisdiction of the Constitutional Court. Certainly, any request for review of constitutionality claiming and/or alleging a violation of the Constitution of Bosnia and Herzegovina, the European Convention or International Covenant ought to be examined in light of the alleged “violations” but, first of all, an issue arises as to the jurisdiction of the Constitutional Court to decide, as stated in the Rules of the Constitutional Court, whether or not the Constitutional Court is competent to take a decision.

On several occasions, during the consideration of the request, and I am reiterating it now, I have held that once all the assertions ensuing from the interpretation of constitutional norms or international conventions are laid bare, it essentially concerns the *perception*, feeling, view, conclusion and assessment of the historical fact being the source of emergence of the Day of the Republika Srpska on the precisely determined date - January 9th and the practice of observing the holiday, and it does not concern a violated constitutional norm.

Incidentally, to my regret I have to mention that, at the time when we were deciding about the participants at the public hearing before the Court, the majority failed to accept my proposition

to invite citizens of the Republika Srpska, primarily Bosniacs, but not only them, who are not political representatives but engaged in cultural, religious, educational, administrative, charitable or some other activities and whose authority and reputation in their place of residence, both before and after the Decision, have been acquired by their own integrity.

Their opinion and their *perception* is a key for assessing equality and the existence of discrimination in both date and practice of observing the holiday in question. Unfortunately, the majority of my colleagues held that it would be sufficient to hear political representatives only, which I do not contest as part of a necessary but *not sufficient* thing to do.

The Law on Holidays of the Republika Srpska and January 9th, as a date, have no ethnic or religious character. It is value-neutral and has no connection with anything religious (Family Patron Saint's Day – Saint Archdeacon Stefan), regardless of the fact that the majority (or the major part) of the Serb People are Orthodox Christians and practice the Christianity.

Therefore, it follows that we (the Constitutional Court) were actually requested to declare a non-existing norm unconstitutional!

Even the applicant himself does not hold that the overlapping of the date is disputable and, as I have understood, the observance of the religious element for those who have such a need is not disputed but the “practice” of observing the holiday.

And, it is now that we have run into the problem. Is it possible to assess, as an issue of constitutionality, something that does not exist in legal norms but, according to the applicant's view, exists in practice?!

Therefore, I am strongly convinced that the Constitutional Court, having been faced with the request to review the constitutionality of the norm that does not exist, and to do so on the basis of *perception* of other elements, was obligated to reject the request as inadmissible, as the Court has no jurisdiction to decide on something that does not exist in the norm subject to the review.

In addition, the conclusion emerges, while we are talking about the admissibility, that the Court, by its Decision no. *U 4/04*, in reviewing the then Law on the Family Patron-Saints' Days and Church Holidays of the Republika Srpska, gave clear parameters the National Assembly of the Republika Srpska was obliged to comply with. The National Assembly of the Republika Srpska did so by enacting a new Law on Holidays. A paradox is that the Constitutional Court stated that the National Assembly of the Republika Srpska *met* its obligations under the Decision no. *U 4/04* and that Decision is deemed enforced! Therefore, it was stated that the Decision had been enforced in

respect of the issue that was raised again and discussed again and in respect of which a different decision was made, whereas the constitutional basis (Constitution) was not altered.

In legal theory and practice this is called *res iudicata* (a matter judged), while such a sequence of events, as regards the constitutional-legal theory, is a classic model of *constitutional-legal uncertainty* that is not tolerated or is tolerated only in exceptional circumstances of the change of social systems (transition from one political system to another, a relatively actual transition to democratic societies), and only if it concerns the most profound rights (such as equality of ownership, the right to life, *etc.*).

As to the Merits

I do not want to reiterate in the Separate opinion the introductory notes of the Decision or the appellant's allegations, and I ascertain that the Decision of the Court, in essence, accepts the arguments of the applicant. Concisely and with a risk of simplifying the complexity of the issues raised in the request, the argumentation was accepted in two directions:

- Firstly, January 9th is challenged because that date is linked with the historical fact that on that same date, *i.e.* on January 9th 23 years ago, was the Day of the Assembly of the Serb People in Bosnia and Herzegovina and that that date is undisputedly the Day of the Republika Srpska for historical reasons;
- Secondly, that "the practise of observance" of the Day of the Republika Srpska, regardless of the value-neutral norm of the law, is discriminatory for being interwoven with the religious element - Family Patron Saint's Day – Saint Archdeacon Stefan – and, as of secondary importance but emphasised in that direction, the obligation of everyone, by indicating the imperatives under the legal norm, to observe the Day of the Republika Srpska.

As regards the first "direction", I have a dilemma whether to mention that argument at all and, out of respect for the proceedings and the Decision adopted by the majority of the Judges, I will make a brief account.

Is it actually possible that a historical fact can be raised as an issue of constitutionality? This means, the fact not disputed by anyone, including the undisputed occurrence of the event. Is it actually possible, by a decision of any court, to make a historical valorisation or re-valorisation of the uncontested event? Is it possible to request a constitutional review of the history?

