

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) and Article 61(2) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 94/14), in plenary and composed of the following judges:

Mr. Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić,

Mr. Giovanni Grasso,

Having deliberated on the request of **nine delegates of the Council of Peoples of the Republika Srpska**, in the case no. **U-2/18**, at its session held on 28 March 2019, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request of **nine delegates of the Council of Peoples of the Republika Srpska** for review of the constitutionality of Article 2(1) of the Law on the Day of the Republika Srpska (*Official Gazette of Republika Srpska*, 113/16) is hereby granted.

It is established that Article 2(1) of the Law on the Day of the Republika Srpska (*Official Gazette of RS*, 113/16) reading as follows: “On the basis of confirmed will of the Republika Srpska citizens, 9 January is recognized as the Republic Day” 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 for Elimination of All Forms of Racial Discrimination and Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Right and Fundamental Freedoms and Article VI(5) of the Constitution of Bosnia and Herzegovina.

Article 2(1) of the Law on the Day of the Republika Srpska (*Official Gazette of the RS*, 113/16) reading as follows: “On the basis of confirmed will of the Republika Srpska citizens, 9 January is recognized as the Republic Day” is quashed in accordance with Article 61(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The quashed Article 2(1) of the Law on the Day of the Republika Srpska (*Official Gazette of RS*, 113/16) reading as follows: “On the basis of confirmed will of the Republika Srpska citizens, 9 January is recognized as the Republic Day”, shall cease to be in force on the day following the day of publication of this decision in *the Official*

Gazette of Bosnia and Herzegovina in accordance with Article 61(3) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

This Decision shall be published in *the Official Gazette of Bosnia and Herzegovina, 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 5 January 2018, nine delegates of the Council of Peoples of the Republika Srpska (“the applicants”) filed with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) a request for the review of constitutionality of Article 2(1) of the Law on the Day of the Republika Srpska (*Official Gazette of RS*, 113/16 of 30 December 2016, “the challenged provision”).

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the National Assembly of the Republika Srpska (“the National Assembly”) was requested on 29 January 2018 to submit its reply to the request.

3. The National Assembly submitted its reply on 30 March 2018.

III. Request

a) Allegations stated in the request

4. The applicants allege that the challenged provision is in contravention of Article I (2) of the Constitution of Bosnia and Herzegovina (“the Constitution of BiH”), Article II (4) of the

Constitution of BiH in conjunction with Article 1.1. and Article 2.a) and c) of the International Convention for 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 (“the European Convention”) and Article VI(5) of the Constitution of BiH. The request is formulated in the following manner:

- Important facts relating to the provisions of the Law on the Republika Srpska Day

5. The applicants claim that under Article III(3)(b) of the Constitution of BiH, the Entities in Bosnia and Herzegovina have positive constitutional and legal obligation to harmonize the Entity’s constitutions and laws with the Constitution of BiH. Analyzing the practice of the Entities’ legislature with respect to this obligation, it follows that they do not take a proactive position as regards this obligation. Because of such position, as it is stated, the legal certainty is exercised through the so called negative protection of constitutionality. It is exercised through the review performed by the Constitutional Court of BiH and through the responsibility of the Entities to comply with and enforce the decisions of the Constitutional Court of BiH in accordance with Article VI(5) of the Constitution of BiH.

6. The applicants noted that in the Decision on Admissibility and Merits no. U-3/13 of 26 November 2015, the Constitutional Court established that the provision of Article 3(b) of the Law on Holidays (*Official Gazette of RS*, 43/07) is unconstitutional and ordered the RS National Assembly to harmonize that provision with the Constitution of BiH within the period of six months. The request of the RS National Assembly for review of this decision was dismissed by the Constitutional Court in its decision no. U-3/13 of 19 September 2016.

7. On 30 September 2016, the Constitutional Court of BiH adopted the Ruling no. U-3/13 of 30 September 2016 and established that the Constitutional Court’s Decision no. U-3/13 was not enforced, and rendered ineffective Article 3(b) of the Law on Holidays of the Republika Srpska (*Official Gazette of RS*, 43/07) on the day following the day of publication of the mentioned Ruling (*Official Gazette of RS*, 100/16 of 25 November 2016). The cited norm ceased to be in force on 26 November 2016.

8. On 15 July 2016, i.e. after the adoption of the Decision of the Constitutional Court no. U-3/13, the RS National Assembly adopted the Decision on Referendum with the question: *Do you*

support 9 January to be observed and celebrated as the Day of Republika Srpska?” Regarding this decision, the Bosniac Caucus in the Council of Peoples of the RS National Assembly initiated the procedure for the protection of the vital national interest. By its Decision no. UV-7/16, the Constitutional Court of the Republika Srpska decided that the Decision on Referendum was not in violation of the vital national interest of the Bosniac people.

9. On 24, 29 and 31 August and on 3 September 2016, the authorized applicants filed the requests “for resolution of a constitutional dispute with the Entity of the Republika Srpska” in connection with the Decision to Call a Republic Referendum, no. 02/1-021-894/16 of 15 July 2016 (*Official Gazette of Republika Srpska*, 68/16, “the Decision on Referendum”). They requested the issuance of an interim measure, whereby the Constitutional Court would suspend the application of the Decision on Referendum pending the final decision of the Constitutional Court.

10. On 17 September 2016, the Constitutional Court of BiH adopted a Decision on Interim Measure no. U-10/16, ordering a temporary suspension of the application of the Decision on Referendum.

11. On 25 September 2016, the Government of the Republika Srpska conducted the Referendum, with 679,069 voters voting and 99.81 % voted in favor of observing 9 January as the Republic Day (the Decision of the RS National Assembly on the results of the Republic Referendum, *Official Gazette of RS*, 87/16).

12. On 25 October 2016, the RS National Assembly adopted a Law on the Republika Srpska Day (*Official Gazette of Republika Srpska*, 113/16 of 30 December 2016). Article 2(1) of the cited Law prescribes the following: “(1) On the basis of the confirmed will of the Republika Srpska citizens, 9 January is established as the Republic Day.”

13. On 1 December 2016, the Constitutional Court of BiH adopted the Decision on Admissibility and Merits no. U-10/16 annulling the results of the referendum conducted based on the Decision to Call a Referendum, which was not in conformity with the Constitution of Bosnia and Herzegovina and which was conducted contrary to the Decision on Interim Measure.

14. The Bosniac Caucus in the Council of Peoples of the RS National Assembly requested the Constitutional Court of the Republika Srpska to protect its vital national interest holding that the

Law on the Republika Srpska Day is in violation of the fundamental human rights of the Bosniac people. By its Decision no. UV-14/16 of 22 December 2016, the Constitutional Court of the Republika Srpska found that the challenged Law is not in violation of the vital national interest of the Bosniac peoples.

Arguments in favor of the review of constitutionality

15. The applicants indicated that the challenged provision established, as did the foregoing applicable Article 3(b) of the Law on Holidays of the Republika Srpska (*Official Gazette of Republika Srpska*, 43/07), that “9 January” was determined as the Republic Day and that this date was established on the basis of “the confirmed will of citizens” at the Referendum held on 25 September 2016.

