

THE DAYTON CONCEPT OF PERFORMING LEGISLATIVE AND OTHER FUNCTIONS OF THE PARLIAMENTARY ASSEMBLY OF BOSNIA AND HERZEGOVINA: COLLAPSE OF THE RULE OF LAW AND EFFECTIVE POLITICAL DEMOCRACY

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ABSTRACT

Bosnia and Herzegovina is a State whose current constitutional solutions are not the result of an effort to ensure basic democratic principles regarding the way of election and functioning of the institutions of the system, but are the result of an effort to establish and ensure peace through the Peace Agreements. However, today - almost thirty years after the entry into force of the General Framework Agreement for Peace in Bosnia and Herzegovina, such constitutional solutions have proven to be an insurmountable obstacle to, in the first place, the realization of the rule of law and development of effective political democracy, that is, to the fulfillment of the necessary conditions on the path to European integration. The constitutional system of Bosnia and Herzegovina, as it is well known, is interwoven with norms of a discriminatory nature that are not in accordance with the European Convention and its protocols, which has resulted in several judgments of the European Court of Human Rights in Strasbourg. It is a matter of severe discrimination on an ethnic basis in domain of the electoral rights of citizens, which is visible at first glance. Maintaining such a state of affairs and not implementing the judgments of the European Court of Human Rights, despite the fact that Bosnia and Herzegovina has ratified the European Convention - and especially its Protocol 12 - along with other ratified protocols, as well as the fact that according to the Constitution of Bosnia and Herzegovina, the above mentioned instruments are the part of the legal system of Bosnia and Herzegovina. Herzegovina, represents an insurmountable obstacle for the serious approach to fulfilling other conditions from the European integration process. In this place, it comes to the unequal value of the votes and discrimination within the decision-making process in the Parliamentary Assembly of Bosnia and Herzegovina (which is not visible at first glance) and - in the first place, through the so-called entity voting in both Houses of this representative body (House of Representatives and House of Peoples). Thanks to the Dayton constitutional solutions that produce a

multiple inequality of the value of votes of MPs of the House of Representatives and delegates of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, along with other deviations, any serious approach to fulfilling the conditions of the European integration process is impossible, the violation of the rule of law has become a constant phenomenon, and all this it has a very harmful effect on the principle of effective political democracy to the point of its complete cancellation. This paper contains considerations regarding the procedures of execution the functions of the Parliamentary Assembly of Bosnia and Herzegovina, along with an analysis of the key causes of delays in fulfilling the conditions of the European integration process based on valid norms that produce an unequal value of the votes in the decision-making process of the Parliamentary Assembly of Bosnia and Herzegovina, but also in terms of violations generally accepted democratic standards of a legal nature that refer to the election of the Houses of this representative body, their mutual relationship and overall position. Due to the multiple inequality of vote and discrimination in the decision-making process of the House of Representatives of the Parliamentary Assembly of BH - as a directly elected House, and in relation to the delegates of the indirectly elected House of Peoples, proceeding has been initiated before the European Court of Human Rights in 2021 (case no. 34891/21), and a decision is expected in this case.

Keywords: *Assembly of Bosnia and Herzegovina, Constitution of Bosnia and Herzegovina, Parliamentary entity voting, Peace Agreements, principle of effective political democracy, Rule of law*

1. INTRODUCTION

This paper mainly contains considerations concerning the procedures of passing acts of law and other decisions of the state representative body of Bosnia and Herzegovina (hereinafter: BH) - the Parliamentary Assembly of BH. As will be seen from the text that follows, the procedure of election as well as the procedure for passing laws and other decisions of the Parliamentary Assembly of BH abound with solutions completely unknown in democratic countries of comparative law and that is completely disputed from the point of view of the principle of equal vote and other generally accepted codified democratic standards of a legal nature (prohibition of discrimination, general and equal voting rights, equal access to public affairs, rule of law, effective political democracy, equality of vote etc.). These procedures produce a marked inequality of votes of the members of both Houses of the Parliamentary Assembly of BH, primarily due to the use of the so-called mechanism. entity voting - as a regular way of decision-making of this representative body.

This paper also provides a brief analysis of the structure, method of election and mutual relations between the House of Representatives and the House of Peoples of the Parliamentary Assembly of BH, which is also one of the causes of the violation of the principles of effective political democracy and the rule of law in BH, which precedes the inadequate decision-making procedures of this representative

body from the point of view generally accepted codified democratic standards of a legal nature.

Regarding the structure and method of elections, the European Court of Human Rights in Strasbourg issued several judgments in which it established a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the European Convention) and its protocols. This paper also contains a brief overview of the impact of the structure, election methods and decision-making procedures of the Parliamentary Assembly of BH on the impossibility of realizing the principles of effective political democracy and the rule of law, as key principles for the development of a democratic society, which the European Convention refers to in its Preamble.

2. PARLIAMENTARY ASSEMBLY OF BOSNIA AND HERZEGOVINA: STRUCTURE AND ELECTION PROCEDURE

The Parliamentary Assembly of Bosnia and Herzegovina, according to the provisions of Annex 4 of the General Framework Agreement for Peace in Bosnia and Herzegovina – well known as Dayton Peace Agreement (hereinafter: DPA)¹,

