



Strasbourg, 14 October 2013

CDL-AD(2013)027
Or. Engl.

Opinion No. 736 / 2013

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

AMICUS CURIAE BRIEF

**ON THE COMPATIBILITY
WITH THE NON-DISCRIMINATION PRINCIPLE
OF
THE SELECTION OF THE REPUBLIC DAY**

OF THE REPUBLIKA SRPSKA

**Adopted by the Venice Commission
at its 96th Plenary Session
(Venice, 11-12 October 2013)**

on the basis of comments by:

**Ms Veronika BILKOVA (Member, Czech Republic)
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I. Introduction

1. The Venice Commission received a request on 20 June 2013 from the Constitutional Court of Bosnia and Herzegovina (hereinafter BiH) to provide an *amicus curiae* brief in relation to the review of the constitutionality of Articles 2.(b) and 3.(b) of the Law on Holidays of the Republika Srpska.
2. The specific question asked is "whether [...] the selection of January 9th as the date of the observance of the holiday of the Day of the Republic can result in the discrimination against the members of the Bosniac and Croat people and Others who live in the Republika Srpska, within the meaning of Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1(1) and Article 2(a), (b), (c), (d) of the International Convention on the Elimination of All Forms of Racial Discrimination".
3. Ms Veronika Bilkova, Mr Kaarlo Tuori and Mr Latif Huseynov acted as rapporteurs in the preparation of this *amicus curiae* brief. The rapporteurs drafted their comments on the basis of the English translation of the Law. In the course of the preparation of the opinion, national Constitutional Courts were consulted for background information including domestic legislation and/or case law related to the issue under examination.
4. The present *amicus curiae* brief was adopted by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013).

II. Background

5. The present analysis only deals with the question addressed to the Venice Commission by the Constitutional Court of BiH, in the light of the European and international standards in the field of the protection against discrimination. It does not address the concrete case at hand. Hence, although the original request for the review of constitutionality of the Law on Holidays of the Republika Srpska touches upon also questions of fact and procedural aspects, these will not be covered by the present document, as it is not for the Venice Commission to pronounce on these issues.
6. At the same time, there are elements of the domestic case law and issues of BiH constitutional law which are of relevance in the present analysis and need to be pointed out (see sections B and C of the present Chapter).

A. International standards

7. The prohibition of discrimination is one of the most fundamental principles of current international human rights law. It is enshrined in a series of international instruments, including the 1948 Universal Declaration of Human Rights (Article 2), the 1966 International Covenant on Civil and Political Rights (Article 26), the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, Article 1) and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 14 of the Convention and Protocol 12 to it). The prohibition cannot be derogated from even in time of public emergency (Article 4(1) of the ICCPR, Article 15 of the ECHR).

8. Art. 1(1) ICERD lays down that “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”.

9. Art 2(1) a)-d) provides that

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

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

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

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

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

10. The ECHR, entered into force in BiH on 12 July 2002, states, in its Article 14 - Prohibition of discrimination: „The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

11. Art 1 of Protocol No. 12 to the ECHR provides that “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”. It further sets out in para 2 that “no one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1”.

12. The European Convention prohibits discrimination without defining the term. The Strasbourg Court has however progressively developed a definition of discrimination in its case-law. Under it, discrimination means “treating differently, without an objective and reasonable justification, persons in analogous, or relevantly similar, situations”.¹ Discrimination also occurs “when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different”² or if “disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group”³⁴.

¹ ECtHR, *Willis v. the United Kingdom*, Application No. 36042/97, 2002, par. 48; *D.H. and Others v. the Czech Republic*, Application No. 57325/00, 2007, par. 175; *Burden v. the United Kingdom*, Application No. 13378/05, 2008, par. 60; *Kiyutin v. Russia*, Application No. 2700/10, 2011, par. 59.

² ECtHR, *Thlimmenos v. Greece*, Application No. 34369/07, 2000, par. 44

³ ECtHR, *D.H. and Others v. the Czech Republic*, Application No. 57325/00, 2007, par. 184.