16. The applicants referred to all arguments, which the Constitutional Court of BiH had presented in paragraphs 75 *et seq.* of its Decision no. U-3/13 of 26 November 2015. The applicants indicated that the factual and legal circumstances have not changed since the date of adoption of the Decision no. U-3/13. Therefore, the same unconstitutional legal solution, which found its basis in the challenged provision, does not have a justification. According to the applicants’ stance, “9 January” as a public holiday and the Day of an Entity finds an inspiration in the historical event, which does not encompass the non-Serb population and is the expression of the political will of only one ethnic group. Accordingly, “9 January” does not represent a symbolism of a joint, collective memory, which may contribute to the strengthening of the collective identity as the value of distinctive importance in the multi-ethnic society that is based on the regard and respect for differences as basic values of a modern, democratic society. The “9 January” is the date which privileges only the Serbs and puts others and those who are different in a discriminatory position. Therefore, referring to the position of the Venice Commission, it is held that, as such, “it cannot be regarded as compatible with the basic values enunciated in the Constitution of the Republika Srpska, i.e. with the respect for human dignity, freedom and equality, national equality, with democratic institutions, the 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” (paragraph 79 of the Constitutional Court’s Decision no. U-3/13 of 26 November 2015).

17. The applicants are of the opinion that the above conclusions are not affected by the fact that the RS legislator decided to refer to the “confirmed will of citizens” when adopting the challenged

provision. In the applicant's opinion, irrespective of whether the decision of the legislative body of the Entity constituted the original will of the legislator or the citizens at the Referendum, the decision *per se* has to be in compliance with the Constitution of BiH. In this connection, references were made to the Decision of the Constitutional Court of BiH no. U-10/16, which established that the Decision to Call a Republic Referendum was in contravention of Article I(2) and Article VI(5) of the Constitution of BiH and the results of the Referendum were annulled as unconstitutional as well.

18. In view of the aforesaid, the applicants hold that, irrespective of whether the challenged provision is viewed through the prism of unconstitutional will of citizens or unconstitutional citizens' legitimacy or in isolation, irrespective of unconstitutional Referendum, that provision is unconstitutional for the reasons stated in paragraphs 75 *et seq.* of the Decision of the Constitutional Court no. U-3/13 as well as for the reasons stated in paragraph 34 of the Decision of the Constitutional Court no. U-10/16.

19. Furthermore, the applicants indicated that by establishing anew that "9 January" is the Republic Day, the authorities of the RS Entity directly opposed and refused to implement the decisions of the Constitutional Court of BiH in the cases nos. U 3/13 and U 10/16, which is contrary to Article VI(5) of the Constitution of BiH. In their opinion, it concerns the principled opposition to the constitutional obligation to comply with the final and binding decisions of the Constitutional Court of BiH. In support of the aforementioned, it was pointed to the statements, which followed after the adoption of the Decision of the Constitutional Court no. U 3/13, as follows: Nedeljko Čubrilović, President of the National Assembly of RS ("The Republika Srpska, as a permanent constitutional and political category with the status of a constituent unit in Bosnia and Herzegovina, cannot annul and will never annul 9 January as the Republic Day and it will observe it permanently"); Mladen Ivanić, the member of BiH Presidency ("[...] 9 January is our holiday, the day on which the Republika Srpska was created, by the will of the Serb people. We will celebrate that day as long as we live and no court or a court decision can stop us from doing it"); and Milorad Dodik, the President of the Republika Srpska ("We shall continue to celebrate our holiday, and on 9 January next year we shall organize a grandiose ceremonial academy"). In the opinion of the applicants, it follows that the representatives of the legislative, executive and judicial power of the Republika Srpska took a position, in a systematic, open, institutional, public and aggressive manner, that they would not enforce the final and binding decisions of the Constitutional Court of BiH in the cases nos. U 3/13 and U 10/16.

20. The applicants indicated that pursuant to Article I(2) of the Constitution of BiH, Bosnia and Herzegovina should function as a legal State. According to their view, there are two aspects of a legal state: the first aspect (a formal-legal state) relates to the so-called state of laws where the separation of powers governs and where human rights and freedoms may be restricted by law solely. The second aspect comprises the substantive principle of the so-called state of justice, where human rights and freedoms have to be respected in their essence. Furthermore, it was noted that the Constitutional Court of BiH, while adhering to the case-law of the European Court of Human Rights, established that the enforcement of final and binding court decisions is an integral part of judicial bodies' decision-making process and has a decisive role in the exercise of rights, and that it will be considered that there is a violation of the rights in cases where the State fails to offer guarantees to the subject concerned with the decision that the respective decision will be enforced (see, *mutatis mutandis*, Constitutional Court, Decision on Admissibility and Merits no. AP 1177/05 of 13 July 2006, and Decision on Admissibility and Merits no. AP 1307/08 of 9 July 2010).

21. In view of the aforesaid, the applicants consider that establishing "9 January" as the Day of the Republic did not result only in the violation of Article VI(5) of the Constitution of BiH, but that it constitutes "a considerably stronger qualification of opposition to the modern principles of the functioning of a legal and democratic state. That causes a great and overall tension in the entire state including, but not restricted to the tension among citizens, the violation of political relations amongst the holders of public powers and the undermining of integration process of Bosnia and Herzegovina into the European Union". That, as the applicants stated, resulted also in the violation of Article I(2) of the Constitution of Bosnia and Herzegovina.

22. Finally, the applicants pointed out that the unconstitutionality of the challenged provision has a much more serious dimension in the context of BiH. In their opinion, in the present situation there is no room for the political and legal conformism, as it would be a confirmation that the legal state in BiH could not be defended in Bosnia and Herzegovina by the monopoly of force of competent institutions and the factual power of the State which it has to display. On the other hand, the Referendum in question, and other referendums which the Republika Srpska aspired to implement, obviously indicate that a democratic mechanism - referendum is abused by the public authorities in the Republika Srpska against the basic constitutional principles set out in the Constitution of Bosnia and Herzegovina, as is the legal state (rule of law).

- Motion of the applicant

23. The applicants suggested that the request be granted and that the court establishes that the challenged provision is not in conformity with Article I(2) and Article VI(5) of the Constitution of BiH, and Article II(4) of the Constitution of BiH in conjunction with Article 1.1. and Article 2. a) and c) of the International Convention for Elimination of All Forms of Racial Discrimination and Article 1 of Protocol No. 12 to the European Convention, and that pursuant to Article 61(2) and (3) of the Rules of the Constitutional Court the challenged provision shall cease to be in effect on the day following the day of publication of the Decision of the Constitutional Court.

b) Reply to the Request

24. The National Assembly indicated that the constitutional and legal grounds for determination of the republic holidays, is contained, inter alia, in the constitutive acts of the bodies and institutions of RS. In this connection, it was pointed to the following: the Decision on establishment of the Assembly of the Serb people in BiH (*Official Gazette of the Serb People in BiH*, 1/1992), which reads as follows: “The Assembly of the Serb people in BiH will consider and decide the issues relating to the realization of the equality of the Serb people with other peoples and nationalities living in BiH [...]”; the Declaration of the Assembly of the Serb people in BiH (*Official Gazette of the Serb People in BiH*, 1/1992”), which reads as follows: “The Assembly [...] invites the assemblies of other peoples who want to live in a joint federal State to support the rights and interests of the Serb people in BiH”. Furthermore, it was pointed out that the Constitution of RS stipulated that it would guarantee “[...] the equality of peoples and citizens before the law and protection from any form of discrimination” (Declaration on Promulgation of the Republic of the Serb People in BiH, *Official Gazette of the Serb People in BiH*, 2/1992). “The citizens of the Republic shall be equal in their freedoms, rights and duties; they shall be equal before the law and they shall enjoy equal rights, protection irrespective of [...] ethnic affiliation, religion [...] and other personal attributes” (Article 1 and Article 10 of the Constitution of the Serb Republic of BiH, *Official Gazette of the Serb people in BiH*, 3/1992); “Freedom of religion shall be guaranteed, religious communities shall be equal before the law [...]” (Declaration on the State and Political Organization of the State, *Official Gazette of the Serb people in BiH*, 14/1992); “All citizens of other ethnicity will be granted all rights arising from the Constitution and laws [...]” (Declaration on Establishment of Peace, *Official Gazette of the Serb People in BiH*, 15/1992); “The Republika Srpska shall cooperate with the bodies of international community in the exercise of human and minority rights” (Declaration of Conclusion of War, *Official Gazette of the Serb People in BiH*, 19/92).