¹ For the different views regarding the Washington and Dayton Peace Agreements, see: Bajtal, E., *Zločini i laži Miloševićeve kriptopolitike*, Univerzitet u Sarajevu, Institut za istraživanje zločina protiv čovječnosti i međunarodnog prava, Sarajevo, 2014, pp. 234-236; Barnes Samuel, H., *The Contribution of Democracy to Rebuilding Postconflict Societies*, The American Journal of International Law, Vol. 95, No. 1, 2001, pp. 86-101 (see: pp. 86-94); Begić, Z., *One More Attempt by the US Administration in Bosnia and Herzegovina: Constitutional Reform of the Federation of Bosnia and Herzegovina—Mission Impossible or Back to the Future?*, Journal of Balkan and Near Eastern Studies, Vol. 19, No. 4, 2017, pp. 419-445, (see: pp. 423-427); Bieber, F., *Post-war Bosnia: Ethnicity, Inequality and Public Sector Governance*, Palgrave Macmillan, New York, 2006, pp. 40-86; Caspersen Nina, *Good Fences Make Good Neighbours? A Comparison of Conflict-Regulation Strategies in Postwar Bosnia*, Journal of Peace Research, Vol. 41, No. 5., 2004, pp. 569-588 (see: pp. 572-583); Chandler, D., *Bosnia: Faking Democracy After Dayton*, Pluto Press, London-Sterling, 2000, pp. 66-89; Chollet, D., *The Road to the Dayton Accords: A Study of American Statecraft*, Palgrave Macmillan, New York, 2005., pp. 133-181; Conces Rory, J., *A Sisyphian Tale: The Pathology of Ethnic Nationalism and the Pedagogy of Forging Humane Democracies in the Balkans*, Studies in East European Thought, Vol. 57, No. 2, 2005, pp. 139-184 (pp. 162-174); Cox, M., *The Right to Return Home: International Intervention and Ethnic Cleansing in Bosnia and Herzegovina*, 47 The International and Comparative Law Quarterly 3, Vol. 47, No. 3, 1998, p. 599-631, (see: pp. 603-616); Friedman, F., *Bosnia and Herzegovina: A Polity on the Brink*, Routledge, London-New York, 2005, pp. 60-76; Graham John, *Black Past, Grey Future? A Post-Dayton View of Bosnia and Herzegovina*, 53 International Journal, Vol. 53, No. 2, 1998, pp. 204-220, (see: pp. 217-220); Horowitz Shale, *War after Communism: Effects on Political and Economic Reform in the Former Soviet Union and Yugoslavia*, 40 Journal of Peace Research 1, Vol. 40, No. 1, 2003, pp. 25-48 (see: pp. 42-43); Ibrahimagić, O., *Državno uređenje Bosne i Hercegovine*, Autor, Sarajevo, 2005, pp. 79-84; Ibrahimagić, O., *Državno-pravni i politički razvitak Bosne i Hercegovine*, Autor, Sarajevo, 2009, pp. 403-409; Karnavas Michael, G., *Creating the Legal Framework of the Brčko District of Bosnia and Herzegovina: A Model for the Region*

has extremely complicated and unfamiliar decision-making procedures, even for democratic states. In the comparative law of modern democratic states, there are no examples of such procedures for passing laws and other decisions of a representative body, for the simple reason that such procedures penetrate the very core of democracy, violating fundamental democratic standards of a legal nature. As will be seen from the following, such type of prescribed decision-making procedures imposes the question of character and classification of the Dayton constitutional construction. Thus, while on the one hand Annex 4 of the General Framework Agreement for Bosnia and Herzegovina is abundant with norms that refer to the highest democratic values and principles of a legal nature which, as such, are standardized at the general and international level, on the other hand the procedure for passing laws and other decisions of the state of the representative body violate the generally accepted democratic standards of a legal nature to the extent that it can be reasonably stated that the constitutional order of Dayton Bosnia and Herzegovina has no democratic character at all.

This, in the first place, arises from the way this representative body is elected. Namely, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina is directly elected by the citizens. Two-thirds of the representatives of the House of Representatives (out of a total of 42) are elected from the territory of the Federation of BH entity - 28 of them, while one third is elected from the territory of the Republika Srpska entity - 14 of them.² Of that number, 21 representatives are directly elected in narrower constituencies in the Federation of BH entity - which for this purpose is divided into five narrower electoral

and Other Postconflict Countries, The American Journal of International Law, Vol. 97, No. 1, 2003, pp. 111-131, (see: 111-112); Kurtčehajić, S.; Ibrahimagić, O., *Politički sistem Bosne i Hercegovine*, Autor, Sarajevo, 2007, pp. 176-217; Kurtčehajić, S., Ibrahimagić, O., *Politički sistem Bosne i Hercegovin*, Autor, Sarajevo, 2007, pp. 246-261; Manning, C., *The Making of Democrats: Elections and Party Development*, Palgrave Macmillan, New York, 2008., pp. 73-85; Miraščić, Dž., *Bosanski model demokratske vlasti*, Of-set, Tuzla, 2009, pp. 109-111; Nystuen, G., *Achieving Peace or Protecting Human Rights?*, Martinus Nijhoff Publishers, Leiden-Boston, 2005, pp. 66-90; Papayoanou Paul, A., *Intra-Alliance Bargaining and U.S. Bosnia Policy*, The Journal of Conflict Resolution, Vol. 41, No. 1, 1997, pp. 91-116 (see: pp. 101-109); Pugh Michael, Cobble Margaret, *Non-Nationalist Voting in Bosnian Municipal Elections: Implications for Democracy and Peacebuilding*, Journal of Peace Research, Vol. 38, No. 1, 2001, pp. 27-47 (see: p. 27, pp. 29-32); Reilly, B., *Democracy in Divided Societies: Electoral Engineering for Conflict Management*, Cambridge University Press, Cambridge, 2001, pp. 143-144; Schneckener U., *Making Power-Sharing Work: Lessons from Successes and Failures in Ethnic Conflict Regulation*, Journal of Peace Research, Vol. 39, No. 2, 2002, pp. 203-228, (see: pp. 209-210); Singer Peter, W., *Bosnia 2000: Phoenix or Flames?*, World Policy Journal, Vol. 17, No. 1, 2000, pp. 31-37 (see: pp. 31-35); Steiner M., *Seven Principles for Building Peace*, World Policy Journal, Vol. 20, No. 2, 2003, pp. 87-93 (see: pp. 88-92); Talbott, S., *Self-Determination in an Interdependent World*, Foreign Policy, No. 118, 2000, pp. 152-163 (see: pp. 154-156); Trnka, K., *Ustavno pravo*, Fakultet za upravu, Sarajevo, 2006, str. 103-106., etc.