⁴ See also the Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin which, though not legally binding on BiH, can be used as a helpful interpretative tool reflecting the case law of the European Court. Under the Directive, direct discrimination “shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin” (Article 2(2)(a)); indirect discrimination “shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular

13. The European Court, similarly to the UN committees (CERD and HRC), is of the opinion that differentiated treatment is only considered discriminatory “*if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised*”.⁵

14. The Strasbourg Court confirmed, in the *Sejdić and Finci* Case⁶, in which discrimination of a Roma and a Jew citizen of BiH was found out, that unjustified differentiated treatment based on the ethnic origin of individuals belonging to various Constituent peoples and to the Others in BiH could fall under Article 14 of the European Convention and/or Protocol 12. In this case, moreover, the European Court asserted that “discrimination on account of a person’s ethnic origin is a form of racial discrimination”.⁷

B. Constitutional framework

15. According to Art II.1 of the Constitution of BiH, “*Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms*”.

16. Art II.2 lays down that “*the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in BiH*” and that “*these shall have priority over all other law*”.

17. Art II.4 of the Constitution provides that “*the enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*”.

18. Finally, according to Art II.6, “*Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above*”. The list in Annex I to the Constitution of additional human rights agreements to be applied in BiH includes *inter alia* 1965 ICERD.

C. Domestic case law

19. In the request for review of the constitutionality of Article 2.(b)⁸ and Article 3.(b)⁹ of the Law on Holidays of the Republika Srpska submitted to the Constitutional Court of BiH, the applicant holds that the two provisions, declaring 9 January a public holiday of the Republic Srpska, are not in conformity with Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article II(4) of the Constitution of BiH, in conjunction with Article 1(1) and Article 2(a), (b), (c), (d) of the International Convention on the Elimination of All Forms of Racial Discrimination.

disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary” (Article 2(2)(b)).

⁵ ECtHR, *Burden v. the United Kingdom*, Application No. 13378/05, 2008, par. 60

⁶ ECtHR, *Sejdić and Finci v. BiH*, Applications Nos 27996/06 and 34836/06, 2009

⁷ *Ibid.*, par. 43.

⁸ “*The Holidays in the Republika Srpska, as holidays of the Republic, shall be the following: a) New Year’s Day; b) Republic Day; c) International Workers’ Day; d) Day of Victory over Fascism; e) Day of the General Framework Agreement for Peace in Bosnia and Herzegovina.*”

⁹ “*The holidays referred to in Article 2 of the Law shall be celebrated as follows: a) New Year’s Day, January 1 and 2; b) Republic Day, January 9; c) International Workers’ Day, May 1 and 2; d) Day of Victory over Fascism, May 9; e) Day of the General Framework Agreement for Peace in Bosnia and Herzegovina, November 21.*”

20. The application states that Republika Srpska opted for 9 January as the Republic Day, a date which already chosen by the 'Assembly of the Serb People in BiH' in 1992, without the participation of Bosniacs and Croats. It further stresses that "January 9th 1992 represents the date when the 'Assembly of the Serb People in BiH' adopted a 'Declaration to Proclaim the Republic of the Serb People of BiH' in the areas of the 'Serb autonomous regions and areas, and other Serb ethnic units in BiH'". In the applicant's view, this indicates that Bosniacs, Croats and Others, as well as other citizens of BiH are treated differently compared to Serbs in Republika Srpska. The applicant more generally considers that "*the stipulation of holidays in the Entities, which symbolize only one, or only two of out of three constituent peoples in BiH, constitutes the measures aimed at differentiating, excluding, restricting, giving priority on the ground of ethnic or national affiliation and their goal is to violate, discredit recognition, enjoyment and exercise of human rights and fundamental freedoms in all areas of life under equal conditions*".

21. The *Law on Holidays of the Republika Srpska* was enacted in May 2007.¹⁰ It replaced the previous *Law on Family Patron-Saint's Day and Church Holidays* adopted in 1992.¹¹ Articles 2 and 3 of the new Law contain a list of secular holidays – so called holidays of the Republic – celebrated in the Republika Srpska, which include New Year's Day (1-2 January), the Republic Day (9 January), the International Workers' Day (1 May), the Day of Victory over Fascism (9 May), and the Day of the General Framework Agreement for Peace in BiH (21 November). Three of these days are celebrated as public holidays in other European countries as well (1-2 January, 1 May, 9 May), two are specific for the Republika Srpska (9 January, 21 November).