25. Furthermore, the National Assembly pointed out that the Preamble of the General Framework Agreement for Peace in BiH (“the Framework Agreement”) lists the following parties to the Agreement: BiH, Republic of Croatia and Federal Republic of Yugoslavia and, *inter alia*, read that the signatory parties confirm the acceptance of the Basic Principles that were agreed upon in Geneva on 8 September 1995 and in New York on 26 September 1995. Paragraph 2 of the first part of that document reads as follows: Bosnia and Herzegovina [...] shall consist of two Entities, the Federation of BiH and the Republika Srpska”, and paragraph 2.2 reads as follows: “Every Entity shall continue to exist in accordance with its current Constitution (the Constitution was amended in order to be in accordance with these principles).” It was indicated that, according to the opinion of the Venice Commission, the RS Constitution was harmonized with the Constitution of BiH.

26. According to the opinion of the National Assembly, the aforementioned provisions confirm the recognition of the continuity, personality and the legal order of RS “in accordance with its constitution”, which was passed on 28 February 1992. According to the viewpoint of the National Assembly, that means that the laws shall remain in force, including regulations and rules, to the extent to which they are not in contravention of Annex IV to the General Framework Agreement (Constitution of BiH), unless otherwise determined by a competent state body.

27. Furthermore, it was indicated that after the signing of the General Framework Agreement the RS “gave up” the “request to be an integral part of the State of Yugoslavia as its federal unit” (as it was determined under the Declaration of 9 January 1992), and that “it will carry out territorial demarcation with other peoples of BiH” (Article 3 of the Declaration).

28. In view of the aforesaid, according to the viewpoint of the National Assembly, the factual and legal continuity of the RS since 1992 has been indisputable to this day. In this connection, it was noted that the validity of Article 5 of the Declaration and Article 10 of the RS Constitution was confirmed also by Article 2 of Annex II to the Constitution of BiH “Continuation of Laws”, for the reason that it is about the “regulations [...] that have been in force in the territory of Bosnia and Herzegovina at the time of entry into force of the Constitution of BiH and that have remained in force since they are not inconsistent with the Constitution”.

29. Bearing in mind that at the time of the adoption of the Declaration, which Article 5 (guarantee of full equality to all peoples and citizens before the law and protection against all forms

of discrimination) carries as priority the standard of insurance and protection of human rights, the National Assembly indicated that that fact was a sufficient reason for the date of the adoption of the Declaration (9 January) to be selected and determined as the Day of the Republic.

30. Further, the National Assembly indicated that while enforcing the Decision of the Constitutional Court (U 4/04), it passed the Law on Holidays of the RS on 30 March 2007. The Law was passed in an ordinary procedure for passing laws with the participation of the representatives of all three constituent peoples.

31. Furthermore, regarding the request for the review of constitutionality of this law in the case no. U 3/13, the National Assembly indicated that it passed the Declaration (*Official Gazette of Republika Srpska*, 46/15). On that occasion, it was noted that it was a political and not a legal request, which hidden goal was to deny the legality and legitimacy of the RS and the constitutional and legal system of BiH under the Dayton Agreement. In addition, it was indicated that holidays were based on the principle of non-discrimination and that they do not undermine the ethnic and religious identity and equality of any of the constituent peoples. They are in accordance with universal values, the European heritage and good practices and experiences.

32. Furthermore, it was indicated that the National Assembly, in accordance with the RS Constitution and the Law on Referendum and Civil Initiative, called and held on 25 September 2016 the Republic Referendum, where 679,069 voters voted on the Referendum of which number 99.81 % voted in favor of observing 9 January as the Republic Day.

33. While complying with the will of citizens expressed at the Referendum, on 25 October 2016 the National Assembly passed a new Law on the Day of the Republika Srpska (*Official Gazette of the RS*, 113/16). The challenged Article 2, paragraph 1 reads: “On the basis of the confirmed will of the Republika Srpska citizens, 9 January is established as the Day of the Republika Srpska”. Further, it was determined that this day shall be observed and celebrated as a secular holiday, and that the RS Government shall regulate, by its decision, the manner of observing and celebrating this day.

34. Further, it was indicated that the Day of the Republic is marked as a day of establishment and promulgation of the RS, which had passed its Constitution on 28 February 1992. This was before the Constitution of BiH was passed and the Constitution was harmonized with the Constitution of BiH after it was passed (14 December 1995). This Constitution, in its Annex II (Transitional Arrangements), prescribes that “All laws, regulations, and judicial rules of procedure

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

35. The National Assembly pointed out that the Bosniac Caucus in the Council of Peoples of RS initiated before the RS Constitutional Court the proceeding for the protection of vital national interest claiming that fundamental human rights of the Bosniac people have been violated. This means that this law places the Serb people in a more privileged position when compared to other peoples and citizens of RS. The RS Constitutional Court, in its Decision no. UV-14/16 of 22 December 2016, established that the challenged law is not in violation of the vital interest of the Bosniac people. The decisions of the Constitutional Court of the RS shall be “universally binding and enforceable in the territory of the RS”.

36. Further, the National Assembly has thoroughly cited the provisions of the RS Constitution and the Law on Referendum and Civil Initiative on which the conclusion was based that the Referendum on the Day of the Republic is constitutional and legal.

37. Consequently, the National Assembly is of the opinion that the applicants’ allegations that the legislative, executive and judicial authorities, as well as holders of public offices, do not enforce the decisions of the Constitutional Court are untrue, unfounded and unacceptable. According to the viewpoint of the National Assembly, by passing a new law which determined that 9 January is the Day of the Republic, the RS enforced the decisions of the Constitutional Court in the cases nos. U 3/13 and U 10/16.

38. The National Assembly further indicated that the request for the review of constitutionality of the challenged Article 2(1) of the Law on the Republic Day is entirely based on references to and the reasons for the previously adopted decisions of the Constitutional Court, and, at the same time, there is no mention as to what acts or failures to act in observing the Day of the Republic threaten the rights and freedoms of the citizens of Bosniac and Croat ethnicity and religion.

39. The National Assembly indicated that the Constitutional Court, in its Decision no. U-3/13 referred to its previous case-law 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”. Furthermore, it was indicated that the Constitutional Court, in its Decision no. U 3/13, concluded as follows: “Article 3(b) of the Law on Holidays, by designating the Day of Republic to be observed on 9 January, establishes a privileged

position for the members of the Serb people when compared to the members of the Bosniac and Croat peoples, Others and citizens of the Republika Srpska”, for the fact that this date represents a part of the historical heritage of only Serb people, for which reason the Constitutional Court established that the challenged Article is in contravention of the Constitution and of the enumerated international instruments.