² See: Constitution of Bosnia and Herzegovina, Article IV/2.

units, while 9 representatives are elected directly in three narrower electoral units from the territory of the Republika Srpska entity. The remaining seven mandates in the entity Federation of BH and five mandates in the entity Republika Srpska are the so-called compensatory mandates that are awarded at the level of both entities with the so-called compensatory lists, according to the Saint-League election system. Although at first glance the method of election of the House of Representatives can be seen as democratic, the distribution of mandates by narrow electoral units in the entities does not follow the principle of equality of votes, which represents a very present problem in terms of the level of legitimacy of the elected representatives, equal representation and the value of votes of citizens with regard to the distribution mandates by electoral units. This problem is particularly pronounced in the Republika Srpska entity.

Thus, in the last elections in Electoral Unit 1 in this entity there were 568,773 registered voters, in Electoral Unit 2 – 395,395, and in Electoral Unit 3 – 295,154 registered voters.³ In all three constituencies, however, according to the BH Election Law, three representatives are directly elected, that is, an equal number of representatives regardless of the large differences in the number of registered voters. At first glance, it is clear that – there is a huge disproportion between constituencies in terms of the number of registered voters. Despite this, citizens directly elect the same number of representatives in all three constituencies - thus, for example, the value of the vote of any citizen from Electoral Unit 3 is almost twice as high as the value of the vote of any other citizen from Electoral Unit 1. In this regard, the Final Report of the Election Observation Mission of ODIHR on the occasion of the general elections held on October 2, 2022 states the following: “The Electoral Law prescribes that competent state and entity parliaments review mandates according to the VIJ every four years. However, the borders of VIJ have not been changed since 2001, with the exception of constituencies for the elections for the National Assembly of the RS, which were last revised in 2012. There is an extremely unequal distribution of registered voters in constituencies for state and entity parliamentary elections, with a deviation of up to 68 percent, which is contrary to the obligations and commitments of the OSCE and the principle of equality of votes.”⁴

³ [https://www.izbori.ba/Rezultati_izbora/?resId=32&langId=1#/2/2/0/0/0/0], Accessed 11 March 2024.

⁴ See paragraph 7.3 of the OSCE Copenhagen Document of 1990, which stipulates that participating states must “guarantee universal and equal suffrage to all adult citizens”. Paragraph I.2.2.iv of the Code of Good Practice in Electoral Matters was adopted by the Venice Commission in 2002 (Code of Good Practice), where it recommends that “the permitted deviation from the norms should not amount to more than 10 percent, and certainly should not exceed 15 percent except in special circumstances.” (taken from: ODIHR Election Observation Mission, Final Report, Warsaw, 02 February 2023).

When it comes to this imbalance, it is partially compensated precisely through compensatory mandates. However, the problem with compensatory mandates is that they are assigned from compensatory lists where a large and decisive influence is held by narrow party leaderships - the presidents of political parties, and the order on the compensatory lists is crucial because these mandates are assigned according to the order of candidates. Compensatory lists are reserved for those candidates who did not enter the representative body by direct election, i.e. by the will of the citizens. Thus, these persons acquire the status of the representative in the highest constitutional and legislative representative body of the state, not based on the will of the citizens, but on the basis of the will of the narrow party leaderships that compile compensatory lists for candidates who were not elected by the citizens. Out of 42 representatives of the House of Representatives of the Parliamentary Assembly of BH, as many as 12 representatives are elected in this way, which in the conditions of complex political relations that prevail in BH ensures that the will of the narrow party leaderships prevail over the will of the citizens regarding key decisions. This is one of the reasons why democracy in BH has been reduced to a mere partitocracy.

The second and significantly more pronounced reason for a kind of desecration of democracy in BH is contained in the position, method of appointment and competencies of the so-called House of Peoples. The situation regarding the democratic capacity and democratic legitimacy of the House of Peoples, which is the second House of the Parliamentary Assembly of BH, is even worse. As BH Constitution stipulates, for the adoption of any law or other decision of the Parliamentary Assembly of BH, it is necessary that the act be adopted in the same text in both Houses - in the House of Representatives and the House of Peoples, which will be discussed more in the following chapters, even though the House of Peoples does not have direct democratic legitimacy that is acquired in the elections, but is appointed indirectly, where the decisive role in the process of candidacy for the position of delegate in the House of Peoples is again played by the narrow party leaderships - i.e. presidents of political parties dominantly. Thus, in accordance with Article IV/1 the Constitution of BH, the House of Peoples consists of 15 delegates, of which two thirds are from the Federation (including five Croats and five Bosniacs) and one third from the Republika Srpska (five Serbs). Nominated Croatian and Bosniac delegates from the Federation are appointed by Croat and Bosniac delegates in the House of Peoples of the Federation, while nominated delegates from the Republika Srpska entity are appointed by the National Assembly of the Republika Srpska. Nine members of the House of Peoples constitute a quorum, provided that at least three Bosniac, Serb and Croat delegates are present.