22. In addition to the secular holidays, several religious holidays of the main denominations present in the Republika Srpska (Orthodox Christianity, Catholic Christianity, and Islam) are also recognized (Article 7). Under Article 9 of the Law, "*the Government may also determine other observance dates, showing consideration for historic, cultural and traditional heritage of the constituent peoples of the Republika Srpska.*"

23. While observance days are working days and in case of religious holidays, only believers are entitled to paid time off work, secular holidays (days of the Republic) are non-working days for everyone. The Law specifies that "*in the days of the holidays of the Republic, republic bodies and organisations, bodies of units of local self-government, companies, and institutions and other organisations and persons whose business relates to service and production activities shall not work*" (Article 5(1)). Legal entities, persons responsible in legal entities and persons whose business relates to service and production, which do not respect this prohibition, commit a misdemeanour and are subject to a fine (Article 11 of the Law)¹².

24. In the course of its adoption/revision, the Law on Holidays has been challenged by non-Serb inhabitants of the Republika Srpska, including through the way of a procedure for establishing the existence of the vital interest¹³ and by requests for constitutionality review.

25. In two decisions issued in March and November 2006 respectively,¹⁴ the Constitutional Court of BiH established that Articles 1 and 2 of the *Law on the Coat of Arms and Flag of the Federation of BiH*, Articles 2 and 3 of the *Constitutional Law on the Flag, Coat of Arms and*

¹⁰ *Official Gazette of the Republika Srpska*, no. 43/07.

¹¹ *Official Gazette of the Republika Srpska*, no. 19/92.

¹² "*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."

¹³ In April 2007, the Bosniac Caucus in the Council of Peoples of the RS initiated the procedure for establishing the existence of the vital interest of the Bosniac people in the Law on Holidays. On 10 May 2007, the Council for the Protection of Vital Interest of the Constitutional Court of the Republika Srpska declared the request inadmissible, due to the lack of explanation as to how and why the vital interests of the Bosniac people should have been affected (Ruling No. UV-1/07, 10 May 2007).

¹⁴ Ruling No. U 4/04, *Official Gazette of BiH*, nos 47/06 and 14/07, 31 March 2006 and 18 November 2006

Anthem of the Republika Srpska, and Articles 1 and 2 of the Law on the Family Patron-Saints Days and Church Holidays of the Republika Srpska were not in conformity with Article II(4) of the Constitution of BiH, in conjunction with Articles 1.1 and 2.a) and c) of ICERD.

26. In the first decision¹⁵, the Constitutional Court interpreted the term discrimination, stressing that the legal order of BiH, due to the presence of Article II.4 encompassing a general anti-discrimination clause, offered a larger protection against discrimination than the European Convention, i.e. *“a constitutional obligation of non-discrimination in terms of a group right”* (§ 118). The Constitutional Court also stressed the importance of symbols for *“the fostering and preservation of tradition, culture, distinctive characteristics of every people and that they have an influence on assembling and joining in one idea and one belief. It is beyond any doubt that the symbols convey certain emotions and meaning which are experienced in a specific way by those who recognize their history, tradition and culture in those symbols”* (§113).

27. In its conclusion the Court held that the *“challenged provisions have discriminating character and are not in conformity with the constitutional principle of equality of the constituent peoples, citizens and Others and that the obligation under the International Convention on the Elimination of All Forms of Racial Discrimination according to which 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 has not been complied with in the instant case”* (§ 149). It stressed that *“it is the legitimate right of the Bosniac and Croat people in the Federation of BiH and the Serb people in the Republika Srpska to preserve their tradition, culture and identity through legislative mechanisms, but an equal right must be given to the Serb people in the Federation of BiH and Bosniac and Croat peoples in Republika Srpska and other citizens of Bosnia and Herzegovina”*. The Court further held that it cannot consider as reasonable and justified the fact that any of the constituent peoples has a privileged position in preservation of tradition, culture and identity as all three constituent peoples and other citizens of Bosnia and Herzegovina enjoy the rights and fulfil obligations in the same manner as provided for in the Constitution of BiH and the Constitutions of the Entities.

