

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 – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in Plenary and composed of the following judges:

Mr. Mirsad Ćeman, President,

Mr. Mato Tadić, Vice-President,

Mr. Zlatko M. Knežević, Vice-President,

Ms. Margarita Tsatsa-Nikolovska, Vice-President,

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić,

Mr. Giovanni Grasso,

Having deliberated on the request filed by Mr. **Safet Softić, Deputy Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina**, in case no. **U 8/17**, at its session held on 30 November 2017, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request filed by Mr. **Safet Softić, the Deputy Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina**, is hereby granted.

It is hereby established that Article 1(1)(7) of the Rulebook Amending the Rulebook on Wearing Uniforms in the part reading “when in uniform, police officers are not allowed to have a beard”, which was passed by the Director of the Border Police of Bosnia and Herzegovina, no. 17-07-02-1161-7/06 of 30 January 2017, is incompatible with Article II(3)(f) and (g) of the Constitution of Bosnia and Herzegovina and Articles 8 and 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Article 1(1)(7) of the Rulebook Amending the Rulebook on Wearing Uniforms, in the part reading “when in uniform, police officers are not allowed to have a beard”, passed by the Director of the Border Police of Bosnia and Herzegovina, no. 17-07-02-1161-7/06 of 30 January 2017, is hereby repealed pursuant to Article 61(2) of the Rules of the Constitutional Court.

The repealed Article 1(1)(7) of the Rulebook Amending the Rulebook on Wearing Uniforms, in the part reading “when in uniform, police officers are not allowed to have a beard”, passed by the Director of the Border Police of Bosnia and Herzegovina, no. 17-07-02-1161-7/06 of 30 January 2017, is rendered ineffective the first day following the date of publication of the present Decision in the *Official Gazette of Bosnia and Herzegovina*, pursuant to Article 61(3) of the Rules of the Constitutional Court.

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 6 October 2017, Mr. Safet Softić, the Deputy Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina (“the applicant”) lodged a request with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) for review of the constitutionality of Article 1(1)(7) of the Rulebook Amending the Rulebook on Wearing Uniforms (“the Rulebook”) in part reading “when in uniform, police officers are not allowed to have a beard”, which was passed by the Director of the Border Police of Bosnia and Herzegovina, no. 17-07-02-1161-7/06 of 30 January 2017.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the Director of the Border Police of Bosnia and Herzegovina was requested on 16 October 2017 to submit his response to the request.
3. The Director of the Border Police of Bosnia and Herzegovina submitted his response on 14 November 2017.

III. Request

a) Allegations stated in the request

4. The applicant points out that the disputed provision of Article 1(1)(7) of the Rulebook Amending the Rulebook on Wearing Uniforms, as relevant, reads “when in uniform, police officers are not allowed to have a beard”. The cited provision, in the applicant’s opinion, is incompatible with Article II(1), II(3)(g) and II(4) of the Constitution of Bosnia and Herzegovina, and Articles 9(1) and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”), and Article 1 of Protocol No. 12 to the European Convention and Articles 2(1), 18(1) and 26 of the International Covenant on Civil and Political Rights (“the ICCPR”). In the applicant’s opinion, the request concerns constitutional issues and, primarily, it relates to the human rights of religious believers safeguarded by the Constitution of Bosnia and Herzegovina and international law. It is further stated that after amendments to the Rulebook on Wearing Uniforms of 30 January 2017, police officers have been banned from wearing a beard when in uniform.
5. As to the background of this case, the applicant states that, after the challenged provision of the Rulebook had been amended, in the period between 3 February and 25 May 2017 the police officers

of the Border Police of Bosnia and Herzegovina (F.A. and A.H., employees of the JGP Sarajevo Airport) addressed the Union of the Border Police of Bosnia and Herzegovina, the Office for Professional Standards, the Director of Border Police of Bosnia and Herzegovina, the BiH Parliamentary Joint Committee on Human Rights and the Ombudsman of Bosnia and Herzegovina, as they were unable to exercise their religious and human rights in the Institutions of Bosnia and Herzegovina, and they requested protection and aid in exercising their religious rights or possible change of work position that does not require wearing their uniform. However, their requests were not complied with.