At first glance, it is clear that the House of Peoples, which, among other things, has the function of a constitutional and legislative body, is elected and appointed on the basis of constitutional norms that cause a state of severe and multiple discrimination on ethnic grounds. Thus, BH citizens who do not belong to the constituent peoples do not have the right to be candidates for this position. These are the citizens who belong to national minorities, and citizens who do not belong to national minorities, nor to constituent peoples, but link their national affiliation to the state affiliation of Bosnia and Herzegovina (Bosnians and Herzegovinians). The European Court of Human Rights in Strasbourg has issued several judgments dealing with severe discrimination on ethnic grounds. Some of them refer to the House of Peoples of the BH Parliamentary Assembly, where severe discrimination on ethnic grounds and violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols have been established (*Sejdić-Finci v BH*, *Zornić v BH*, *Šlaku v BH*, *Kovačević v BH*)⁵. The stipulated method of appointment and structure of the House of People also violates the rights of the constituent nations, since Serbs from the Federation of Bosnia and Herzegovina entity, and Croats and Bosniaks from the Republika Srpska entity do not have the right to run for these positions due to their entity affiliation. However, although the European Convention and its protocols⁶ are binding legal acts of a constitutional nature on a double basis - by the force of the Constitution, and by the act of ratification, the judgments of the European Court of Human Rights have never been implemented thanks to the prescribed decision-making procedures of the BH Parliamentary Assembly, which are full of undemocratic blocking mechanisms completely inappropriate for a democratic system, and which are against the generally accepted democratic standards of a legal nature - without the respect and implementation of which one cannot talk about the existence of democracy as such.

Regarding the structure and method of election the Parliamentary Assembly of BH, as the highest state constitutional and legislative body, the questions arise - can a representative body that is elected in an undemocratic way rule - make laws and other decisions in a democratic way? Can a constitutional system centered on a representative body that is elected in an undemocratic manner be considered democratic at all?

⁵ *Sejdić and Finci v BH* (2009) Application Nos. 27996/06 and 34836/06; *Zornić v BH* (2014) Application No. 3681/06; *Šlaku v BH* (2016) Application no. 56666/12; *Kovačević v BH* (2023) Application No. 43651/22.

⁶ For the legal position of ECHR in the constitutional order of BH see: Begić, Z., *O ustavu legalitetu i legitimitetu: Bosna i Hercegovina – od ZAVNOBiH-a do Dejtona i poslije*, Fakultet za upravu Univerziteta, Sarajevo, 2021, pp. 157-170.

As will be seen from the text that follows, the problem does not end with severe discrimination in terms of the election of this representative body, but continues and deepens through its decision-making procedures.

3. DECISION-MAKING PROCEDURES OF THE PARLIAMENTARY ASSEMBLY OF BOSNIA AND HERZEGOVINA

The Parliamentary Assembly of BH, as stated above, consists of two chambers, the House of Representatives and the House of Peoples. Article IV 3 c) of the Constitution of BH stipulates that “all legislative decisions shall require the approval of both chambers”. This way of decision-making and the position of the chambers would not be disputed if both chambers had at least an approximately equal level of democratic legitimacy.

Namely, the House of Peoples is actually appointed by the ruling political parties autonomously, by their own discretion and without clear criteria, apart from the criteria of party affiliation and loyalty, unlike the House of Representatives, which - despite the shortcomings mentioned above, is still elected by citizens directly in elections, whereby, in addition to the existing very complicated decision-making procedures in the House of Representatives, in the House of Peoples any decision of the House of Representatives can be stopped - especially by using the mechanism of the so-called entity voting, according to which decisions are made in both chambers.

Thus, Article IV/3 of the Constitution of BH stipulates that the decisions of the Parliamentary Assembly of BH are made by a majority vote of MPs in House of Representatives and delegates in House of Peoples who are present and vote, but that majority in both chambers must include at least one third of the MPs in the House of Representatives, i.e. one third of the delegates in the House of Peoples from both entities who are present and vote. Bearing in mind that the House of Representatives of the Parliamentary Assembly of BH consists of 42 deputies, of which 14 are elected directly from the territory of the RS and 28 from the territory of the Federation of BH, this specifically means that in majority there must be at least 5 votes of deputies elected in the entity of the RS, and at least 10 votes of deputies from the entities of the Federation of Bosnia and Herzegovina, with the majority of all elected to the House of Representatives constituting a quorum. If there is not the required number of votes from each entity, no decision can be made in the House of Representatives, regardless of whether there is a majority of votes. For example, in a hypothetical case, all MPs elected from the territory of the Federation of Bosnia and Herzegovina and 4 elected from the territory of the

entity of the RS can vote in favour of a particular decision, which makes a total of 32 votes – out of a total of 42 MPs, but the decision cannot be made in the House of Representatives. The situation is even more dramatic in the House of Peoples, which consists of a total of 15 delegates, of which 10 delegates (5 Bosniacs and 5 Croats) are delegated from the Federation of BH entity, and 5 Serb delegates are delegated from the RS entity. Without the votes of at least 2 delegates from the entity of the RS and at least 1/3 of the delegates from the entity of the Federation of BH (four of them), the decision/law cannot be passed even if it is unanimously adopted in the House of Representatives. Moreover, it should be borne in mind that the House of Representatives is directly elected, unlike the House of Peoples, which is elected indirectly, whose members do not possess any democratic legitimacy - except for party affiliation or eligibility, as explained above. Nevertheless, even if any act of law was adopted unanimously in the House of Representatives, without the stipulated majority in the House of Peoples, which must include at least one-third of the votes of delegates from both entities, that act of law cannot be adopted. Simply put, this means that the vote of two indirectly elected delegates from the entity of the Republika Srpska (as well as one third of the delegates of the House of Peoples from the Federation of Bosnia and Herzegovina) is worth more than the votes of all directly elected MPs of the House of Representatives and all other delegates of the House of Peoples. This ultimately calls into question the equality of citizens represented by elected MPs, and seriously calls into question the democratic capacity and legitimacy of this institution. Discrimination based on ethnicity in the election of the delegates for the House of Peoples, confirmed by the judgments of the European Court of Human Rights, should be added to the list.

