

PARTICULAR EXAMPLES OF FEDERAL BICAMERALISM AND CONSTITUTIONAL SOLUTIONS IN BOSNIA AND HERZEGOVINA

ABSTRACT: Every form of bicameralism contains certain specific features, as it reflects the particular characteristics of a political community and the interests within it that need to be institutionally expressed. This paper examines distinctive examples of cooperative federal and consociational models (Germany and Belgium), which effectively reflect a higher level of constitutional complexity. However, the primary focus is placed on the constitutional solutions in Bosnia and Herzegovina, as an atypical case. Bosnia and Herzegovina continues to represent a state with significant potential for political conflict, while the constitutional balance conditioned by its complex ethnic structure is still faced with serious legal and political challenges. The aim of the paper is to point to the specificity and rationale of these solutions, as well as to deviations from, or differences in relation to, standard models. Balancing various interests, i.e. preventing majorization, in a state that has undergone both dissolution and aggregation and that possesses a greater conflict potential than other states, requires such a complex mechanism. Nevertheless, the necessary complexity of the mechanism must be accompanied by an appropriate political culture – a lasting commitment to achieving agreement among the constituent peoples.

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1. Introduction

The emergence of bicameralism is linked to profound social and political changes or the dominance of a new ideology, and its developmental path has not been uniform or unidirectional. The physiognomy of bicameralism has been determined by various factors: in some cases long-standing political practice, in others compromises aimed at eliminating internal conflict, ensuring political balance or the coexistence of different collectivities, and more rarely doctrinal findings.

Over time, chambers have changed their function and composition. At times, they reflected a new social order, a political experiment, were part of a struggle for power between old and new political forces, served as a pillar of federalism, or acted as a safeguard against more powerful factors in the political process, etc. Nevertheless, despite ambitious intentions, major innovative interventions did not yield the expected results. Numerous questions shape the physiognomy of bicameralism, many of which have over time become standardized, so that it is possible to speak of its forms, models within those forms, and specific examples with regard to particular issues (De Vergotini, 2015, p. 564).

Although every bicameral system is in some respect unique, this paper focuses on federal forms with cooperative and consociational models (Germany and Belgium), whose logic may be useful in understanding bicameralism in Bosnia and Herzegovina. In analyzing certain issues (composition, election, relations, decision-making), reference will also be made to solutions that represent standards, as well as to specificities characteristic of complex states. However, the emphasis is on the solutions in BiH, as complex and specific ones, in which consociational and federal, cooperative elements are combined or intertwined in the part that exists as law, even though there are many regulations and practices that do not conform to this, since BiH still represents a state with political conflict potential and extra-constitutional factors influencing the constitutional process. Under such conditions, constitutional norms and constitutional interpretation cannot have their full and proper effect.

2. Consociative Bicameralism

Since the 1970s, a process of constitutional reforms has been initiated which, through six phases, transformed Belgium from a unitary into an (asymmetrical) federal state composed of communities and regions, with a clear division of competences (Stanković, 2014). The path from a unitary to a federal state, with a tendency toward further devolution from the federation to communities and regions (even confederalization), was conditioned by the need to manage interethnic differences (Popelier, 2018, p. 224). Multinational states, with the aim of overcoming conflict potential, introduce elements of consociation, most importantly: 1) horizontal division of power among communities (proportional, parity-based); 2) autonomy of segments, especially in matters relating to identity; 3) the right of veto or qualified majority in decision-making; 4) a proportional electoral system and large coalitions (Lijphart, 1977; Savanović, 2012). Consociation may represent a supplement to territorial autonomy and federalism based on an ethnic criterion, particularly in cases of their inconsistent or incomplete institutionalization. Belgian bicameralism also represents an element of the consociational system. In addition to it, consociationalism also includes the status of communities and regions, the parity composition of the Government, the composition of the Constitutional Court, the status of Brussels (Swenden, 2006, p. 258). The development of bicameralism was determined by the division of Belgian society along ethno-linguistic lines into the Flemish and French communities.¹ Legislative power is exercised jointly by the King, the Chamber of Representatives and the Senate (Art. 36 of the Constitution, 2021). However, the actual power of the Senate is already limited by Article 74 – legislative power, except in cases referred to in Arts. 77–78, is exercised by the King and the Chamber of Representatives.

The Senate, as the upper chamber, is mandatorily involved only in relation to two categories of matters: 1) matters listed in Article 77 of the Constitution (2021) – the Senate has the same powers as the Chamber of

¹ The Constitution of Belgium does not refer to a federal parliament in any provision in an integrated way. The constitutional text speaks of the King and the federal chambers (the Chamber of Representatives and the Senate), and in the relevant places “the chambers jointly.” It seems that, from the perspective of the constitutional text, it speaks of two separate organs, not two chambers of a single one. On the other hand, the U.S. Constitution explicitly names Congress – indeed, the very first article of the Constitution expressly states that the legislative power belongs to the Congress of the United States, which is composed of the Senate and the House of Representatives.