40. According to the opinion of the National Assembly, in the case no. U 3/13, the Constitutional Court dealt with the assessment of the perception, historical facts, emphasis of the difference as a problem, and not as a wealth of this society, which results in undermining the authority of the Constitutional Court.

41. Further, the National Assembly indicated that the Constitutional Court, in its Decision no. U 18/16, stated that the referendum, held on 29 February and 1 March 1992 on the status of BiH, had been conducted in the entire territory of BiH, and that all citizens of BiH with the right to vote without any distinction were called, and that more than 64% of citizens voted, of which number 99.44% voted in favor of a “sovereign and independent BiH, the state of equal citizens, peoples of BiH – Muslims, Serbs, Croats and members of other peoples who live therein. According to the opinion of international observers, the referendum was conducted in accordance with international democratic standards”. The National Assembly indicated that the referendum on the Day of the Republic was called and conducted based on the same principles of international and domestic law.

42. According to the standpoint of the National Assembly, the procedures conducted in the course of discussion and decision-making on the constitutional disputes in the cases nos. U-3/13 and U-18/16 clearly indicated that there is unequal and discriminatory treatment of the applicants in these proceedings, applied by the majority in the Constitutional Court in favor of the applicants in the Case no. U-3/13. In support of the aforementioned, as alleged, it was indicated that three distinctions favoring the applicants without reasonable ground were made in the constitutional dispute in the case no. U-3/13 when compared to the constitutional dispute in the case no. U-18/16. In this way, according to the standpoint of the National Assembly, the principle of the constituent status of peoples referred to in the Preamble of the Constitution of BiH has been violated.

43. In support of the aforementioned, the National Assembly indicated that in the case no. U 3/13 the procedure was complied with regarding the part of the proceeding relating to the public hearing as a form of democratic inclusion of the applicants and general public in the deliberation on the issue of ethnic equality and to inviting a respectable number of public workers to present their

respective opinions. The international representatives in BiH were also invited in order to present their opinion as *amicus curiae* and the opinion of the Venice Commission was also requested. In this way, the importance was given to the issue concerned and to the applicants as well.

44. In the case no. U 18/16 it was completely different. Although the applicants sought that a public hearing be held, and that distinguished public workers be called to present their respective opinions and that the opinion of the Venice Commission be sought, these proposals were rejected. According to the opinion of the National Assembly, that confirms that the majority of judges did not want to allow the treatment of the applicants in the case no. U 18/16 to be equal to the treatment of the applicants in the case no. U 3/13. In the opinion of the National Assembly, this is so for the reason that the majority of judges feared that they would not be able to give answers to the questions raised in the case no. U 18/16.

45. Furthermore, it was pointed out that ignoring specific nature of the BiH society and its historic heritage and making incorrect and ungrounded comparisons of individual appeals with requests for the review of constitutionality is indicative of unpreparedness among a part of the “compact judicial majority” within the Constitutional Court that was always giving the same opinion - to consider cases and take decisions at the legal profession’s level, which is required by the position, role and responsibility of the Constitutional Court.

46. Furthermore, the National Assembly pointed to and particularly emphasized the different reasons given by the Constitutional Court in Decisions nos. U 3/13 and U 18/16 although the Constitutional Court was deciding, in essence, the identical issues – the dates that were selected to mark historical and political events. In both cases it was about the requests for review of the constitutionality of one specific date which was proclaimed to be the holiday and about the issue whether the status or perception that one or two constituent peoples have was violated in that way, and whether it amounted to discrimination.

47. The National Assembly pointed out that the Constitutional Court, in its Decision no. U-3/13 concluded that the Law on Holidays was passed in the course of a legal procedure in the National Assembly and that there was no discriminatory treatment in the course of the procedure of passing the law and that the law was passed as part of the implementation of the decision of the Constitutional Court. However, in the case no. U-18/16 it was about the Decision on the Referendum on Independence of BiH, which was passed and implemented despite the fact that an

entire people that was, at that time, the constituent people, refused to participate in the referendum. However, the Constitutional Court did not take into account this fact at all.

48. The independence of BiH and its autonomous existence as a State within the existing borders and with internal structure defined by the Constitution of BiH is an indisputable fact since the 1995 Constitution's entry into force. However, the National Assembly points out that in the case no. U 18/16 the request did not raise the issue of independence of the State of BiH and the relevant reasons may be considered a professional failure or an attempt to cloud different decision in similar or identical situations.

49. The National Assembly considers that in the case no. U-18/16, in connection with the Decision on Referendum and the selection of 1 March, the view of the Constitutional Court in the case no. U 3/13 on the selection of 9 January, for it, "[...] as a date of marking the holiday - the Day of the Republic does not symbolize collective and common memory that may contribute to the strengthening of the collective identity as values that have special meaning in multi-ethnic society that is based on the respect for differences as one of the fundamental values of a modern democratic society. In that sense, the selection of 9 January as a day to mark the Day of the Republic, as one of the holidays of the Entity that represents a constitutional category and, as such, it must represent all citizens of the Republika Srpska, whom the Constitution of the Republika Srpska recognizes equal rights, is not in accordance with the constitutional obligation on non-discrimination within the meaning of the rights of groups, as it establishes a privileged position of only one people, i.e. the Serb people, whose representatives without the participation of the representatives of Bosniacs, Croats and Other passed, on 9 January 1992, the Declaration of Proclamation of the Republic of the Serb People of Bosnia and Herzegovina, which represents a unilateral act."

50. In the opinion of the National Assembly, in the case no. U 18/16, while observing the aforementioned case-law applied in the case no. U 3/13, the Constitutional Court had to give answers to the questions relating to the following: whether the selection of 1 March as a date of marking the holiday symbolizes collective and common memory that may contribute to the strengthening of the collective identity as values that have special meaning in a multi-ethnic society that is based on the respect for diversity as one of the fundamental values of a modern democratic society; whether the selection of 1 March as one of the Entity holidays that represents constitutional category must represent all constituent peoples of the respective Entity; whether the law provision on selection of 1 March as a holiday is in accordance with the constitutional obligation on non-

discrimination within the meaning of the rights of groups and whether a privileged position of only two constituent peoples is established in that way.

51. The National Assembly points out that it is indisputable that on 1 March the members of two constituent peoples, without participation of the Serb people, passed the decision on independence which represents a unilateral act with regards to the Serb people. Therefore, in the opinion of the National Assembly, a question arises as to whether, according to historical valuation, it is possible to say that the selection of 1 March points to tragic events for the Serb people that occurred after that day, including the tragic event on 1 March that amounts to discrimination based on perception of the Serb people?

52. The National Assembly claims that 1 March represents a painful memory for the Serb people in BiH of total disregard for and violation of the SFRY Constitution and of the Constitution of SR BiH on equality of peoples, particularly when it comes to decision-making on the fateful issues such as secession from SFRY and the internal organization of BiH. This resulted in bringing the Serb people from the status of the constituent people to the position of one undefined (non-constituent) diffuse minority – which was, for the international community and for the other two constituent peoples - brought to a simple sum of individuals deprived of the capacity of collectivity within the meaning of collective rights of the constituent peoples.

53. Furthermore, it was pointed out that in each member of the Serb people in BiH 1 March evokes a painful memory of the day that is considered to be the cause for the civil war in BiH, i.e. the day when the representatives of the Bosniac people in BiH (at that time it was the Muslim people) decided to reject, while being in Cutileiro Working Group of the Conference on Yugoslavia, the negotiations with the representatives of the Serb people on the future organization of BiH. Therefore, they claim that 1 March is not, cannot and will not be accepted by the Serb people as a symbol of unity, common identity and common aspiration, because that is not what it is.