28. In the second decision¹⁶, the Court also pointed *“to the importance of symbols in fostering and preservation of tradition, culture and distinctive characteristics of every people”*. It argued that *“given that the symbols represent the achievements, hopes and ideals of a state, they have to be respected by all its citizens, in this specific case by the citizens of Entities”*. Consequently, *“in order to be seen in that way by all the citizens of Entities in Bosnia and Herzegovina, the flag of the Republika Srpska must be the symbol of all of its citizens and the holidays celebrated in the Republika Srpska must be regulated in such a way that none of the constituent peoples is treated in a preferential manner”*.

29. In its conclusions, the Court held that *“the holidays provided for in the challenged provisions of the law in question only exalt the history, tradition, customs and religious and national identity of the Serbs and that at the same time such values are imposed on the members of other constituent peoples, other citizens and Others on the territory of the Republika Srpska”*, and that *“these means of preserving the tradition and identity of the Serb people are not proportional to the aim sought to be achieved”*. Thus, *“taking into account that Republika Srpska has the obligation to revoke, i.e. annul every law and every regulation with the aim of introducing racial discrimination or making it permanent where it exists”*, the Court concluded that *“Articles 1 and 2 of the Law on Family Patron-Saints’ Days and Church Holidays of the Republika Srpska are not in conformity with the constitutional principle of equality of the constituent peoples, citizens and Others in Bosnia and Herzegovina, are discriminating and therefore are in inconformity with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1.1 and*

¹⁵ Ruling No. U 4/04-DO 1 of 31 March 2006

¹⁶ Ruling No. U 4/04-DO 2 of 18 November 2006

Article 2. a) and c) of the International Convention for Elimination of all Forms of Racial Discrimination under Annex I. to the Constitution of Bosnia and Herzegovina”.

30. It is important to point out that, in its analysis, the Court stressed two main factors.¹⁷ The first relates to the context in which the 1992 Law was adopted. This context was marked by the lack of equal participation in decision-making procedures by the non-Serb peoples living in the Republika Srpska. The second factor pertains to the fact that the public holidays identified in the 1992 Law¹⁸ were “*almost exclusively orthodox religious holidays and holidays related to the historical past of the Serb people alone. These days /.../ were imposed, from the position of the authorities, on all citizens of the Republika Srpska that do not belong to Serb people and Orthodox religion*” (§ 64).

31. The Venice Commission indeed notes that the Case U 4/04, decided through the two above-mentioned rulings, differs from the now pending case U 3/13 in the respect that it dealt with laws issued before the landmark decision of the Constitutional Court of BiH on constituency of peoples (U-5/98)¹⁹, and the subsequent amendment of the entity constitutions²⁰. In the said decision, the constitutional Court held that “*the express recognition of Bosniacs, Croats and Serbs as constituent peoples by the Constitution of BiH can only have the meaning that none of them is constitutionally recognized as a majority, or, in other words, that they enjoy equality as groups*” adding that “*the constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits any special privilege for one or two of these peoples*”. However, this difference does not affect the relevance of the general argumentation of the Court on the prohibition of discrimination for entity legislation on national symbols and holidays. By contrast, this difference may be of significance in identifying the relevant anti-discrimination provisions of international human rights instruments.

III. Analysis

A. National Holidays

32. National holidays, together with flags, coats of arms and national anthem, constitute important symbols in the life of a nation. Providing a “yearly recurrent opportunity for people to reflect upon the identity of the collective they belong to”,²¹ national holidays should unify people in the collective, shared remembrance of crucial events in their common history, thus strengthening the collective identity of a nation living in a certain country. Disputes over national holidays, or other national symbols, usually reflect broader controversies relating to the nature, and sometimes the very existence, of such a collective identity. These disputes always need to be interpreted in the light of specific circumstances of a given country.

¹⁷ In case of the flag, coat of arms and anthem, another factor, the use of those symbols during the civil war in BiH in the early 1990s by the army of the Republika Srpska and the likely association of the symbols with the crimes committed by this army against non-Serb inhabitants was invoked.

¹⁸ The list of these holidays differed from the list in the 2007 Law on Holidays. It encompassed: Christmas – 6, 7 and 8 January, Day of Republic – 9 January, New Year – 14 and 15 January, Epiphany, St. Sava – 27 January, First Serb Uprising – 14 February, Easter Holidays: Good Friday – one day and Easter – two days, May Day – Labour Day – one day, Whitsuntide – two days, St. Vitus’s Day – 28 June.