6. As to a violation of Article 9 of the European Convention, it is pointed out that religious appearance, the wearing of a beard in the present case, falls within the scope of religious rights and the rights safeguarded by Article 9 of the European Convention. Thus, as pointed out, the prohibition of wearing a beard in the particular case amounts to an interference with the religious rights. It is further stated that, in accordance with the provisions of the European Convention and the case-law of the European Court of Human Rights, the state may interfere with the freedom to manifest one's religion if the requirements set forth in Article 9(2) are cumulatively met. The applicant holds that the challenged provision of the Rulebook is in violation of the right to freedom of religion, as this norm is not prescribed by law, there is no legitimate aim, nor is it necessary in a democratic society. In relation to the first requirement that the measure limiting the right to freedom of religion is a measure prescribed by law, it is pointed out that in the particular case it is the Rulebook in question which does not have a legal status or legal significance, as it was passed by the Director of the Border Police of Bosnia and Herzegovina and not by a legislative or any other electoral body. As regards the existence of a legitimate aim referred to in Article 9(2) of the European Convention it is stated that a legitimate aim does not exist in the present case. It is further pointed out that the document of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina no. Ž-SA-04-113/17 of 19 June quotes the position of the Border Police of Bosnia and Herzegovina that the disputable measure was issued *for the purpose of a neat and uniformed appearance of the police officers when they are in uniform of the Border Police of Bosnia and Herzegovina...* In the applicant's opinion, the aforementioned does not represent any of the legitimate aims laid down in Article 9(2) of the European Convention. Even if a legitimate aim exists, a measure restricting the freedom of religion must be proportionate to that aim, which is not the case in the particular situation. In addition, as the applicant alleges, the question might be raised given that the wearing of moustaches is allowed, is it possible that moustaches can be well-kept and beards cannot and how is it possible to achieve that employees of the Border Police of Bosnia and

Herzegovina are uniform in their appearance if some of them have moustaches and some do not. With regard to the requirement that any interference or restriction must be “necessary in a democratic society, this requirement has not been complied with as it is not proven anywhere and in any possible manner that the challenged measure is necessary in the society of Bosnia and Herzegovina. Moreover, in the period between 28 April 2006, when the first Rulebook had been passed, and 30 January 2017, when the Rulebook in question was passed, the then applicable provision allowed the wearing of a beard and there were no difficulties in work activities or any objections related to the appearance of employees of the Border Police of Bosnia and Herzegovina. Furthermore, the applicant points out that there was no analysis whether the impugned measure was justified and necessary in the society of Bosnia and Herzegovina. In view of the aforesaid, the applicant concludes that the Rulebook is not in conformity with the relevant provisions of the Constitution of Bosnia and Herzegovina.

7. As to a violation of the right not to be discriminated against, it is pointed out that the impugned measure, *i.e.* the Rulebook, discriminates against the Border Police’s employees who are followers of Islam, as only in the Islamic tradition the wearing of beards is considered a recommendation and an act to please God. In other words, as highlighted, although the impugned measure is general and relates to all employees irrespective of their religious affiliation, the implementation of that measure affects only Muslims, *i.e.* followers of Islam (indirect discrimination).

8. The applicant further points out that the European Commission for Democracy through Law (“the Venice Commission”), in its Guidelines for Legislative Reviews of Laws Affecting Religion or Belief, adopted on 18 and 19 June 2004, regarding several issues that arise related to public institutions, including prisons, the military and state-operated hospitals, concluded that *limitations should be made only after a proper “limitations analysis,” with the understanding of the reasonable possibility of heightened state security interests.* In the opinion of the applicant, it follows from the aforementioned that a limitation of the freedom of religion in the army may be justified only if a proper “limitations analysis” is made in pursuit of one of the legitimate aims, and that is the protection of “public safety”. When the disputed Rulebook was passed no analysis was made and there was nothing to prove that the limitation of the freedom of religion, by prohibiting the wearing of a beard, could in any way affect “public safety”. In addition, it is stated that in the aforementioned Guidelines, the Venice Commission, as regards the *external freedom (forum externum)* points out that *it is important to remember that it is both the manifestations of an individual’s beliefs and those of a community that are protected. Thus, the manifestation of an individual’s beliefs may be protected even if the individual’s beliefs are stricter than those of other*

members of the community to which he or she belongs, and finally, that manifestations of religion or belief, in contrast to internal freedom, may be limited, but only under strictly limited circumstances set forth in the applicable limitations clauses. The applicant underlines that the European Convention and the ICCPR safeguard the public manifestations of religion by an individual even if these manifestations are stricter than those of other members of the community to which s/he belongs. In the particular case, as pointed out, that means that the right to wear a beard for religious reasons is protected even if some members of the Islamic Community do not wear a beard or even if they do not consider that wearing a beard is mandatory. It is sufficient that an individual considers that this is a religious norm he/she desires to follow. In the cited paragraph of the Guidelines, the Venice Commission points out that the limitation of the freedom of religion may be imposed only as defined by Articles related to the limitations, *i.e.* Article 9(2) of the European Convention and Article 18(2) of the ICCPR.

9. It is proposed that the Constitutional Court declare the Rulebook unconstitutional and order the Director of the Border Police of Bosnia and Herzegovina to annul the relevant Rulebook immediately or no later than one month after this Decision is published in the *Official Gazette of Bosnia and Herzegovina*.

b) Reply to the Request

10. In the reply to the request, the Director – Chief General Inspector of the Border Police stated, *inter alia*, that the reason for amending the Rulebook and passing the impugned provision was the need that the police officers, while in uniform of the BiH Border Police, are neat and uniform in their appearance, respecting their racial, national and ethnic origin, religious and other beliefs or orientations. Every police officer of the Border Police is subject to the relevant amendments to regulations, notwithstanding their racial, religious or other affiliation. The amendments to the regulations were “imposed by a vital need, meaning that it was established that the norm as a whole was imperfect and deficient, including the possibility of the abuse thereof”. In addition, “having a beard may affect or affects to the largest possible extent a person’s appearance, which is also important in the fight against corruption that occurs in connection with the performance of duty by police officers of the Border Police and as regards difficulties in identifying and recognizing such police officers wearing a beard and the need that the police officers, when in uniform of the BiH Border Police, are neat and uniform in their appearance.” It is also stated that “when entering Bosnia and Herzegovina, a foreign visitor first encounters a police officer of the Border Police and, based on his/her look, behaviour and physical appearance, the foreigner gets an impression of the State represented by the police officer”.