If the majority does not include one-third of the votes of the MPs and delegates from the territory of each entity (in both chambers), the chair of House and his deputies (in both chambers separately), working as a committee, will try to reach an agreement within three days from the day of the vote. If these efforts fail, decisions will be made by a majority of those present and voting, provided that the votes against do not include two-thirds, or more, of the delegates in the House of Peoples or MPs in the House of Representatives elected from each entity. However, this kind of unblocking mechanism gives almost no result in terms of removing the entity blockade if there is no entity support of 1/3 MPs in House of Representative and 1/3 delegates in House of Peoples from the territory of each entity.

A very illustrative example that can vividly describe this situation is the attempted legislative-institutional response of the BH Parliamentary Assembly to the pandemic caused by the Covid-19 virus. For the urgent procurement of vaccines for the population of Bosnia and Herzegovina, it was necessary to pass two laws - the

Law on Amendments to the Law on Public Procurement and the Law on Amendments to the Law on Medicines and Medical Devices. At the seventeenth session of the House of Representatives of the Parliamentary Assembly of BH on February 25, 2021, these acts of law were adopted unanimously, with the prescribed 1/3 of the votes of MPs from the territory of both entities. The adoption of these acts of law, however, was stopped in the House of Peoples (seventh emergency session of the House of Peoples from March 2, 2021). The House of Peoples, in the first place, adopted the request for urgent procedure, and then rejected the adoption of these acts of law, with the following voting results: 9 IN FAVOUR - all from the territory of Federation of BH; 4 AGAINST – all from the territory of Republika Srpska entity; 1 ABSTAINED. These acts law were not adopted despite the fact that they were unanimously adopted in the House of Representatives with 30 votes in favour, and despite the fact that in the House of Peoples there was a majority of 9 votes in favour – and 4 votes against, for the reason that according to the provisions of the BH Constitution it is stipulated that in the House of Representatives and the House of Peoples, there must be at least 1/3 of the votes of all MPs in the House of Representatives and 1/3 votes of delegates in the House of Peoples from the territory of both entities – as explained above. Since in the convincing majority of 9 votes in the House of Peoples there were not at least 2 votes of delegates from the territory of Republika Srpska, these very important acts of law were not adopted. Then, at the sixteenth session of the House of Peoples from April 8, 2021, in the second round of voting, these acts of law were finally rejected, with the voting results: (9 IN FAVOUR - all from the Federation of BH); (4 AGAINST – all from the Republika Srpska); (1 ABSTAINED). In the second round of voting, as stated above, in order for the law to be adopted, a general majority is required, and that at least 2/3 of the House of People's delegates from each entity are not against the adoption of the proposal. Although these acts of law were adopted unanimously in the House of Representatives by a majority of 30 votes IN FAVOUR of the directly elected MPs, and despite the fact that there was a convincing majority of 9 votes IN FAVOUR in the House of Peoples, these acts of law were rejected by votes AGAINST of the 4 delegates of the House of Peoples from the territory of Republika Srpska. This case represents a very illustrative example of the multiple inequality of the votes of the directly elected members of the House of Representatives in relation to the indirectly appointed delegates of the House of Peoples, but also of the delegates of the House of Peoples among themselves - considering the entity affiliation, where the will of the political minority expressed through only 4 votes AGAINST is imposed as the ruling over the will of a unanimous majority in the House of Representatives (of 30 votes IN FAVOUR) and a convincing majority in the House of Peoples (of 9 votes IN FAVOUR). This is only one of numerous examples of the disparity in the value of votes of the elected members

of the House of Representatives compared to the indirectly appointed delegates of the House of Peoples, where it is evident that the protective mechanisms in the form of the so-called entity voting are being abused and in practice are being used as mechanisms of absolute blockade aimed at the degradation of the institutions of Bosnia and Herzegovina, and even when it comes to such important decisions that seek to preserve the lives of citizens threatened by the pandemic. This is also the case when entities – as internal administrative units of BH and their interests were not being endangered in any way by proposed acts of law.

In simplified terms, bearing in mind the voting results in this case, Bosnia and Herzegovina is the only nominally democratic country in which 2 or 4 is greater than 39. However, the situation is identical in the House of Representatives, where there is also a pronounced inequality of the values of votes of the elected MPs thanks to the so-called entity voting. From 2018 until the middle of 2021, dozens of proposals for important acts of law, as well as many parliamentary initiatives, etc., were stopped by the (mis)use of the so-called entity voting in the House of Representatives of the BH Parliamentary Assembly, even though they had a convincing majority in this House. In the period from December 2018 to mid-2021, a total of 55 acts of law were blocked through the so-called entity voting (a number of these were related to fulfilling obligations from the EU integration process). At the same time, the acts of law that were blocked in this way had nothing to do with the collective rights of the constituent peoples or the position of the entities, but concerned all citizens and their rights, so it is a matter of pure abuse for the purpose of political blockade of the entire system. Such continuous (mis)use of decision-making mechanisms within the House of Representatives and the House of Peoples, which leads to an unbearable level of inequality of the directly elected MPs as well as citizens who elected them, is the cause of general stagnation, loss of trust in institutions, blockage of institutions - even in times of a pandemic, undermining democratic society, stagnation on the way to European integration, and the creation of a state of general insecurity and a continuous crisis that threatens to regional peace and security.

Thanks to such constitutional solutions, in the period 1997–2007 alone, the adoption of as many as 59.9% of reform acts of law were blocked, of which 136 were due to the lack of consent from the entity RS and 20 due to the lack of entity consent from the Federation of BH (see: Trnka et al., 2009, pp. 77–90).⁷ It was mainly about acts of law of importance for the process of European integration and for other key processes of interest to the all citizens of BH.

⁷ Trnka, K. et. al., *Proces odlučivanja u Parlamentarnoj skupštini Bosne i Hercegovine*, Konrad Adenauer, Sarajevo, 2009, pp. 77-90.