54. The National Assembly considers that in that sense 9 January and 1 March are inseparably connected. Namely, as they claim, 9 January should have prevented the referendum before the constituent peoples reached an agreement on how the future independent and sovereign BiH should be organized. Unfortunately, that did not happen and 1 March appeared to be a day when the status of the constituent people was taken away from the Serb people in BiH. Therefore, given that 9 January was declared unconstitutional, then 1 March should have been declared unconstitutional as well.

55. Further, by giving a counter argument that by selecting 9 January the preference is given to only one constituent people, the National Assembly pointed out, *inter alia*, that 9 January is a day of common memory and admonishment for all constituent peoples in BiH. To support the aforementioned, it was pointed out that 9 January admonishes about a historic case when two constituent peoples and the European community, contrary to the Constitution of the SRBiH, had taken away the capacity of the constituent people from the Serb people and the right to decide about the future of BiH based on the equality of the constituent peoples under the Constitution of the SRBiH. In addition, 9 January is a day that admonishes about the consequences of the violation of the constitutional equality of constituent peoples. Therefore, according to the view of the National Assembly, it is in a way a mutual deed of all constituent peoples given that the Serb people had defended the Constitution of SRBiH, while the other two peoples had violated it. Therefore, 9 January is not a holiday of only one people, but it has a diametrically different symbolism when compared with the wrong and unfounded perception of the applicants.

56. Furthermore, the National Assembly is of the opinion that an issue is raised as to whether the applicants, the Constitutional Court or any other governmental authority in BiH, are competent to determine what is a “mutual symbolism” or what “collective identity” entails. In this connection, they indicated that 1 March as the Day of Independence of the RBiH, which did not involve Serbs as a constituent people, is the date that certainly does not contribute to “mutual symbolism” or “collective identity” and, nevertheless, the Constitutional Court considered it constitutional. Thus, according to the position of the National Assembly, possible assessment of Article 2 (1) of the Law on the Day of the Republic as unconstitutional by the Constitutional Court would constitute an unequal treatment in equal cases.

57. The National Assembly indicated that it found the claim and proposal stated in the request to be worrisome in that they called on the use of “the monopoly of force of the competent institutions and the factual strength of the State that has to be demonstrated”. According to the standpoint of the National Assembly, this part of the request speaks about offensive and irreconcilable aversion to the existence of the RS, which is the creator and signatory of all Annexes to the General Framework Agreement, to the constituent status of the Serb people and to the General Framework Agreement itself. In this connection, it was pointed out that the mentioned statement reminds of the events from October, November and December 1991, and January, February and March 1992, when the request was made that the then BiH authorities use the force against those who did not accept the secession of BiH before the agreement was reached on its internal organization while, at the same time, there

was opposition to the use of force by the State of SFRY against those who wished to tear apart the SFRY. Such demands interrupted the negotiations process of the working group for BiH within the International Conference on Yugoslavia, which was chaired by Ambassador Jose Cutileiro although they, from a realistic point of view, could have prevented the civil war in BiH. According to the position of the National Assembly, only the force of reason may regulate the relations in BiH and the State's monopoly of force and factual forces of the State cannot do that. Therefore, the National Assembly gives preference to negotiations and mutual understanding.

58. Furthermore, the National Assembly assessed as unfounded the perception of the Day of the Republic as an Orthodox religious holiday that is offending religious feelings of the members of other religions. In this connection, it was indicated that 9 January 1992 was selected completely by chance to be the date of the passing of the Declaration of Proclamation of the Republic of the Serb People of BiH, i.e. it had been selected by the very dynamics of the then events concerning the situation in SFRY and BiH. The same goes for 28 February 1992, when the Constitution of the Republic of the Serb People of BiH was passed. The National Assembly points out that both dates were selected by the events occurring at the time and the need to react to the actions and acts of the political representatives of Croats and Muslims who had formed a political alliance, and not the symbolism of a date. In the opinion of the National Assembly, an issue arises in this part with regards to the jurisdiction of the Constitutional Court, since the religious holidays cannot be the subject-matter of a constitutional dispute. Also, the National Assembly emphasizes that the applicants failed to state any evidence or fact whatsoever suggesting that the marking of the Day of the Republic, which only accidentally coincides with a religious holiday, jeopardizes anyone's rights and discriminates against anyone on any ground whatsoever. In the opinion of the National Assembly, the request is a political act and not an act based on the law, and it contains unconcealed intention to bring down the legality and legitimacy of the RS and of the constitutional order of BiH, which was agreed upon in Dayton, thus it is manifestly ill-founded.

59. In the opinion of the National Assembly, the arguments are unfounded in so far as they suggest that the marking of the Day of the Republic, 9 January, which is also the religious holiday of the Orthodox religion believers, discriminates against the other two constituent peoples. According to the position of the National Assembly, it concerns inappropriate equalization of the nationality and religion, it was pointed out that the frustration and subjective perception of the applicants that the Day of the Republic is marked in accordance with anyone's religious or philosophical beliefs are not understandable. The National Assembly referred also to the position of

the European Court of Human Rights that the “subjective perception is not in itself sufficient to establish a violation of the relevant right”. Finally, while referring to Article 1 of Protocol No. 12 and Article 1 of the International Convention on Elimination of All Forms of Racial Discrimination, the National Assembly pointed out that the applicants did not specify the right or freedom concerned, therefore, it follows that it is the right to observe the Day of the Republic, which, according to the applicants, the Serbs, i.e. those of Orthodox religion, are the only people entitled to that right. This right, according to the position of the National Assembly, does not exist in the enumerated international instruments.

60. Furthermore, it was indicated that neither constitutional nor legal arrangements associate 9 January - the Day of the Republic with Saint Stephen’s Day, nor with any other holiday, and that was confirmed by the Venice Commission on 14 October 2013. The Day of the Republic is observed on the same day as the day of Saint Stephen, however the Republic holiday was not established for that reason and it has nothing to do with the religious holiday. The Day of the Republic is marked on 9 January as on that day the Declaration of Proclamation of the Republic of the Serb People of Bosnia and Herzegovina was passed.

61. Also, the National Assembly recalled that the European tradition is to mark religious holidays in addition to secular holidays, as well as to celebrate religious holidays in the manner in which public holidays are celebrated in the European countries and in the institutions of the European Union. Finally, no proceedings have been instituted so far before the Europe Court of Human Rights to suggest that other peoples’ rights are discriminated against by the act of marking holidays in the above described way. In this connection, it was pointed to the view of the European Court of Human Rights that “the decision on whether the State will follow the tradition or not falls within the scope of free margin of appreciation of the relevant State”, and that “the Court, besides that, must take into consideration the fact that Europe is defined by a great diversity of the States it consists of, particularly in the sphere of cultural and historical development.”

62. The National Assembly indicated that 9 January as the Day of the Republic relates to RS only and that it is a holiday of all its constituent peoples, citizens and Others. For that reason, not a single law, judicial decision or any other act can change historical and political facts with regards to the time and circumstances of establishment and proclamation of the RS. Therefore, the Republika Srpska, as a permanent, constitutional, legal, historical and political category, with the status of a state-building unit in BiH, cannot and will never abolish 9 January as a Day of the Republic and shall observe it permanently.