The logical conclusion in the specific case would be as follows: it is about a historical event for the Republika Srpska and the Republika Srpska is an integral part of Bosnia and Herzegovina,

meaning that it is about a historical event for Bosnia and Hercegovina. In my view, a historical event for the Republika Srpska is a historical event for all citizens of the Republika Srpska and although “historians” are inclined to revisions, history is inclined to resist revalorisations, particularly, a change of historical facts. It is possible to have different *perceptions* of importance and/or value of events, but it does not change the existence of the event. I have already given my opinion about *perceptions* in terms of the interpretation of the Constitution and, generally, as regards the issue for review of the constitutionality of a norm.

In a way, it is a travesty that the *perception* on unacceptance is pointed out because of the first part of the name of the event – *Assembly of the Serb People ... Republic of the Serb People ...*, whereas “the full name” of the historic event is completely disregarded – *Assembly of the Serb People in Bosnia and Herzegovina ... the Republic of the Serb People in Bosnia and Herzegovina!* It seems that the sound of words Bosnia and Herzegovina “produced” in the full name of the historic event is inappropriate!

It follows that the Day of the Republika Srpska, January 9th, is inappropriate because of the *perception* on unacceptance for it marks the historic event relating to the constitutional character of Bosnia and Herzegovina in the then valid constitutional order (we need to recall that the provision on the constituent status of peoples – all three peoples - was applicable at the time), and also now, the historic event by which the constituent status of the three peoples was introduced as a constitutional principle is observed as a holiday in one part of Bosnia and Herzegovina. The famous phrase etched in the memory of my generation is the following: *It (Bosnia and Herzegovina) is neither Serbian, nor Croatian, nor Muslim, but rather equally Serbian, Croatian and Muslim!*

- The notion *Muslim* I expressly use as the then historical name for the Bosniac People.

The assertion in the Decision that the date itself does not reflect common values of everyone or, as stated in paragraph 79, January 9th does not symbolize collective, shared remembrance contributing to strengthening the collective identity, is ironic and unjust to contemporary Bosnia and Herzegovina.

What is the date in contemporary history that would fulfil that requirement and that would be accepted by everyone? What is the date symbolizing collective, shared remembrance contributing to strengthening the collective identity? The collective identity itself is in question in this country?! What is the shared remembrance that carries collective symbolism? No answer is offered either by contemporary history or long past or future history?! I indicate bitterly that such a date could possibly be found in the early medieval period, which I doubt, as while some would be

annoyed, for example, with crowning ceremony in the Orthodox monastery, others would be annoyed with the lily as a symbol of Catholic loyalty to a flag, whereas some would be annoyed with the historic fact relating to those who had pulled down that creation of the early medieval period!

The construction of such a sentence in the Decision is not a solution but a source of further problems for it opens the door to raise doubts that the collective identity and the symbolism of shared remembrance relate to only one (people) and not to all (peoples) or, even worse, meaning that this country is mechanically inoculated with someone else's experience, without a respect accorded to the "national" context (in terms of the state), as often said in Opinions of the Venice Commission.

This is not about the symbolism of shared remembrance, as our remembrances in Bosnia and Herzegovina, as a rule, are different. This is about something much more important – tolerance towards different understanding, and acceptance that there could exist different remembrance of a holiday, which is secular, and the existence of which we accept not because of an imaginary symbolism but because of the actual need for mutual respect and tolerance.

The aforementioned relates to this or any other holiday.

Finally, as regards this "direction" of the argumentation referred to in the request, references to the decisions of the Constitutional Court of the Republic of Bosnia and Herzegovina from the period 1992-1995 resemble to the controversial position and decision-making by the then composition of the Court not only in this case but also in many other cases that are exclusively *unilaterally and politically coloured*, so that it is much better for all of us not to open the issues on decision-making at that time.

I ignore the thesis developed in the request in respect of the historic event of January 9th, 1992 and the alleged tragic consequences which flowed therefrom, as it is not worth a comment in present Bosnia and Herzegovina and, in particular, in the future one, the country which, I guess, we build together.

The second "direction of argumentation" affects far more seriously my deliberation on the request and the decision made.

Although the "practice of observance" of the Day of the Republika Srpska, in itself, cannot amount to a constitutional violation, taken as a whole and with perception presented through religious elements on the "exclusivity" of a ceremonious character for one historical religion and

one people only, imposes the need to elaborate the “practice of observance” and its effects on the entire society in the Republika Srpska.

The aforementioned is referred to in paragraphs 80-95 of the Decision made by the majority, where it is attempted in a confused manner to clarify religious part and secular one and, at the same time, to give reasoning as to the rights of individuals, groups and collectivities to express their religious affiliation or to manifest their religion, and it is endeavoured to dispute the right in the specific case, as well as to indicate that a religious holiday cannot be imposed by a decision of the Court or to interfere with that right but, at the same time, to dispute the existence of the religious holiday to one religion.