¹⁹ Official Gazette of BiH, 14/9/2000

²⁰ See also *Opinion on the Implementation of Decision U5/98 (“Constituent Peoples”) of the Constitutional Court of Bosnia and Herzegovina by the Amendments to the Constitution of the Republika Srpska*, adopted by the Venice Commission at its 52nd Plenary Session (Venice, 18-19 October 2002), CDL-AD(2002)024

²¹ Karen Gammelgaard, Ljiljana Šarić, *Discursive Construction of National Holidays in West and South Slavic Countries after the Fall of Communism. Introductory Thoughts*, in Ljiljana Šarić, Karen Gammelgaard, Kjetil Rå Hauge (eds), *Transforming National Holidays: Identity discourse in the West and South Slavic Countries, 1985-2010*, John Benjamins Publishing, 2012, p. 5.

33. As a reflection of the national identity, national holidays and other national symbols often change together with the political system of a country. Thus, many countries of the former Eastern block revised their list of national holidays after the fall of communism, removing holidays related to the old political system (typically 7 November - the Communist Revolution in 1917) and adding new holidays that either recall important days predating the communist regime or are associated with the fall of this regime. Such a process also happened in the countries of the former Yugoslavia, which moreover newly gained (or regained) their independence in the 1990s.²² Since most of these countries define themselves as countries with one predominant (ethnic) nation, the choice of national holidays usually reflects the religious traditions and the interpretation of the history adhered to by this nation²³.

34. BiH has faced a more difficult situation. In addition to the change of the political system and the newly gained independence, the country has had to deal with the heritage of the civil war of the early 1990s and the ethnic division of its population. As a consequence of this specific situation, BiH remains the only country in the region, and certainly one of very few in the world, “with no commonly accepted holiday related to state formation”.²⁴ The country, moreover, still lacks a single general law on holidays, although several drafts have been put forward over the past years.²⁵ Thus, national holidays are regulated at the sub-state level, with each of the two Entities,²⁶ together with the Brčko district, establishing its own holidays.²⁷ The only “shared” holidays are the New Year (1 January) and the Labour Day (1 May), though this is simply the result of overlapping regulations.

B. The Law on Holidays of the Republika Srpska

35. The question raised before the Constitutional Court of BiH has a narrower focus than the one the Constitutional Court dealt with in 2006 (Ruling U 4/04), as it solely challenges the compatibility with human rights standards of the selection of one particular day of national holidays, not the whole catalogue of national holidays as was the case previously.

²² See chapters in Ljiljana Šarić, Karen Gammelgaard, Kjetil Rå Hauge (eds), *op. cit.*: Ljiljana Šarić, *Collective memory and media genres: Serbian Statehood Day 2002–2010*, pp. 35-55; Tatjana Radanović Felberg, “*Dan skuplji vijeka, ‘A day more precious than a century’*. Constructing Montenegrin identity by commemorating Independence Day, pp. 101-124; Ljiljana Šarić, *Croatia in search of a national day. Front-page presentations of national-day celebrations, 1988–2005*, pp. 125-148; Vjeran Pavlaković, *Contested pasts, contested red-letter days. Antifascist commemorations and ethnic identities in post-communist Croatia*, pp. 149-169; Marko Soldić, *Ilinden. Linking a Macedonian past, present and future*, pp. 191-212.

²³ For instance, Croatia celebrates, in addition to a series of catholic holidays, one international holiday (Labour Day – 1 May), one holiday in remembrance of the struggle against fascism (22 June – the beginning of the uprising of Croats against German and Italian occupying forces in 1941) and three holidays related to its recent history (25 June - Statehood day, declaration of independence in 1991; 5 August - seizure of Knin during the Operation Storm in 1995; 8 October - the termination of the links with Yugoslavia in 1991). Serbia, on its turn, celebrates various Orthodox Christian holidays, the Labour Day (1 May), the end of the First World War (11 November) and Serbia National Day (15-16 January - Anniversary of the first Serbian Uprising in 1804 and the first Serbian Constitution in 1835).

²⁴ Sven Monnesland, *Disputes over National Holidays. BiH 2000-2010*, in Ljiljana Šarić, Karen Gammelgaard, Kjetil Rå Hauge (eds), *op. cit.*, p. 251.

²⁵ See Zašto BiH nema zakon o državnim praznicima, *Al Jazeera*, 1 mart 2013.