63. According to the position of the National Assembly, when reviewing the constitutionality of the challenged Article 2, paragraph 1 of the Law on the Day of the Republic, one should be mindful of the fact that it clearly follows from the content of this provision that it does not discriminate against and it does not place into a subordinate position any of the constituent peoples in the RS when it comes to the exercise of the rights related to the vital national interest, since it does not contain religious or national elements. Given that it is observed as a secular holiday, it is clear that all citizens are treated in the same manner regardless of their religion or ethnic connotations.

64. The National Assembly considers that the challenged Article 2, paragraph 1 of the Law on the Day of the Republic is not in contravention of Article I(2) and Article II(4) of the Constitution of BiH and that the acts of the RS do not constitute a violation of the mandatory nature of the decisions of the Constitutional Court. In addition, the National Assembly considers that they do not amount to opposition to modern principles of the functioning of a legal and democratic state and that they do not provoke any kind of tension, including but not limited to distress among the people and citizens, deterioration of political relations among the holders of public offices and the process of integration into the European Union.

65. The National Assembly also considers the act of referring to Article 1 of Protocol No. 12 to the European Convention unacceptable, in support of which it referred to the case law of the European Court of Human Rights in connection with Article 14 of the European Convention. It was indicated also that there is not a differential treatment of not only constituent peoples, but also of Others and citizens of the RS both in marking the Republic Holidays and religious holidays that are observed in an identical manner and that differential treatment does not exist on the basis of any law provision.

66. The National Assembly pointed out that the applicants who submitted the request are as follows: “the ten delegates in the Council of Peoples of the RS”, “eight delegates in the RS Council of Peoples”, and the “Bosniac Caucus in the Council of Peoples of the RS” and that the applicants did not make an effort to accurately specify who the real applicant is, which leads to a conclusion that, manifestly, it does not concern a legal problem related to (non)constitutionality of the Law on the Day of the Republic, but it rather concerns a political ambition of addressing the Constitutional Court in an inappropriate manner. The National Assembly also considers that the Constitutional Court should have invited the applicants to specify the request concerning the facts and evidence challenging the unconstitutionality of Article 2 paragraph 1 of the Law on the Day of the Republic. In the opinion of the National Assembly, given the reasons for the request, it is not possible to

conclude in which manner the Law on the Day of the Republic “differentiates between persons, excludes, limits or gives priority” to anybody with the aim or result that “jeopardizes or compromises the recognition, enjoyment or exercise of human rights and freedoms under the same conditions” in any sphere of life.

67. The National Assembly deems that the request was written in an offensive language and that it expresses irreconcilable aversion to the existence and equality of the Entities in BiH and that constitutes the conduct against the Dayton Peace Agreement, which is unacceptable. According to the standpoint of the National Assembly, calling on the monopolized force of the State and the factual force of the State in the process of resolving the constitution-related dispute, as stated in the request at issue, is offensive for all who used to live in the RS during the war and those who presently live in the RS, and that an effort is made to conceal the lack of evidence and facts on which the request would be based and that is the admissibility requirement in accordance with the Rules of the Constitutional Court.

68. The National Assembly considers that it would be justified, in accordance with Article 46 of the Rules of the Constitutional Court, to hold a public hearing during the plenary session in this case.

IV. Relevant Law

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

PREAMBLE

(...)

Recalling the Basic Principles agreed in Geneva on September 8, 1995, and in New York on September 26, 1995, Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows:

(...)

Article 1(2)

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

Article I(3)

Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska (hereinafter "the Entities").

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 VI(5)

Decisions of the Constitutional Court shall be final and binding.

Annex II

Transitional Arrangements

(...)

2. Continuation of Laws

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

(...)

70. The **International Convention on Elimination of All Forms of Racial Discrimination** adopted at the Plenary session of the General Assembly of the United Nations on 21 December 1965 (*Official Gazette of SFRY – International Treaties and other agreements, 31/67*), as relevant, reads

Article 1

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

Article 2

1. 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;

(...)

71. **The Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms** (*Official Gazette of BiH – International Treaties, 8/03*) 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, color, 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.

72. The **Law on the Republika Srpska Day** (*Official Gazette of Republika Srpska*, 113/16), in its relevant part, reads as follows:

Article 1

This Law establishes the Republika Srpska Day (“the Republic Day”) and determines a competent body which regulates the manner in which the citizens, Republic institutions and organizations, bodies of local self-government units, business companies, institutions and other organizations and persons professionally performing service-oriented businesses shall observe and celebrate the Republic Day.

Article 2

(1) On the basis of confirmed will of the Republika Srpska citizens, 9 January is recognized as the Republic Day.

(2) The Republic Day shall be observed and celebrated as a secular holiday.

Article 3

The Government of the Republika Srpska shall determine the manner of observance and celebration of the Republic Day by its Decision.

Article 4

This Law enters into force on eight day upon publishing thereof in the Official Gazette of Republika Srpska.

V. Admissibility

73. 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 19 of the Rules of the Constitutional Court.

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

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

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

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

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

75. The request for the review of constitutionality was filed by nine delegates of the Council of Peoples of the Republika Srpska, which means that the request was filed by an authorized person within the meaning of Article VI(3)(a) of the Constitution of BiH, as the Council of Peoples has 28 delegates. The subject-matter challenged is the provision of the law passed by the National Assembly.

76. Having regard to 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 respective request met the admissibility requirements.

VI. Merits

77. The applicants hold that the challenged provision is in contravention of Article I(2) of the Constitution of BiH, 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 Elimination of All Forms of Racial Discrimination and Article 1 of Protocol No. 12, and Article VI(5) of the Constitution of BiH.

78. The challenged Article 2, paragraph 1 of the Law on the Day of the Republic reads:

(1) On the basis of the confirmed will of the Republika Srpska citizens, 9 January is established as the Republic Day.

79. In order to support their statements, the applicants referred to the arguments of the Constitutional Court provided in the Decision no. U 3/13, from paragraph 75 onwards, and to the arguments of the Constitutional Court given in the Decision no. U 10/16, which, according to their

opinion, also applies to the case at hand. The applicants primarily emphasized that the challenged provision contains the same unconstitutional arrangement as Article 3(b) of the Law on Holidays does, which the Constitutional Court declared unconstitutional and rendered ineffective (the case no. U 3/13), and that the factual and legal situation did not change when compared with the one which was considered in the case no. U 3/13. Also, the applicants claimed that the fact that the challenged provision determined 9 January on the basis of the confirmed will of the citizens has no effect on reaching a different conclusion, as the Constitutional Court declared the Decision on referendum unconstitutional and annulled the results of the referendum conducted on the basis of this decision (the case no. U 10/16). Finally, in support of the opinion that the challenged provision is unconstitutional the applicants pointed out that it constitutes an open refusal to enforce the decisions of the Constitutional Court nos. U 3/13 and U 10/16.

80. The Constitutional Court recalls that in the Decision on Admissibility and Merits no. U 3/13 of 26 November 2015 (available at www.ccbih.ba), the subject-matter of consideration was the request challenging Article 3(b) of the Law on Holidays of the RS where it was determined that the Day of the Republic is to be observed on 9 January. The Constitutional Court concluded (see paragraph 79), the following:

“(…) that the selection of 9 January as the date to observe the Day of the Republic does not have the symbolism of a collective, shared remembrance that may contribute to strengthening the collective identity as values of particular significance in a multi-ethnic society based on the consideration and respect for differences as the basic values of a modern democratic society. In that sense, 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 established a privileged position for only one people, namely the Serb people, whose representatives had adopted on 9 January 1992, without the participation of the Bosniacs, Croats and Others, the Declaration Proclaiming the Republic of the Serb people of Bosnia and Herzegovina, which constitutes a unilateral act. As such, in the opinion of the Constitutional Court and according to the position of the Venice Commission it cannot be seen as compatible with the fundamental values declared in the Constitution of the Republika Srpska, namely the respect for human dignity, freedom and equality, ethnic equality, 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, ban on discrimination (Preamble). [...]"