IV. Relevant Law

11. The **Law on Police Officials of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, 27/04, 63/04, 5/06, 33/06, 58/06, 15/08, 50/08, 63/08, 35/09 and 7/12), as relevant, reads:

Article 1

Scope of the Law

This Law regulates police powers and the working legal status (labour relations, including: obligations and rights, recruitment, education and in-service training, deployment, ranks, performance evaluation and promotion, remuneration, working conditions, disciplinary responsibility, responsibility for damage and termination of employment) of police officials of Bosnia and Herzegovina (“BiH”).

Article 2(1)

Police Officials

(1) This law applies to police officials employed within the State Investigation and Protection Agency (SIPA) and the Border Police of Bosnia and Herzegovina (BPBiH) and the Directorate for Coordination of Police Bodies of Bosnia and Herzegovina (“the Directorate”).

Article 3

Basis of the Work

(1) The work of police officials shall be based on the Constitution of Bosnia and Herzegovina, the law and other regulations in force in BiH.

(2) In performing his/her duties, a police official shall act in an impartial and legal manner, guided by the public interest to serve and assist the public, promoting the development and preservation of democratic practices consistent with the protection of human rights and fundamental freedoms.

Article 4

National Balance

The structure of police officials within the police body shall generally reflect the ethnic structure of the population of BiH in accordance with the 1991 census.

Article 5(2) and (3)

Police Insignia

(2) A police official wears a police uniform pursuant to the rulebook of a police body and relevant regulations.

(3) The Council of Ministers of Bosnia and Herzegovina (“the Council of Ministers”) prescribes the form of the police identification card and the police badge, the latter of which must be clearly recognizable to the public as a police insignia, and issues regulations on design of a police uniform.

Article 36(3)

(3) A police official shall always refrain from publicly manifesting his/her political beliefs, and from publicly manifesting religious beliefs while on duty;

Article 131

Regulations by the Head

Within three months upon the entry into force of this Law, the Head shall pass the regulations on the following:

– On wearing of the police uniform (Article 5, Paragraph 2);

[...]

12. The **Law on Border Police of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, 50/04, 27/07 and 59/09), as relevant, reads:

Article 15(2)

Duties and Responsibilities of the Director

(2) In addition to the duties and responsibilities referred to in paragraph 1 of this Article, the Director shall also perform other tasks, such as:

a) issuance of Rulebooks with the Council of Ministers’ approval, as well as the adoption of other regulations envisaged by law which are necessary to perform tasks within the competence of the BPBiH.

13. The **Rulebook on Design of a Police Uniform** (*Official Gazette of Bosnia and Herzegovina*, 90/05), as relevant, reads:

Article 1

(1) This Rulebook determines the design and type of police uniforms in the State Investigation and Protection Agency, State Border Service (“the police bodies”), parts thereof, colour, shelf life and special police insignia.

14. The **Rulebook on Wearing Uniforms**, no. 18-06-02-1161/06 of 28 April 2006, in relevant part reads as follows:

VI

*Police officers are obliged to comply with the following **general rules on wearing and maintenance of uniforms**:*

- 1. All officers on duty or at the same border crossing and on other official task must be uniformly dressed and have uniformed footwear.*
- 2. A police officer on all occasions, while on duty or in public place, should be properly dressed and should behave in the spirit of the police code of conduct protecting their reputation and the dignity of service.*

[...]

- 5. Wearing other insignia, badges or pins on a uniform is prohibited.*
- 6. In public places and while on duty, carrying umbrellas, nylon bags or other goods is prohibited with the exception of smaller bags or suitcases, totes or similar.*
- 7. when in uniform, police officers should have their hair neatly cut and their beards shaven. Having a well-kept beard and moustache is allowed.*

[...]

15. The **Rulebook Amending the Rulebook on Wearing Uniforms** no. 17-07-02-1161-7/06 of 30 January 2017, as relevant, reads:

Article 1

The Rulebook on Wearing Uniforms (no. 18-06-02-1161/06 of 28 April 2006 and no. 17-07-02-1161/06 of 6 November 2014) in Item VI under no. 6, the sentence: “when in uniform, police officers should have their hair neatly cut and their beards shaven. Having a well-kept beard and moustache is allowed.” is amended and reads:

“7. When in uniform, police officers should have their hair neatly cut and they are allowed to have a moustache, which should be neat and clean and of length not exceeding face volume. When in uniform, police officers are not allowed to have a beard.”