²⁶ For the Federation of BiH, see *Zakon o praznicima* (Broj 2/92 i 13/94). The Federation celebrates several religious holidays, the Statehood Day (25 November) and the Independence Day (1 March - Declaration of Independence of BiH in 1992). Neither of these two secular holidays is celebrated in the Republika Srpska.

²⁷ For the Brčko District, see *Zakon o praznicima Brčko Distrikta BiH* (no. 10/02, Broj: 0-02-022-305/02, 29. 11. 2002). In the Brčko District, New Year (1 January), the Labour Day (1 May) and the Day of the Establishment of the District (8 March) are public holidays.

a. 9 January as a Controversial Day

36. As mentioned by the Constitutional Court of BiH in its request, the *Law on Holidays of the Republika Srpska* does not specify the reasons for which 9 January has been selected as the Republic Day, nor “*whether this date carries special symbolism*”. Nor is any explanation contained in the *travaux préparatoires* of the Law or of its 1992 predecessor.

37. According to the information available to the Venice Commission, the date can be associated with two different events. The first is the day of St. Stephen, the saint patron of Serbia and of the Republika Srpska. The second is the adoption on 9 January 1992, by the Assembly of the Serb People in BiH, of the *Declaration to Proclaim the Republic of the Serb People of BiH*²⁸. It is noted that, in April 1992, the Republic of the Serb People declared independence from BiH. In July of the same year, its name was changed to the Republika Srpska, under which it was recognized in the 1995 *Dayton Agreement*.

38. Independently of what the intent of the authors of the Law on Holidays of the Republika Srpska originally was, it seems that both in the Republika Srpska and outside it, the Republic Day of 9 January is perceived as a holiday connected with the two events at the same time.²⁹ This is evident from the reaction that the preservation of the holiday - called the Republic Day - in the 2007 Law gave rise to within the Bosniac cluster of the National Assembly of the Republika Srpska, as well as from media reports about the holiday.³⁰

39. It is indeed not uncommon for states or sub-state entities to celebrate as national holidays the dates at which they were originally created. It is also sometimes the case that the date is not uncontroversial, especially when the creation of a new state was directly linked to the dissolution of a previous one and when this dissolution was not welcomed by the population as a whole (the case of several countries of the former Yugoslavia, former Czechoslovakia, or the former USSR). Yet, the choice by the Republika Srpska of 9 January as the Republic Day can be seen as particularly delicate for two reasons, specific to the situation in BiH.

40. First, the adoption of the Declaration to Proclaim the Republic of the Serb People of BiH was a unilateral act, not supported by other, non-Serb peoples living in the Republika Srpska. Its adoption, moreover, was followed by the outburst of a civil war, in which numerous cruelties, including instances of large-scale ethnic cleansing were committed under the banner of various nationalistic ideologies. Rather than helping to enhance a shared identity - of common goals and values - of the inhabitants of the Republika Srpska, and of BiH more generally, the commemoration of such a controversial day - as the Republic Day - could become a yearly recurrent opportunity for people to recall past grievances and bring back old animosities.

41. In any case, whether associated with St. Stephen or with the adoption of the 1992 Declaration, 9 January is considered to be primarily a holiday of one constituent people, namely the Serb people.

42. Secondly, while it is not uncommon for states to select holidays based on the traditions of the predominant nationality, other nationalities always need to be provided with some space accommodating their different traditions. The situation is even more delicate in a country such as BiH, in which three constituent peoples (Bosniacs, Croats, Serbs) and Others shall live on equal terms. In this context, it is particularly important to ensure that the principles of equality and non-discrimination among all citizens, independently of their nationality and/or ethnicity, are fully

²⁸ "The Declaration of Proclamation of the Republic of the Serb People of Bosnia and Herzegovina", *Official Gazette of the Serb People in Bosnia and Herzegovina* (in Serbian) 1 (2): 13–14. 27 January 1992.

²⁹ That 9 January is not associated with St. Stephen's Day solely, is also confirmed by it being called the Republic Day and ranked among secular, not religious holidays.

³⁰ See, for instance, RS slavi svoj dan i krsnu slavu Svetog Stefana, *Kurir online*, 8. 1. 2013.

respected in all spheres of the social life, including that of public holidays.