81. Furthermore, in its Decision on Interim Measure no. U 10/16 of 17 September 2016 (available at www.ccbih.ba), the Constitutional Court suspended temporarily the application of the Decision to Call a Republic Referendum no. 02/1-021-894/16 of 15 July 2016 (*Official Gazette of Republika Srpska*, 68/16). The Constitutional Court, *inter alia*, concluded (see paragraph 28):

"[...] the Constitutional Court holds that there were sufficient reasons at this stage of the proceedings that indicate that the conduct of the referendum, prior to a decision of the Constitutional Court on the requests filed in the specific case, would cause serious and irreparable detrimental consequences for the enforcement of the Decision of the Constitutional Court of Bosnia and Herzegovina, no. U 3/13 and to the unhindered and efficient work of the Constitutional Court in the present case and for the constitutional order in general."

82. Furthermore, the Constitutional Court rendered the Ruling no. U 3/13 of 30 September 2016 (available at www.ustavnisud.ba), whereby it established that the National Assembly failed to enforce the Decision no. U 3/13. In doing so the Constitutional Court noted the following (see paragraph 13):

"[...] an order that Article 3(b) of the Law on Holidays of the Republika Srpska be harmonized with the Constitution of Bosnia and Herzegovina is based on the finding that the mentioned provision is unconstitutional and that finding is also based on the legal interpretation of the Constitutional Court that the determination of 9 January as a Day of the Republic is in contravention of the constitutional obligation on non-discrimination. Bearing in mind the aforesaid and the fact that the Decision on the Referendum determined the referendum question: "Do you support January 9th to be observed and celebrated as the Day of the Republika Srpska?", the Constitutional Court considers that the allegations of the National Assembly of the Republika Srpska are unacceptable in that the rendering of the Decision on the referendum is "a concrete activity aimed at enforcement of the decision of the Constitutional Court". Namely, the question asked in this way ignores the Decision of the Constitutional Court no. U 3/13 and its position that 9 January as a holiday of the Entity "has to represent all the citizens of the Republika Srpska who are recognized equal rights under the very Constitution of the Republika Srpska", and that that date as the holiday of the Republika Srpska "is not in accordance with the constitutional obligation on non-discrimination within the meaning of the rights of the groups, as it establishes a privileged position for only one people, Serb people."

83. Furthermore, the Constitutional Court recalls that in the Decision on Admissibility and Merits no. U 10/16 od 1 December 2016 (available at www.ustavisud.ba), it established that the Decision on the Referendum is not in conformity with Article I(2) and Article VI(5) of the Constitution of Bosnia and Herzegovina. Also, the same decision annulled the results of the referendum held on 25 September 2016 for the reason that the referendum had been held on the basis of the Decision on the referendum, which was established to be in contravention of the Constitution of BiH, and contrary to the order of the Constitutional Court referred to in the Decision on Interim Measure no. U 10/16 of 17 September 2016 (available at www.ustavisud.ba). The Constitutional Court pointed out (see paragraphs 37 and 39):

“[...] The referendum question (“Do you support that January 9th be observed and celebrated as the Day of the Republika Srpska?”), which was determined under the challenged Decision on the Referendum is the same issue, which the Constitutional Court decided in its Decision no. U 3/13. This further means that the National Assembly, by calling the referendum with the same question on which the Constitutional Court took a final and binding decision, caused a constitutional dispute which can be decided only by the Constitutional Court. This dispute certainly does not relate to the issue as to whether the National Assembly can call a referendum or not, nor does it relate to the question whether a State authority or institution has competence for that issue, which was alleged in the replies to the request. This dispute concerns precisely what the National Assembly unfoundedly indicated as non-existent, namely, that there is a “disagreement between the Republika Srpska and some of the institutions of Bosnia and Herzegovina regarding a constitutional issue, a right or legal fact”. Namely, the adoption of the Decision in the case no. U 3/13 generated a constitutional obligation for the Republika Srpska to enforce the Decision of the Constitutional Court. The disagreement with that decision neither reduces nor derogates this constitutional obligation to comply with the final and binding decision of the Constitutional Court as a constitutional institution of Bosnia and Herzegovina, concerning which the National Assembly gave its opinion in detail in the reply to the requests. The constitutional nature of the decisions of the Constitutional Court means that none of the authorities, legislative, executive or judicial, has competence to render different acts on the issues, which were decided in such a decision, or to review such decisions in any manner whatsoever, including the referendum, as is the case here. Quite the contrary, the constitutional provision relating to the final and binding nature of the decisions of the Constitutional Court can mean only one thing: all authorities are obliged to enforce such decisions. This is also required under Article I(2) of the Constitution of Bosnia and Herzegovina, which prescribes the principle of the rule of law, the integral part of which is the enforcement of court decisions. [...]

It should be noted that the National Assembly still has the competence to call a referendum in respect of the issue regarding the specific date on which the Day of the Republika Srpska will be celebrated.

However, in exercising that competence, the National Assembly must take account of the binding decisions of the Constitutional Court as an institution of Bosnia and Herzegovina. Therefore, the date in respect of which a referendum could possibly be called under the jurisdiction of the National Assembly cannot be 9 January, as it is contrary to the Decision no. U 3/13. [...]"

84. The Constitutional Court considers that the aforementioned arguments from the Decision of the Constitutional Court no. U 3/13 is entirely applicable to the challenged Article 2, paragraph 1 of the Law on the Day of the Republic, whereby it is prescribed that “on the basis of the confirmed will of the Republika Srpska citizens, 9 January is recognized as the Republic Day”. The fact that, according to the challenged provision 9 January was determined as the Day of the Republic “on the basis of the confirmed will of the Republika Srpska citizens”, bearing in mind the aforementioned reasons referred to in the Decision no. U 10/16, which established that the Decision on the referendum was not in conformity with the Constitution of BiH and the results of the referendum were annulled, may not result in a different conclusion.

85. The Constitutional Court particularly emphasized that neither this decision nor the Decision no. U3/3 questioned the issue of the existence of the very holiday - the Day of the Republic. Namely, in the Decision no. U 3/13, the Constitutional Court established that the selection of January 9th as the day to mark the Day of the Republic (Article 3(b)) under the Law on Holidays of the Republika Srpska (*Official Gazette of Republika Srpska*, 43/07) is not in conformity with the Constitution of Bosnia and Herzegovina and the mentioned international instruments, for the reasons reiterated in this decision as well. However, in no way is the existence of the holiday - the Day of the Republic as one of the holiday – the Day of the Republic as one of the holidays of the Entity of RS brought into question, ruled out or limited (it is the constitutional category within the meaning of Article I(3) of the Constitution of BiH) determined by Article 2 of the mentioned law. Also, neither this decision nor the Decision no. U 10/16 questions, rules out or limits the competence of the National Assembly to call referendum concerning the day to be celebrated as the Day of the Republic. However, for the reasons that had been reiterated in this decision as well, the day which might be the subject of the referendum call in accordance with the competencies of the National Assembly cannot be 9 January. On the other hand, the Constitutional Court emphasized that non-compliance with and failure to enforce its decisions, listed in paragraphs 81-83 constitutes the violation of the Constitution of Bosnia and Herzegovina, because it is contrary to the rule of law and undermines the authority of this court.