V. Admissibility and Merits

16. The Constitutional Court first notes that, given the specific nature of the particular request and issues raised therein, it will examine the admissibility and merits of the request together.

17. The Constitutional Court observes that, in view of the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Rules of the Constitutional Court, the request in question was filed by an authorised person.

As to the Constitutional Court’s Competence

18. As the relevant request challenges the act of a lower rank than the law, the Constitutional Court will make reference to its case-law in such cases. In this respect, the Constitutional Court notes that according to its hitherto case-law, in the situations where the issue of compatibility of a general act not expressly referred to in the provision of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina has been raised, the Constitutional Court has assessed the circumstances of the relevant case on a case-by-case basis commensurate with the competences which are conferred upon it by the mentioned Article and, accordingly, has expressed its positions as to whether or not the requests for review of such acts were admissible. In addition, the Constitutional Court points out that it is the master of the characterization to be given in law to the facts of the case, and that it is not bound by the characterization given by parties to the proceedings (see, Constitutional Court, Decision on Admissibility and Merits no. *U 6/06* of 29 March 2006, paragraph 21, *the Official Gazette of BiH*, 40/08), and that the Constitutional Court is the ultimate judicial authority on the interpretation and application of the Constitution of Bosnia and Herzegovina (see, Constitutional Court, Decision on Admissibility and Merits no. *U 9/09* of 26 November 2010, paragraph 70, *the Official Gazette of BiH*, 48/11).

19. In view of the case-law of the Constitutional Court in cases nos. *U 4/05* and *U 7/05* (Decisions on Admissibility and Merits available at the website of the Constitutional Court, www.ustavnisud.ba) as well as in the cases nos. *U 1/09* and *U 7/10* (Decisions on Admissibility available at the website of the Constitutional Court, www.ustavnisud.ba), the Constitutional Court points out that it clearly follows from the quoted case-law that the Constitutional Court, as an institution which upholds the Constitution, is competent to review the constitutionality of acts of

lower rank than laws if such acts raise an issue concerning the protection of human rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina and the European Convention. In line with the arguments concerning human rights, the Constitutional Court holds that it must, whenever this is feasible, interpret its jurisdiction in such way as to allow the broadest possibility of removing the consequences of human rights violations (*op.cit.* U 4/05, paragraph 16).

20. In the present case, the applicant holds that the challenged provision of the Rulebook is in violation of the right to freedom of religion, as guaranteed by Article II(3)(g) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention, and Articles 2(1), 18(1) and 26 of the ICCPR, as well as the right not to be discriminated against, as guaranteed by Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention and Article 1 of Protocol 12 to the European Convention in respect of the members of the Border Police of Bosnia and Herzegovina who manifest their religious beliefs by growing a beard.

21. In connection with the above, the Constitutional Court will establish, by reference to its own case-law and the case-law of the European Court of Human Rights, whether the challenged provision raises an issue of human rights safeguarded by the Constitution of Bosnia and Herzegovina and the European Convention.

22. According to its hitherto case-law related to the allegations about a violation of the right to freedom of religion because of the wearing of a scarf-hijab by a member of the Armed Forces of Bosnia and Herzegovina and the wearing of a hat in the courtroom of the Court of Bosnia and Herzegovina for the purpose of manifesting their religion, the Constitutional Court took the position that the allegations stated in the appeals raised the issue of guarantees under Article 9 of the European Convention and, as such, were falling within the scope of application of Article 9 of the European Convention (see, the Constitutional Court, Decision on Admissibility and Merits no. *AP 2190/13* of 9 July 2015 and *AP 3947/12* of 9 July 2015, available at the website of the Constitutional Court, www.ustavnisud.ba).

23. In addition, the Constitutional Court notes that Article 9 of the European Convention does not engage *numerus clausus* in respect of the forms which manifestation of one's religion or beliefs may take. On the contrary, each individual is free to choose a form of manifestation of religion or beliefs. In particular, the manner in which an individual manifests his/her religion may differ and take the form of 'custom' including, for instance, wearing a beard, hair, special diet and the like

(*mutatis mutandis*, European Court of Human Rights, *Leyla Sahin vs. Turkey*, Judgement of 10 October 2005). As regards the issue of having a beard, in the case of *Biržietis v. Lithuania* the European Court of Human Rights established a violation of Article 8 of the European Convention in the situation where the applicant, who was serving a prison sentence, was prohibited from growing a beard by the internal rules of the correctional institution in which he was placed. The Court stated in the cited case that personal choices as to an individual's desired appearance, whether in public or in private places, relate to the expression of his/her personality and thus fall within the notion of private life and held that, in the circumstances of the relevant case, the choice to grow a beard constituted a part of the applicant's personality and individual identity and fell within the scope of private life, and Article 8 of the European Convention is therefore applicable (see, the European Court of Human Rights, *Biržietis v. Lithuania*, Judgement of 14 June 2016).