In addition, it is possible to stop the adoption of any decision/law in the House of Peoples by using the mechanism to protect the vital interests of the constituent peoples⁸ (see: Article IV/3. e) and f) of the BH Constitution). However, the vital interest protection mechanism is relatively rarely used, since political parties from RS entity exercise absolute control over the legislative process in the state legislature by using the mechanism of entity voting. Thus, delegates from the ranks of the Serb constituent peoples in the state House of Peoples have never used the vital interest protection mechanism, but MPs and delegates from Republika Srpska regularly use the mechanism of entity voting in order to block legislative activity at the state level. This is due to the fact that when using entity voting, unlike the vital interest protection mechanism, there is no provision for constitutional-judicial control that can unblock the decision-making process because it is a regular way of decision-making, thus there is an open possibility of abusing this mechanism.

At least two more important details related to the decision-making process in the BH Parliamentary Assembly should be added to this. Thus, even though Article IV/2. b) of the Constitution of BH establishes that the quorum in the House of Representatives consists of a majority of the total number of members, and despite the fact that Article IV/3 d) of the Constitution of BH stipulates that decisions in both Houses are made by majority of the votes of those who are present and who vote, according to practice and the Rules of Procedure of the House of Representatives and the House of Peoples, the necessary one-third of the votes from each entity are not counted according to the number of MPs and delegates who are present and who vote at the session, but are always counted with regard to the total number of MPs in the House of Representatives and delegates in the House of Peoples - regardless of the real number of them who are present at the session.⁹ In this sense, one can justifiably ask the question whether this practice is in accordance with the Constitution of BH at all?

Another very important detail, which has no example in any democratic or even non-democratic country, is the position of the Chair and Deputy Chairs of the Houses of the BH Parliamentary Assembly in the process of passing laws and other decisions. The Constitution of BH in Article IV/3 b) stipulates that the leadership of the House of Representatives as well as the House of Peoples consists

⁸ O principu konstitutivnosti naroda, vidi šire: Ribičić, C.; Begić, Z.; Pavlović, D., *Bosnia and Herzegovina after Sejdić-Finci Case*, Universitätsverlag, Regensburg, 2016, pp. 8-35; Trnka, K., *Konstitutivnost naroda*, Vijeće kongresa bošnjačkih intelektualaca, Sarajevo, 2000, pp. 47-58, etc.

⁹ See: The Rules of Procedure of the House of Representatives of the Parliamentary Assembly of BH, Official Gazette of BH No. 79/14, 81/15, 97/15, 78/19, 26/20, 53/22, 59/23, 87/23), Article 85, and the Rules of Procedure of the House of Peoples of the Parliamentary Assembly of BH, Official Gazette of BH No. 58/14, 88/15, 96/15 and 53/16, Article 75.

of the Chair and two Deputy Chairs who are elected from among the constituent peoples - Bosniacs, Serbs and Croats. Therefore, the election of the Chair and Deputy Chairs of the House of Representatives is carried out with severe discrimination against all MPs who do not belong to the constituent peoples and who, according to the Constitution itself, do not have the right to run for these very important positions due to their ethnicity. Bearing in mind the structure of the House of Peoples of the Parliamentary Assembly of BH, which consists of five Bosniac, Serb and Croat delegates, and the fact that a citizen of BH who does not belong to these ethnic groups cannot run for the position of the delegate, by the nature of things the Chair and two Deputy Chairs of this House are elected also exclusively from Bosniac, Serb and Croat constituent peoples. In addition to the fact that the Chair and Deputy Chairs of the Houses of the Parliamentary Assembly are elected on the basis of discriminatory norms, their very important position is of particular importance in terms of passing laws and other decisions, when the Chairs and Deputy Chairs of the Houses take over the legislative procedure.

Thus, the Rules of Procedure of the House of Representatives and the House of Peoples prescribe and specify the procedure for passing laws and all other decisions. However, in the first place, Article 85 of the Rules of Procedure of the House of Representatives and Article 75 of the Rules of Procedure of the House of Peoples stipulate that the prescribed decision-making procedures apply to all decisions of the House, including acts of law. Then, in paragraph 1 and 2 of the aforementioned articles of these Rules of Procedure it is prescribed that if the majority of votes in the procedure for making all decisions of the House of Representatives and House of Peoples does not include at least one-third of the votes from each entity (the so-called entity voting), the Chair and Deputy Chairs will try to reach an agreement within three days. If they reach an agreement, the relevant decision of the House of Representatives as well as House of Peoples (including acts of law!) is considered adopted, and the relevant House are only informed about it. If the Chair and Deputy Chairs do not reach agreement, only in that case the Houses will vote in the second round. Therefore, the Chair and Deputy Chairs of both Houses of the BH Parliamentary Assembly (the House of Representatives and the House of Peoples) take over the course of the legislative procedure and by their decision - that is, by their consent they can pass the acts of law and any other decision in situations where the majority of votes does not include one third from each entity - which is a very frequent, almost constant occurrence.¹⁰

¹⁰ See: e.g. Report on efforts to reach agreement on the Proposal of the Law on Amendments to the Law on Value Added Tax, number 02-50-6-16-10/23 dated 6 October 2023.

However, in Bosnia and Herzegovina, the decision-making process of the representative legislative body can be taken over by only three persons in the function of Chair and two Deputy Chairs in each Houses of the BH Parliamentary Assembly - who represent exclusively the constituent peoples (Serbs, Croats and Bosniacs). In addition, as can be seen from the above, Bosnia and Herzegovina is a state where Roma, Jews, Bosnians and Herzegovinans and all others who do not belong to the so-called constituent peoples cannot be elected to one of the two Houses of the state legislative body (House of Peoples), nor can they be candidates for the position of Chair and Deputy Chairs in both Houses.