43. The 1992 Law on Family Patron-Saint's Day and Church Holidays was found not to be in compliance with these principles by the Constitutional Court of BiH, since by proclaiming as national holidays almost exclusively days of relevance for one constituent people only, the Law did not respect the pluralistic nature of the society. The 2007 Law seeks to redress this shortcoming by recognizing, in its Article 7, as religious holidays a whole range of holidays celebrated by all the main denominations (Orthodox Christianity, Catholic Christianity, Islam) as well as by limiting the catalogue of secular holidays to internationally recognized days (1 January, 1 May, 9 May) or to holidays of relevance to the country as a whole (21 November).

44. The Republic Day of 9 January remains the only exception to this rule. Unlike religious holidays of individual denominations, it has no counterbalance in similar holidays of other constituent peoples. In fact, it being called the "Republic Day" and ranked among the secular holidays cannot but create the impression that the authors of the Law meant it to be a whole-nation holiday. This impression is further strengthened by the Republic Day being one of the non-working days and by the prohibition for legal entities, persons responsible in legal entities and persons whose business relates to service and production to work on this day. Since the Republika Srpska defines itself as "one of the two equal entities in BiH" (Article 1 of the Constitution) in which three constituent peoples, the Serbs, Bosniacs, Croats, and Others shall live together in equal dignity and without any discrimination, the commemoration as a Republic Day of a day so closely connected with only one constituent people may be seen as problematic.

a. The Republic Day and the prohibition of discrimination

45. As previously explained, the Republic Day of 9 January, ranked among the secular holidays of the Republika Srpska by the 2007 Law on Holidays of the Republika Srpska, is a holiday primarily associated with one constituent people. Moreover, the events it is supposed to recall, especially the adoption of the 1992 Declaration to Proclaim the Republic of the Serb People of BiH, are controversial.

46. The choice of 9 January as the Republic Day is therefore not a fortunate one. It can hardly be seen as compatible with the main values declared in the Constitution of the Republika Srpska, namely "*the respect for human dignity, freedom and equality, national 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). It may be perceived as going against the goal of turning the Republika Srpska into a multicultural, pluralistic country in which the equality of all citizens, independently of their nationality, is respected. Moreover, instead of contributing to the promotion of a climate of cooperation, tolerance and mutual understanding between the different parts of the population of the Republic Sprska³¹, this choice is likely to exacerbate divisions within society. The yearly recurrent commemoration of 9 January, regardless of the intent of those having originally introduced this holiday, could indeed stir painful memories of the dramatic events of the early 1990s, thus dividing the society rather than strengthening the common elements of its identity.

47. The principle of non-discrimination, as explained in the previous section, prohibits differentiated treatment based on one of the discriminatory grounds, provided such treatment is not justified by objective and legitimate reasons.

³¹ Under Article 6.1 of the Framework Convention for the Protection of National Minorities, entered into force in BiH on 1 June 2000 (and included in Annex I of the Constitution of BiH), "[t]he Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity[...]"

48. In *Sejdić and Finci v. Bosnia and Herzegovina*³², the European Court of Human Rights has recalled that “*discrimination means treating differently, without an objective and reasonable justification, persons in similar situations*” (§ 42). On the same occasion, the Court stressed that Article 1 of Protocol No. 12 extends the scope of protection to “any right set forth by law” and “*thus introduces a general prohibition of discrimination.*” (§ 53)

49. The Court furthermore established, in its case law, that “*a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group.*”³³

50. It is pointed out that in this context that, under Article (2)1 of ICERD, “Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions [...]”. These provisions are therefore of relevance in examining potentially discriminatory measures and policies adopted in respect of the constituent peoples of BiH. It is also recalled that, neither the European Convention, for those States having ratified Protocol 12, nor the 1965 ICERD require identification of a violation of a particular human right for a certain action or policy to be considered as discrimination.

51. In itself, the text of the Law on Holidays of the Republika Srpska is not ostensibly discriminatory, as its provisions, including Articles 2 and 3 declaring 9 January the Republic Day, are applicable to all citizens of the Republika Srpska without distinction.

52. Nevertheless, two factors need to be taken into account.

53. The first is the text of the Law itself, which proclaims as 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 provisions of Article 2(b) and 3(b) of the Law on Holidays appear to be based on a differentiated treatment of one constituent people. No objective or legitimate justification is given by the Law for this treatment.