24. Upholding its own jurisprudence in the aforementioned cases as well as the cited case-law of the European Court of Human Rights, the Constitutional Court concludes that the applicant's allegations that the prohibition on the members of the Border Police of Bosnia and Herzegovina to wear a beard for the purpose of manifesting their religious beliefs raises the issue of human rights under Article 9 of the European Convention.

25. However, the Constitutional Court holds it necessary to underline that wearing a beard is an aspect of private life safeguarded by Article 8 of the European Convention. This follows from the above cited case-law of the European Court of Human Rights, notwithstanding the fact that the cited case concerned the specific circumstance of wearing a beard in prison and the particular case before the Constitutional Court relates to the case of wearing a beard while performing public duties, as it is a "personal choice as to an individual's desired appearance, whether in public or in private places". Although this aspect related to the challenged Rulebook is not explicitly stated in the request, the Constitutional Court points out that it implicitly follows from the request itself. Namely, it is also stated in the response to the request that "all police officers of the Border Police are subject to the relevant amendments to the regulations notwithstanding their racial, religious or other affiliation". Hence, prohibiting the police officers to wear a beard while in uniform affects all of them notwithstanding their racial, religious or other affiliation, including those who wear a beard only as their "personal choice as to an individual's desired appearance". Therefore, the Constitutional Court holds that this issue cannot be considered only as the issue of manifesting one's religious beliefs but also as a matter of privacy and concludes that this request raises an issue

of qualified rights, in particular, the right to respect for private life and the right to freedom of religion safeguarded by Articles 8 and 9 of the European Convention.

26. The Constitutional Court further notes that an absolute ban on beards for police officers in uniform was imposed by the challenged provision. Taking into account that “a well-kept beard and moustaches” were allowed by the provision applicable before the impugned amendment thereto have been passed, the provision of the Rulebook imposing the absolute ban on beards for police officers in uniform, according to the assessment of the Constitutional Court, interfered with the right to private life and the right to freedom to manifest one’s religion. Given that the interference with the relevant qualified rights occurred on the basis of the Rulebook in question, as a by-law, the Constitutional Court more readily considers that it has the jurisdiction to examine its constitutionality. Supporting its own position that it is competent to review the constitutionality of acts lower rank than laws, if such acts raise an issue of human rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina and the European Convention, the Constitutional Court concludes that, in the particular case, the request for review of constitutionality is admissible in terms of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Rules of the Constitutional Court.

27. After concluding that the particular request is admissible, the Constitutional Court will consider the merits of the request, *i.e.* whether the interference with the right to private life and freedom of religion has been justified under paragraph 2 of Articles 8 and 9 of the European Convention.

Right to Private Life

28. Article II(3)(f) of the Constitution of Bosnia and Herzegovina reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

f) The right to private and family life, home, and correspondence.

29. Article 8 of the European Convention reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

30. Under the case-law of the Constitutional Court, the primary purpose of Article 8 of the European Convention is to protect individuals against arbitrary interferences by the public authorities with their rights guaranteed by Article 8 of the European Convention. Article 8(2) of the European Convention allows the public authorities, in certain cases, the interference with the rights of individuals safeguarded by Article 8 of the European Convention. To be justified, the interference of public authorities must be ‘in accordance with the law’. This requirement of legality, in accordance with the meaning of terms of the European Convention consists of several elements: a) interference must be based on the national or international law, b) the law concerned must be sufficiently accessible so that an individual is instructed on the circumstances of the law that must be applied to a given case, and c) the law must be formulated with appropriate accuracy and clarity so that an individual is enabled to adjust his/her actions to it. If it is established that the interference by the public authorities was in accordance with the law, it must be established whether such interference was ‘necessary in a democratic society’ and whether the interference related to the one of aims specified in Article 8(2) of the European Convention. In that context, it should be considered whether the decision of the public authorities had a legitimate aim and whether it represented a measure which was necessary in a democratic society.

Freedom of Thought, Conscience and Religion

31. Article II(3) of the Constitution of Bosnia and Herzegovina in the relevant part reads as follows:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

g) freedom of thought, conscience and religion

32. Article 9 of the European Convention reads as follows:

1. Everyone has the right to freedom of thought, conscience and religion; this right

includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

33. The Constitutional Court considers that freedoms enshrined in Article 9 of the European Convention represent one of the foundations of a 'democratic society'. In their religious dimension, these freedoms are one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practice or not to practice a religion (see, European Court of Human Rights, *Kokkinakis v. Greece* of 25 May 1993, Series A no. 260-A, p. 17, paragraph 3; *Buscarini and Others vs. San Marino [GC]*, no. 24645/94, paragraph 34, ECHR 1999-I).

34. In assessing the role of religion in a democratic society, the European Court pointed out that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected (*op.cit.*, *Kokkinakis v. Greece*).

35. The Constitutional Court points out that Article 9 of the European Convention is so structured that the first paragraph defines the freedoms that are protected and the second paragraph contains the so-called restrictive clause, which means that it provides for the circumstances under which the public authorities may restrict the enjoyment of the protected freedoms. Namely, Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance (see, European Court of Human Rights, *Kalaç vs. Turkey*, Judgment of 1 July 1997, Decisions and Reports 1997-IV, paragraph 27).