86. The Constitutional Court concludes that the challenged provision is not in conformity with Article I(2) of the Constitution of BiH, and Article II(4) of the Constitution of BiH in conjunction with Article 1.1 and Article 2.a) and c) of the International Convention for Elimination of All Forms of Racial Discrimination and Article 1 of Protocol No. 12 to the European Convention, and Article VI(5) of the Constitution of BiH.

VII. Conclusion

87. The Constitutional Court concludes that Article 2(1) of the Law on the Day of the Republika Srpska (*Official Gazette of RS*, 113/16) 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 for Elimination of All Forms of Racial Discrimination and Article 1 of Protocol No. 12 to the European Convention, and Article VI(5) of the Constitution of Bosnia and Herzegovina.

88. Pursuant to Article 59(1) and (2) and Article 61(2) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this decision.

89. Pursuant to Article 43 of the Rules of the Constitutional Court, a separate dissenting opinions of the President Zlatko M. Knežević and Judge Miodrag Simović make an annex to this decision

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

/signed/

SEPARATE DISSENTING OPINION OF PRESIDENT ZLATKO M. KNEŽEVIĆ

Unfortunately, in the mentioned case I disagreed with the majority opinion for the following reasons:

- The applicants who filed the request for the review of constitutionality – constitutional dispute – in short, challenged the provision of Article 2 of the Law on the Day of the Republika Srpska, which the Republika Srpska National Assembly passed in a procedure of harmonizing the legislature and the enforcement of the Decision of the Constitutional Court no. U 3/13.
- Without addressing at this moment the reasons adduced by the applicants, it is my duty to mention that the Constitutional Court did not give its take on several important facts, which essentially change primarily the need for decision-making, starting from the admissibility of the request to the decision-making on the merits.
- Namely, when it comes to the substance of the dispute in earlier decisions, including this decision relating to the crucial issue of the existence of 9 January *as the date that is celebrated/observed*, it is unnecessary to reiterate my positions presented before as to the justification of the request or the justification of the Constitutional Court's engaging in the assessment of historical facts. Regretfully, I emphasize that my worries about the undermining of the authority of the Constitutional Court and the social non-acceptance of decisions have become reality, for, at least in the Republika Srpska, a great majority of the public opinion deems that the Constitutional Court unnecessarily undermined their will about the date of the holiday and did not accept the *perception* of the historical, and even constitutional and political *inception* of the constitutional order of the Republika Srpska. Even this decision carries the percentage of the population who had given their opinion at the referendum, for, irrespective of the nullity of the results following the decision of the Constitutional Court, it is not possible to neglect the will expressed, thus indirectly contesting the will of a substantial part of the society.
- However, the portion of this decision that was left unreasoned, according to my belief, continues to generate further social refusal of the enforcement of our decision.

- The first question is the question of admissibility, for a well-founded discussion may be conducted and, in my opinion, it may be contested as well as to whether the decision-making on a law may be based on arguments that were used for decision-making on the constitutionality of another law. One case concerns the Law on Holidays, while the other case concerns the Law on the Day of the Republic. One case involves the arguments relating to the *practice* of law enforcement, while the other case involves only a norm. At the same time, the right to protection against discrimination of an individual or collective requires, during decision-making, also the discussion on the existence/non-existence of individual actions manifesting the discrimination. For instance, whether a person who does not accept the holiday as their own is forced to take part in the manifestations of celebration, or the very celebration in any way whatsoever limits the right of any citizen.
- The second question is even more so important. Did the arguments provide an answer to the request and establish that there are possibly reasons to grant the request? To put it more precisely, what arguments were used to reason the granting of the request.

The reasoning of our decision, from paragraph 80 onwards, does not have the *reasoning*, instead it copies and pastes the positions from other decisions related to the same matter. As much as the decision itself carries references to *essentially equal merits*, the necessity to respect the dignity of the applicants, as well as of the National Assembly, which was communicated the decision for enforcement purposes, required, if necessary all over again, the mention of reasons which, *this time around*, made the Constitutional Court render such a decision. Point by point. For instance, if the practice of the celebration of the holiday is completely secular now, if there is not a single religious element in the celebration, if the emphasis is placed upon the freedom of acceptance (or non-acceptance) of the celebration, how did the Constitutional Court reach a conclusion which it had reached and what were the reasons.

However, all the aforementioned pales before the non-existence of the answers to the crucial questions.

In this decision too (as was the case with the previous ones) the Constitutional Court strongly emphasized the right of the Republika Srpska to their holiday (the Day of the Republic or a similar holiday marking the constitutional and factual existence of the Republika Srpska) thereby protecting the part of the constitutional order, which is based on the Constitution of Bosnia and Herzegovina, as well as on the Constitution of the Republika Srpska. However, in this decision it emphasized the positions referred to in another decision (U 10/16), which reinforced the right to referendum in the Republika Srpska (certainly about the issues falling within the constitutional

order of Bosnia and Herzegovina and the Republika Srpska). Without engaging in the discussion now about the possibilities of a referendum-based expression of opinion or the effects of the results thereof, one reaches a conclusion that the Constitutional Court stated in this decision (to put it simply) that the Republika Srpska has the right to its own holiday (its day) and that the referendum may be used for citizens to express their opinion about all issues falling within the constitutional order of Bosnia and Herzegovina and the Republika Srpska. However, due to the effect of this decision, January 9th cannot be the date of the holiday.

The question that is the key reason for my contesting and voting against the opinion of the majority and which appears as the most important question is as follows:

Did the Constitutional Court say, by means of this decision, that out of 365 days in the year the National Assembly may declare any date as the holiday, except for January 9th? Or any other hypothetical date will be the subject-matter of historical *valorisation* by the Constitutional Court in case a request for the review of constitutionality is filed? Just as an illustration, without any intention whatsoever to interfere in any way with the powers of the National Assembly, what if February 28th is declared as the day of the passing of the first Constitution of the Republika Srpska? Following the hypothetical example of the review of constitutionality, will we then follow the case-law from the Decision no. U 3/13 in that case and give our opinion about the historical facts and protect the well-founded or unfounded *perception*, or will we, as we did in the case no. U 18/16, protect the real or formal *possibility* of participation in the decision-making and reject the *perception* as irrelevant?

I reemphasize, the historical facts had taken place. By way of our decisions, we neither can nor should engage in the assessment of those facts, in particular we should not allow ourselves to take a different approach to assessment in a delicate ethnic balance of Bosnia and Herzegovina.

Therefore, for the reasons I furnished in the earlier decisions, unfortunately I disagree with the majority opinion.

SEPARATE DISSENTING OPINION OF JUDGE MIODRAG SIMOVIĆ

Due to substantial difference in the legal approach to the problem-area of this constitutional matter, I cannot support the decision of the majority in establishing the unconstitutionality of Article 2, paragraph 1 of the Law on the Day of the Republika Srpska (*Official Gazette of Republika Srpska*, 113/16). My reasons are essentially the same as those I presented in my Separate dissenting opinion regarding the Decision on Admissibility and Merits no. U 3/13 of 26 November 2015. I am of the opinion that this decision of the Constitutional Court too will lead more towards compromising its constitutional and judicial function than its affirmation. Between “judicial restraint” and “judicial activism”, the Constitutional Court failed to make the right choice.