54. The second factor is the specific situation of BiH, a country which, after a cruel civil war of the early 1990s, still strives to get over the past wrongs and to construe a truly multi-ethnic society.

55. It is indeed likely that certain inhabitants of the Republika Srpska could feel uncomfortable, or even humiliated, by having as one of the five main holidays of the Entity a day so closely linked to the events of the early 1990s and, moreover, by being under the obligation, under the sanction of a relatively high fine, to refrain from working on such a day. Although no obligation to take part in formal celebrations of the Republic Day is imposed upon citizens, the mere fact that the Law requires all inhabitants to commemorate it as a free day can be seen as problematic and its application as having a disproportionate impact on individuals/members of certain national communities living in the Republika Srpska and on the concerned communities.

56. It is recalled in this connection that, in its decision on Constituent Peoples (see footnote 19), the Constitutional Court of BiH held that “*the recognition of constituent peoples and its underlying constitutional principle of collective equality poses an obligation on the Entities not to discriminate in particular against these constituent peoples which are, in actual fact, in a minority position in the respective Entity. Hence, there is not only a clear constitutional obligation not to violate individual rights in a discriminatory manner which obviously follows from Article II. 3. and 4. of the Constitution of BiH, but also a constitutional obligation of non-discrimination in terms of*

³² *Sejdić and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, Judgment of 22 December 2009

³³ *D.H. and Others v. The Czech Republic*, Application no. 57325/00, Judgment of 13 November 2007, § 184; see also *Hugh Jordan v. Unitek Kingdom*, Application no.24746/94, Judgment of 4 May 2001

a group right if, for instance, one or two of the constituent peoples are given special preferential treatment through the legal system of the Entities” (§ 59). As previously indicated, the Court made specific reference to this conclusion in its rulings in cases U 5/98 and U 4/04 (see § 31 above).

57. In the specific circumstances of BiH and taking into account the case law of the Constitutional Court of BiH, these provisions may give rise to discrimination in the meaning of Article 1 of Protocol 12 ECHR and Article 2(a),(c),(d) of the ICERD, in conjunction with Article II(4) of the Constitution of BiH.

58. Should the Constitutional Court of BiH find that the Law on Holidays of the Republika Srpska, is discriminatory against other constituent peoples and Others on the territory of the Republika Srpska, it would be useful to suggest alternative options to the current way of addressing the issue of the Republic Day, such as: choosing as the Republic Day another day, which would be of importance for all inhabitants of the Republika Srpska, or limiting the list of secular holidays to the uncontroversial holidays.

59. Moreover, increased attention could be recommended to the necessity and benefits of having a law on national holidays adopted at the state level. In the situation in which each of the Entities and the Brčko district chose their own holidays and when overlaps are rather scarce, national holidays serve more as a wedge than as a joint in the society of BiH.

IV. Conclusion

60. The Constitutional Court of BiH has stressed in its case law that the BiH Constitution lays down not only an obligation not to violate individual rights in a discriminatory manner but also a constitutional principle of equality of constituent peoples, which prohibits any special privilege for one or two of these peoples.

61. The selection of 9 January as the Republic Day by the Law on Holidays of the Republika Srpska is inspired by an event of particular significance for one of the constituent peoples only, which is painful for people belonging to other communities. Nevertheless, it is imposed upon all citizens of the Republika Srpska. This choice is hardly in line with the unifying values of dialogue, tolerance, mutual understanding and equality which should be the underlying basis for the choice of a national day.

62. In the light of the specific circumstances of BiH and taking into account the case law of the Constitutional Court of BiH, the Venice Commission is of the view that the selection and maintaining of 9 January as the date of the observance of the Republic Day may give rise to discrimination in the meaning of Article 1 of Protocol 12 ECHR and Article 2(a), (c) and (d) of the ICERD, in conjunction with Article II (4) of the Constitution of BiH.

63. The Venice Commission did not examine whether the concerned provisions of the Law on Holidays of the Republika Srpska contradict other provisions or principles of the Constitution of BiH, limiting itself to the question contained in the request of the Constitutional Court of BiH. Such an analysis may be helpful.

64. The Venice Commission is ready to provide any further assistance to the Constitutional Court of BiH, should it request it.