36. Bringing the said principles into connection with the facts of the instant case, the Constitutional Court recalls that the limitation prescribed by Article 9(2) of the European Convention affords to the states the possibility to decide only on the scope of enjoyment of these rights and freedoms, and only when such intervention of the state is prescribed by law and

necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. Consequently, the state is permitted to place limitations on the enjoyment of these rights only in the general public interest but it is not allowed to suspend them.

37. The freedom of religion and beliefs, unlike the freedom of thought and conscience (*forum internum*), has its external component (*forum externum*). Namely, Article 9 of the European Convention guarantees the right to external manifestation of religion and belief. However, this right is not absolute and is subject to limitations set out in Article 9(2) of the European Convention. In this respect, the Constitutional Court observes that it is established by the Guidelines for Legislative Reviews of Laws Affecting Religion or Beliefs, passed by the Venice Commission on 18 and 19 June 2004, that manifestations of religion or beliefs, in contrast to internal freedom, may be restricted, but only under strictly limited circumstances set forth in the applicable limitations clauses.

Justification for restricting the right to respect for private life and freedom of religion under Article 8(2) and Article 9(2) of the European Convention

38. The Constitutional Court points out that Article 8(2) and Article 9(2) of the European Convention include identical reasons justifying the restrictions on the rights guaranteed in the preceding paragraph of the mentioned Articles. Namely, in order to impose restrictions on the exercise of the rights listed in Article 8(2) and Article 9(2) of the European Convention, there must be a legal basis to do so and such measures must be necessary in a democratic society and prescribed in the interests of general (broader) objectives, referred to in Article 8(2) and Article 9(2) of the European Convention.

39. In view of the above, the Constitutional Court will examine whether the interference with the right to respect for private life and the right to freedom of religion is justified under Article 8(2) and Article 9(2) of the European Convention, taken together.

40. Taking the applicant's objection as a starting point that the impugned provision is not prescribed by law, the Constitutional Court notes that the impugned provision is included in the Rulebook on Wearing Uniforms, which was passed by the Director of the Border Police based on Articles 5(2) and 131(2) of the Law on Police Officials of Bosnia and Herzegovina and Article 15(2) of the Law on State Border Service of BiH. Therefore, the impugned provision is not prescribed by law in the formal sense but by the Rulebook, a bylaw. The Constitutional Court notes that the mentioned legal provisions stipulate the authority of the Director to pass regulations on the

appearance and manner of wearing a uniform. In addition, the Constitutional Court notes that, according to the request, it is undisputed that the members of the Border Police, whom the impugned provision relates to, are familiar with the impugned provision and that the provision is clear. Taking into account that, in case no. *AP-3947/12*, the Constitutional Court concluded that restricting the right to freedom of religion for wearing a cap in the courtroom of the Court of BiH was lawful in terms of Article 9(2) of the European Convention, given the internal act of the Court of BiH and other judicial institutions (*op.cit. AP-3947/12* paragraph 44), and taking into account the position taken by the European Court of Human Rights in the case of *Biržietis v. Lithuania* that the notion “law” encompasses not only written laws enacted by Parliament, but also statutes and regulatory measures of a lower order passed by professional regulatory bodies under independent rule – making powers delegated to them by Parliament (*op. cit. Biržietis v. Lithuania*), the Constitutional Court concludes that the restrictions on the right to respect for private life and the right to freedom of religion in the present case are prescribed by “law”, within the meaning of Article 8(2) and Article 9(2) of the European Convention.

41. In addition, as regards the issue whether the impugned measure was necessary in a democratic society and whether it pursued one of the legitimate aims under Article 8(2) and Article 9(2) of the European Convention, the Constitutional Court notes that it is necessary first to determine whether the impugned measure was passed in the interest of legitimate aims under Article 8(2) and Article 9(2) of the European Convention, which are to be interpreted strictly, and if so, whether the impugned measure, as such, is proportionate to that aim and necessary in a democratic society. In this connection, the Constitutional Court points out that the Rulebook on Wearing Uniforms, prior to the amendments thereto, had prescribed as follows: *A well-kept beard and moustache shall be permitted*. Furthermore, the Constitutional Court notes that the provision of Article 36(3) of the Law on Police Officials of Bosnia and Herzegovina prescribes as follows: *A police official shall always refrain from publicly manifesting his/her political beliefs, and from publicly manifesting religious beliefs while on duty*. The Constitutional Court notes that the applicant failed to define the appearance of a beard, as a form of expression of one's religious belief, but he highlighted that the cited provision, applicable before the impugned amendment thereto was passed (*A well-kept beard and moustache shall be permitted*), had caused no problem. In addition, the Constitutional Court has already pointed out that a beard, as part of the body and physical appearance of a person, is a form of expression of one's religion only where the beard is worn for religious reasons but it is also an aspect of one's private life, as it is not associated only with religious symbols.