4. DECISION-MAKING PROCEDURES OF THE PARLIAMENTARY ASSEMBLY OF BOSNIA AND HERZEGOVINA IN THE CONTEXT OF RULE OF LAW AND EFFECTIVE POLITICAL DEMOCRACY – SHORT OBSERVATIONS

Elections based on democratic standards (and non-discrimination norms!) are not an end in themselves, the goal of conducting elections is to ensure the participation of citizens in the performance of public affairs indirectly through their democratically elected representatives. These are the foundations of representative democracy – in short, where the equality of the vote in the election phase is an imperative that is achieved by constitutional guarantees and, in particular, by the creation of electoral units, while the equality of the positions of those who are elected in the elections for the representative bodies is simply implied in every democratic society (except in Bosnia and Herzegovina!).

In democratic countries, there may be deviations regarding the principle of equality of citizens through possible deviations regarding the modelling of electoral units, which then has a negative impact on the principle of equal representation of citizens in the decision-making procedure of representative bodies, but there is no known case of inequality of citizens that is realized within the representative body based on the unequal position and value of the votes of its members - who represent citizens in decision-making legislative procedures (except in Bosnia and Herzegovina).

Of course, in some states, there are bicameral representative bodies, but the rule is – of a legal nature that in that case both chambers must be elected based on norms that must not be of an undemocratic and discriminatory character. At the same time, the position of lower houses in democratic countries of comparative law is, as a rule, dominant in terms of the position and competencies in relation to the upper houses, and that the position of both houses in terms of mutual

relations and the competencies assigned to them is in direct proportion to the level of democratic legitimacy and democratic capacity they possess according to the method of election (direct or indirect) - which are also generally accepted democratic standards of a legal nature codified by the norms of international and inner law. In Bosnia and Herzegovina, the upper house - the House of Peoples - is elected based on norms that are extremely discriminatory - about which there are judgments of the European Court for Human Rights - as explained above. These norms discriminate not only those BH citizens who do not belong to the constituent peoples (national minorities and those who connect their nationality to the state affiliation of Bosnia and Herzegovina), but also the citizens who belong to the constituent peoples - Croats and Bosniacs from the entity of the RS and Serbs from the entity of the Federation of BH. These citizens do not have the right to run for office and to be appointed to the position of member of the House of Peoples due to entity territorial affiliation. They cannot even influence in any way the appointment of delegates to the House of Peoples for the reason that the procedure for their appointment is indirect and firmly in the hands of individuals who belong to the constituent peoples based on entity territorial affiliation. In contrast to that, quite understandably, all decisions/laws that are passed in the decision-making procedure of such an established legislator, greatly affect the rights, freedoms and status of the all citizens - including those who have no influence on the appointment of the House of Peoples - either by the fact of their adoption - or by their non-passing/blocking due to undemocratic decision-making procedures in which there is a privileged minority - not only in the House of Peoples, but also in the House of Representatives thanks to the so-called entity voting as a regular form of decision-making in these two Houses, but also thanks to the inadequate position of the House of Peoples within relations and procedures in the BH Parliamentary Assembly.

In addition, this Chamber is not elected directly, but appointed indirectly, where the key role in the process of selecting candidates and appointing them to this position is played by the narrow leadership of political parties - which, due to the solutions of the DPA and the accompanying electoral geometry, mainly come from the circles of the nationalistic political parties. Despite all this, the House of Peoples in the process of passing laws and other decisions of the Parliamentary Assembly of BH, according to the Dayton Constitution itself, has an equal role and position with the House of Representatives - which is directly elected by the citizens, in the sense that any law or other general decision must be adopted in the same text in both Houses to enter into force. In practice, the position of the House of Peoples is much stronger compared to the House of Representatives, bearing in mind the pure mathematics and logic of numbers according to which the House

of Representatives consists of 42 members, while the House of Peoples consists of 15 members. This means that any law, even if it was unanimously adopted in the House of Representatives, cannot be adopted unless it has the support of at least two delegates of the House of Peoples from the RS entity, and four delegates from the Federation of BH entity.

However, without a democratic legislative procedure and democratic relations within the legislative procedure, there can be no democratic society, and especially no rule of law and effective political democracy. Any non-democratic deviation within this procedure inevitably, by a domino effect, leads to the disruption of all other values within society - in the areas of rule of law in general, human rights and freedoms, stability, security and peace.

As can be seen, Bosnia and Herzegovina have a serious problems in these both key phases of the functioning of democracy – in the phase of elections as well as in the phase of functioning of representative body as a central institution of the constitutional system, which produces concrete consequences of an undemocratic nature directly to the principle of effective political democracy, and then spreads very negative consequences for the entire society and democracy - precisely for the reason that deviations are present at the very source from which the organization of the society that was supposed to develop as democratic begins.

However, pronounced discrimination regarding the inequality of the status and value of the votes of the members of both chambers of Parliamentary Assembly of BH by ethnicity and entity territorial affiliation is not only the result of the so-called entity voting in both Houses, but also the special - inadequate position of the House of Peoples within the relations and procedures in the Parliamentary Assembly of BH. This was stated by the Venice Commission in its Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative No. CDL-AD (2005) 004 from March 11-12, 2005.¹¹ Thus, in paragraph 36 of the aforementioned Opinion of the Venice Commission, it is stated as follows: “The drawback of this arrangement is that the House of Representatives becomes the chamber where legislative work is done and necessary compromises are made in order to achieve a majority. The role of the House of Peoples is only negative as a veto chamber, where members see as their task to exclusively defend the interests of their people without having a stake in the success of the legislative process. It would therefore seem preferable to move the exercise of the vital interest veto to the House of Representatives and abolish the House

¹¹ Venice Commission, Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative No. CDL-AD (2005) 004 from March 11-12, 2005 – available at [<https://www.venice.coe.int>].

of Peoples. This would streamline procedures and facilitate the adoption of legislation without endangering the legitimate interests of any people. It would also solve the problem of the discriminatory composition of the House of Peoples.”