Everything stated in those paragraphs is confusing and, regardless of my opposition to the Decision itself, the reasoning offered in that part of the Decision is at a critical point of the minimum (speaking benevolently) required for decisions of the Constitutional Court of Bosnia and Herzegovina. Such an inarticulate attempt to give the reasoning about the conflicts in respect of secularism, the preference of one religion, the practice of observance, including and even referring to elements of religious rites, such as breaking of the *slavski kolac* (“Slava cake”), not only is contradictory but it also opens very dangerous abuses of such a construction.

For instance, Bosnia and Herzegovina has accumulated a very rich practice of observance of religious dates.

For many centuries all historical religions in the country have been publicly and ceremoniously marking the dates that are important to them. There is also a religious holiday that is manifested in a very ceremonious way, publicly, as an event and in a massive cavalry parade in historical costumes. Participants of the parade come from everywhere and that day is a holiday not only for that municipality but also for a wider area. In my view, that is something that represents wealth of this country but, according to the position stated in the Decision, as it is about a religious holiday of one religion, practiced mostly by members of one constituent people, and a holiday that is actually the holiday for secular area as well (I mean the area of certain administrative unit – municipality), that is subject to dispute as preference is given to one religion and to one people. So, anyone can create a *perception* that his/her right, he/she has as a member of a different religion or as a believer generally or agnostics or atheist, is violated, not to mention possible ethnic connotations and imagined feelings of discrimination on ethnic grounds?!

This illustration speaks about the absurdity of bringing down a wealth of tradition, including a wealth of religious diversities or religious existence, to a nuisance or discomfort and, particularly,

to use it as *pro* and *con* arguments. When it comes to religious connotations, it all comes down to the question whether the members of other historical religions, who are at the same time the members of the other two constituent peoples, are bothered by the existence of the religious holiday of one historical religion and of its believers, who are at the same time the members of the third constituent people. It is my deep conviction, which has been upheld on different occasions by the unanimous addresses of all those representing historical religions in this country, that mutual tolerance is the essence of their vocation of professing faith, meaning that there is no question of “nuisance”.

The question that should have been answered by the Decision is whether “the practice of observance” of the Day of the Republika Srpska exceeded the boundary of secularity and, as regards the undisputable right to express or manifest religion, whether it exceeded the boundary of the importance of tolerance we apply in our dealings with others daily.

Unfortunately, the contradictions in the aforementioned paragraphs of the Decision do not offer an answer to that question and as if the change of the religious holiday were indirectly called for. We missed the opportunity to discuss, in the Decision, the level of tolerance of everyone in this country, when talking about sensitive issues and about the importance to associate tolerance not only with those who are not affiliated with the prevailing religious holiday but also with those who are part of it. For clarification of this thesis, the best thing to do is to paraphrase Marko Miljanov’s saying about humanity, and in our case it is about tolerance, which, as a paraphrase, means that tolerance is that I, in exercising my right, endeavour not to hinder or discomfort another person. That would be contribution to the Constitution and constitutionality, which, unfortunately, was not realised. We missed the opportunity to discuss it with *authorities* and to make a decision about the boundaries of exercising one’s right and, at the same time, about the boundaries of contesting one’s right, within the frame of the unwritten constitutional principle of tolerance, which is far more important, and the *national context*!

Conclusion

In this separate opinion, my conclusion is as follows:

1. The Day of the Republika Srpska, January 9th, in itself, contains no national or religious determinants and, therefore, Article 3(b) of the Law on Holidays certainly does not amount to discrimination;
2. That date, January 9th, is a holiday of the Republika Srpska – of all its citizens – and, as such, it certainly cannot amount to discrimination;

3. As it concerns a historical date for the Republika Srpska, at the same time it is a historical fact for Bosnia and Hercegovina as a whole;
4. The assessment of *perception* of accepting the historical quality of the historical fact is not and cannot be the matter the constitutionality of which can be reviewed under the Constitution of Bosnia and Herzegovina and the Rules of the Constitutional Court and, therefore, the request is inadmissible for the Constitutional Court is not competent to decide on the request;
5. The issue of “practice of observance” could have resulted in a Constitutional Court’s decision so that, by assessing the inadmissibility of the request, the principle of tolerance would have been indicated and, possibly, the public authorities could have been requested a firm separation between the secular and religious holiday in practice; however, the decision does not deal with that, apart from the described constructions that I have already commented;
6. There is no difference as to the right or obligation to observe the specific date and, therefore, in that part there is no discrimination; however, as stated in paragraph 5 of this Conclusion, the Decision could have issued recommendations to the public authorities to amend that part of the Law.

For the aforementioned reasons, as well as for the other reasons that I had presented when considering the request at the Constitutional Court’s sessions, I voted against this Decision.