42. The Constitutional Court recalls that according to the consistent case-law of the European Court of Human Rights, the Contracting States have a certain margin of appreciation in assessing the existence and extent of the need for interference with citizen's rights, but this margin is subject to European supervision, embracing both the law and the decisions applying it, even those given by independent courts (see, European Court of Human Rights, *Dahlab v. Switzerland*, 16 February 2001, Application no. 42393/98). In addition, according to the consistent case-law of the European Court of Human Rights, the Court's task is to determine whether the measures taken at national level are justified in principle – that is, whether the reasons adduced to justify them appear “relevant and sufficient” and are proportionate to the legitimate aim pursued (see, European Court of Human Rights, *The Sunday Times v. the United Kingdom* (no. 1), 26 April 1979, Series A no. 30).

43. In order to answer the question whether the impugned provision was passed for the purpose of achieving the legitimate aim referred to in Article 8(2) and Article 9(2) of the European Convention, the Constitutional Court will determine whether the absolute ban on beards for police officers in uniform was issued in the interest of general objectives, such as national security, public safety, health or morals, or the rights and freedoms of others, *etc.* According to the response of the Director of the Border Police of 14 November 2017, the reason for amending the Rulebook and passing the impugned provision was the need that the police officers, while in uniform of the BiH Border Police, are neat and uniform in their appearance, and the fight against corruption that occurs in connection with the performance of duty by police officers and difficulties in identifying a person wearing a beard. In the opinion of the Constitutional Court, the stated the objectives of a general nature as reasons for passing the impugned provision, given that it is completely logical that any uniformed police should be “neat and uniform in the appearance”, but Director of the Border Police failed to explain why, otherwise (for example, if a neat and well-kept beard would have been allowed, as previously prescribed by the law), this general objective would be imperilled. Does it mean that, before the impugned provision was passed, the police officers had been untidy and non-uniform in their appearance? Therefore, it seems that the Director of the Border Police, in the manner mentioned above, expressed his personal views on how police officers should look like in order to be “neat and uniform in their appearance”; however, given that the impugned provision amounted to an interference with fundamental human rights, such as the right to respect for private life and the right to freedom of religion, no reasonable and logical explanation about the necessity of this measure was offered. Does it really mean that a police officer, who would wear a well-kept beard, would violate grooming and personal appearance standards to such an extent that it required an intervention to his fundamental constitutional right to respect for private life and the right to

freedom of religion? As to the second reason offered in the response, the fight against corruption, the Constitutional Court holds that it concerns an arbitrary assertion that can reasonably be countered by the opposite assertion that it is easier to identify a person wearing a beard (well-kept beard), because, as stated in the response, “the beard may affect and affects the person's facial physiognomy.” Therefore, these reasons do not satisfy the requirement of necessity in a democratic society for the protection of the general values mentioned in Article 8(2) and Article 9(2) of the European Convention. In the absence of any other relevant justification by the enactor of the impugned provision, the Constitutional Court highlights that it does not find that there exists a special reason justifying the “necessity” for the interference with the aforementioned constitutional rights in the manner it was done by the impugned provision. Once again, the Constitutional Court points out that it does not find a reason that would in itself be an obstacle for the police to perform its duty in the interest of public safety or for the protection of public order, if some police officers wear a well-kept beard. The Constitutional Court may reiterate all the aforementioned also with regard the fulfilment of other standards set forth in the second paragraph of the right to respect for private life and the right to freedom of religion (*the protection of health or morals, the protection of the rights and freedoms of others*). That would mean that the impugned measure, which was prescribed by the impugned provision, could not be justified even in terms of the remaining standards referred to in Article 8(2) and Article 9(2) of the European Convention.

44. Therefore, the Constitutional Court considers that, in the present case, no relevant and sufficient reasons were offered based on which the Constitutional Court could conclude that the relevant measure of restriction was prescribed in the interest of the legitimate aims referred to in Article 8(2) and Article 9(2) of the European Convention. In addition, the Constitutional Court notes that the impugned provision prescribes an absolute prohibition against the wearing of beard without any possible guidelines on its aesthetic appearance or any other characteristics or exceptions. Therefore, taking into account that the specific restriction on the fundamental human rights does not pursue the interest of general objectives referred to in Article 8(2) and Article 9(2) of the European Convention, the Constitutional Court concludes that the impugned provision is in violation of the right to respect for private life and the right to freedom of religion under Article 8 and Article 9 of the European Convention.

45. The Constitutional Court concludes that the impugned provision of the Rulebook is in violation of Article II(3)(f) and (g) of the Constitution of BiH and Articles 8 and 9 of the European Convention.

Other allegations

46. As to the applicant's allegations that the impugned provision is discriminatory against the Border Police employees who are the followers of Islam, the Constitutional Court notes that the impugned provision is of a general nature and that it applies equally to other denominations, which require that their followers wear a beard. Having regard to the conclusion of the Constitutional Court that there is a violation of Article 9 of the European Convention, the Constitutional Court holds that it is not necessary to examine separately the allegations about a violation of the rights under Article II(4) of the Constitution of BiH and Article 14 of the European Convention and Article 1 of Protocol No. 12 to the European Convention. Also, taking into account the aforementioned conclusion on a violation of Article 9 of the European Convention, the Constitutional Court considers that it is not necessary to examine separately the allegations about a violation of Article 2(1), Article 18(1) and Article 26 of the International Covenant on Civil and Political Rights.