In paragraph 101 of this Opinion of the Venice Commission it is stated: “the time seems ripe to start a process of reconsideration of the present constitutional arrangements in BH and the impetus provided by the Parliamentary Assembly in this respect is most welcome. Constitutional reform is indispensable since present arrangements are neither efficient nor rational and lack democratic content.”

Paragraph 29 of the aforementioned Opinion of the Venice Commission also states that: “a balance has indeed to be struck between the need to protect the interests of all constituent peoples on the one hand and the need for effective government on the other.”

Further, in paragraph 34 of the Opinions of the Venice Commission regarding the so-called entity voting, this Commission took the following position: “This veto, which in practice seems potentially relevant only for the RS, appears redundant having regard to the existence of the vital interest veto.” In fact, this position shows that the Venice Commission also recognized the privileged position of members of the Houses of the Parliamentary Assembly of BH from the Republika Srpska in relation to other members of these houses.

At the same time, the relations in both Houses of the Parliamentary Assembly of BH, including the position of the House of Peoples, have no example in any democratic country. It is not even a question of the so-called qualified majority, which is usually necessary for the adoption of certain decisions of the representative body (e.g. passing amendments to the Constitution), but rather a “qualified minority” that has the power to absolutely stop any act of law or other decision of the democratic majority based on the entity territorial and ethnic affiliation through so-called entity voting as a regular form of decision-making.

In this regard, the position of elected individuals in the relations within the state representative body of BH with regard to entity and ethnic affiliation should be observed as well. They are a participants in relations within the Parliamentary Assembly of BH, as an individual with his own individual personality and integrity, in any case when they do not have the constitutional or legal right and obligation to represent the institution of which they are members, nor the public authority or the BH state itself. In this case, however, there are also those who cannot even be part of the leadership of the both Houses because they do not belong to the constituent peoples, as explained above.

In this respect, for example, are the views of the European Court of Human Rights in the case of *Forcadell and Lluís and others v. Spain* (No. 75147/17, May 7, 2019), where the European Court recognized the right of a group of members of the representative legislative body to submit an application as admissible to this Court, because the rights they invoked concerned them individually and could not be attributed to Parliament as an institution. In the case of *Mathieu-Mohin and Clerfayt v. Belgium* (application no. 9267/81, March 2, 1987) the European Court also declared the application as admissible and allowed the applicant, who was a member of a representative legislative body, to participate in the proceedings before the European Court.

Regarding the unequal status and multiple inequality of votes in the decision-making procedures of the Parliamentary Assembly of BH, proceeding was initiated before the European Court of Human Rights in Strasbourg in 2021 (case no. 34891/21, *Begić v BH*). In this paper, there will be no more words about this case for reasons of correctness, bearing in mind that the proceeding before the European Court of Human Rights is ongoing.

5. CONCLUSION

The European Convention, as well as the European Court of Human Rights through its practice, give special importance to the principles of effective political democracy and the rule of law, which are very closely related (see: *United Communist Party of Turkey and Others v. Turkey* of 30 January 1998 Reports 1998-I, paragraph 45; *Refab Partisi and Others v Turkey* from 13 February 2003, paragraphs. 86-87; *Kjeldsen, Busk Madsen and Pedersen v Denmark*, application No.: 5095/71, 5920/72 and 5926/72, series A-23, p. 27. etc.).

If the representative body in BH (House of Peoples) is elected on the basis of expressed discrimination on ethnic grounds (on which there are already judgments of the European Court in the mentioned cases), if the representative legislative body established in this way consists of two Houses that have an unequal level of electoral legitimacy and therefore democratic capacity, if in that representative body the indirectly appointed House - the House of the People has a stronger position than the directly elected House of Representatives, if there is pronounced inequality in the House of Representatives itself according to the entity affiliation of the citizens elected to represent other citizens (MPs) - then such a situation cannot be called a “separation of power in a democratic society” (as it is often presented, especially as the position of the defendant BH in proceedings before the European Court of Human Rights), rather, it is about the absence of democracy, which reminds a lot of a kind of apartheid on European soil and in the 21st cen-

tury. Both regarding the gross restriction of voting rights of citizens on the basis of ethnicity, as well as on the established relations of multiple discrimination and inequality within the representative body on the basis of ethnic/national and entity affiliation - which is ultimately based on the entity's ethnic structure, which is a direct consequence of genocide, war crimes and crimes against humanity.

Such a situation led to complete dysfunctionality in the exercise of the legislative function. For many years, Bosnia and Herzegovina has not been able to respond to the demands of all its citizens, even in the extraordinary circumstances of a pandemic, when the health of the population is at risk - as explained above, thanks to the extremely undemocratic decision-making procedures of the state representative legislative body, nor can it effectively fulfill its obligations of a legal nature on the way to European and Atlantic integrations. The prescribed structure, procedure of election and decision-making procedures of the Parliamentary Assembly of BH abounds with elements of an undemocratic nature that lead to the inequality of the votes of the citizens' representatives and thus, ultimately, to the pronounced inequality of the citizens. The reason for the non-implementation of, for example, the Judgments of the European Court of Human Rights, as well as legal obligations from the European Convention and its protocols, which are ratified instruments referred to by the BH Constitution of BH, is not in the absence of a democratic majority, but in the undemocratic procedures of decision-making where the political and privileged minority (mostly from the territory of the Republika Srpska entity) blocks the decision-making of the democratic majority. The adoption of European democratic standards on the way to European integration must certainly include the necessary reform of the institution of the Parliamentary Assembly of BH - as a representative legislative body, which in every democratic society is the central institution from which democracy begins and which ensures democracy. This, in the first place, by respecting the principles of effective political democracy and the rule of law - which include mostly of all other generally accepted codified democratic standards of a legal nature which are derived from mentioned principles, on which every democratic society and democratic system is based.

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