VI. Conclusion

47. The Constitutional Court concludes that an absolute prohibition on the BiH Border Police' police officers to wear a beard while wearing their police uniform is in violation of the right to respect for private life and the right to freedom of religion safeguarded by Article II(3)(f) and (g) of the Constitution of BiH and Articles 8 and 9 of the European Convention, as the impugned measure does not pursue the general objectives set forth in Article 8(2) and Article 9(2) of the European Convention.

48. Pursuant to Article 43(1) of the Rules of the Constitutional Court, a Separate Concurring Opinion of Judge Tudor Pantiru is annexed to the present Decision. Vice-Presidents Mato Tadić and Zlatko M. Knežević and Judges Valerija Galić and Miodrag Simović have given their dissenting statement, expressing their disagreement with the majority decision.

49. Having regard to Article 59(1) and (1) and Article 61(2) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present Decision.

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

Mirsad Ćeman

President
Constitutional Court of Bosnia and Herzegovina

SEPARATE CONCURRING OPINION BY JUDGE TUDOR PANTIRU

In its decision of 30 November 2017, the Constitutional Court of BiH, in case no. *U-8/17*, granted the request for review of the constitutionality of Article 1(1)(7) of the Rulebook Amending the Rulebook on Wearing Uniforms no. 17-07-02-1161-7/06 of 30 January 2017 (“the Rulebook”), which had been adopted by the Director of the Border Police of Bosnia and Herzegovina.

In the enacting clause of the Decision it is established that Article 1(1)(7) of the Rulebook, in the part reading **when wearing uniform, a police officer’s beard must be shaven**, is incompatible with Article II(3)(f) and (g) of the Constitution of Bosnia and Herzegovina and Articles 8 and 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Although I agree with the decision of the majority as regards the unconstitutionality of the provisions of Article 1(1)(7) of the Rulebook, with all due respect I think that the Decision of the Constitutional Court is incomplete and that it should not have been limited to the aforementioned for the following reasons.

It is true that the Rulebook was passed on the basis of provisions of the Law on Police Officials of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 27/04, 63/04, 5/06, 33/06, 58/06, 15/08, 50/08, 63/08, 35/09 and 7/12, “the Law on Police Officials”). It follows directly from the provisions of Article 5(2) of the aforementioned Law, which read: “A police official wears a police uniform pursuant to the rulebook of a police body and relevant regulations.” In the present case it has been disregarded that the Law on Police Officials includes also the provisions of Article 36(3), which read: **A police official shall always refrain from publicly manifesting his/her political beliefs, and from publicly manifesting religious beliefs while on duty**. Therefore, the aforementioned provision, in its relevant part, stipulates that: **A police official shall always refrain from publicly manifesting his/her political beliefs while on duty**. This means that the Law stipulates an absolute prohibition against the public manifestation of all religious beliefs by police officials while on duty. It is my deep conviction that the aforementioned, as a whole, means that the impugned provision of the Rulebook, imposing an absolute ban on wearing a beard (as a form of manifesting religious beliefs) while on duty, is derived from the cited provision of the Law on Police Officials. Likewise, the aforementioned means that the Director of the Border Police of Bosnia and Herzegovina prescribed the aforementioned prohibition against the public manifestation of religious beliefs on the basis of the provisions of Article 36(3) of the Law on Police Officials, which, as already stated, prescribes an absolute prohibition against the public manifestation of all religious beliefs by police officials while on duty.

The question then arises what is the purpose of the decision of the Constitutional Court in the present case, if the provisions of Article 36(3) of the Law on Police Officials, in addition to the impugned provision of the Rulebook, were not examined. In my opinion, in this case the said provision of the Law on Police Officials is implicitly referred to in this case, as the Rulebook cannot be viewed separately from the said Law, taking into account the undisputed fact that the Rulebook was passed based on the Law on Police Officials. Therefore, the provisions of Article 36(3) of the Law on Police Officials engage Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, given that those provisions stipulate an absolute prohibition against the public manifestation of all religious beliefs by police officials while on duty. Taking into account the manner in which it was done, the Director of the Border Police of Bosnia

and Herzegovina has been put in a very difficult situation, as he adopted the impugned provision of the Rulebook based on Article 36(3) of the Law on Police Officials.

In view of the above, I hold that the Constitutional Court should have examined whether the absolute prohibition against the public manifestation of all religious beliefs by police officials while on duty, prescribed by Article 36(3) of the Law on Police Officials, is consistent with the limitations on the freedom to manifest one's religion or beliefs that are permitted under Article 9(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. That is the main reason why I wrote the separate opinion in the present case, concurring in the Decision of the Constitutional Court no. *U-8/17* of 30 November 2017.