Representatives: with regard to amendments to the Constitution, as well as matters that directly affect the federal structure, the status of communities and regions, the electoral system, and the organization of the Constitutional Court; 2) in relation to laws listed in Article 78 of the Constitution (2021) – the Senate has the right to debate bills adopted by the Chamber of Representatives and to propose amendments, but it has neither the right of veto nor the right of initiative, and the Chamber of Representatives decides definitively. Other normative tasks are performed by the Chamber of Representatives, including taxation and budgetary matters. The Government is politically responsible to the Chamber of Representatives, which the King may dissolve in cases determined by the Constitution (2021).

With regard to the composition of the federal chambers, the principle of consociationalism is maximally emphasized. In addition, there are no political parties in this state that cover the entire territory of Belgium (Swenden, 2006, p. 142), so large coalitions are always formed. Following the sixth reform and the Butterfly Agreement (Stanković, 2014, p. 129), the Senate, conceived as the guardian of federalism, consists of 60 senators. Its composition is very complex, but it still primarily consists of ethno-linguistic groups. This means that representatives of the Brussels region must also be distributed into two linguistic groups. What further complicates this system is the fact that the Flemish Community and the Flemish Region have merged, with only one parliament, while the French Community and the Walloon Region are separate entities with different parliaments. The Constitution (2021, Art. 67) provides that 29 senators are elected from the Flemish Parliament or the Dutch-speaking linguistic group in the Brussels region (one must have residence in Brussels); 10 senators are appointed by the Parliament of the French Community; 8 senators are elected by the Walloon Parliament; 2 senators are elected by the French-speaking group of the Brussels Parliament; and one is appointed, from among its members, by the Parliament of the German-speaking Community. These senatorial seats are allocated according to a majority system (with specific variations). In addition, 10 senators are co-opted by the other 50 senators (6:4). The representation of co-opted senators, however, is contrary to the logic of a chamber of federal entities.

The Chamber of Representatives has 150 members (Article 63), elected proportionally, according to the D'Hondt method. For the election of members of this chamber, 10 electoral districts have been formed and the Brussels region. Electoral districts coincide with the linguistic division, so that the Flemish group will always elect and be represented by Dutch-speaking representatives, while the Francophone group will always be represented by

Francophone representatives (from different parties). Only in the Brussels district do voters elect representatives regardless of linguistic affiliation. The allocation of mandates to electoral districts is only generally determined by the Constitution, by the proportionality method. Although there are no formal quotas (as in the Senate), due to population density the majority of this chamber consists of representatives of the Flemish linguistic group, but the Government is never formed solely by votes from this group; instead, it is formed on a parity basis. From the composition of the chambers, it is evident that no member, not even a co-opted one, represents the entire population of the Kingdom; rather, they are representatives of the citizens of the federal entities.

Majority decision-making represents the more frequent method of decision-making – so-called ordinary laws. The primary protective mechanism exists in the adoption of laws concerning the status of regions and communities, elections, etc., where, in addition to a two-thirds majority of members in both chambers, a majority of votes in both linguistic groups is required. The Constitution also contains a mechanism allowing a linguistic group, with three-quarters of the votes of its members, to block the adoption of “ordinary” laws if it considers that such an act harms it – the “alarm bell” procedure, which implies that the proposed act is suspended and returned to the (parity-composed) Government for consideration or amendment (Article 54). Although this is primarily a means of political pressure, which is rarely used, it is part of a comprehensive mechanism ensuring the protection of collectivities.

3. Cooperative Bicameralism

Unlike the evolutive Belgian federalism, German federalism represents an imposed constitutional arrangement upon a defeated state by the Allied powers (the London Agreement of 1948). It is not of an ethnic character, but was intended to ensure constitutional democracy and a center–periphery balance. The inviolability of the federal structure (Article 79 of the Basic Law, 2024), the parliamentary system, bicameralism, a strengthened chancellor, and vertical cooperation constitute the fundamental characteristics of this system. The German federal parliament consists of two chambers – the representative chamber (Bundestag) and the Federal Council (Bundesrat). German constitutional theory (König, 2001, p. 418; Scharpf, 2018; Dalton, 2009, p. 294) emphasizes the fact that members of the Federal Council are representatives of the governments of the federal units. This makes

German bicameralism distinctive, as it is based on the intertwining, and even interdependence, of the legislative body of the Federation and the executive authorities of the Länder. Bicameralism in Germany is an expression of harmonious federalism, based on cooperation, but also on preventing centralization (Čepo, 2013, p. 173).

The Bundestag, from the 21st legislative term (2025), has a fixed number of members (630), elected in general and direct elections (Art. 38(1)) for a term of 4 years. The Electoral Act provides for a mixed electoral system, in which voters have two votes: the first is used to elect a candidate directly in their electoral district, and the second is cast for a party list. The Bundesrat consists of representatives of the federal units, holding an imperative mandate, who are appointed and recalled by the governments of those federal units and act in accordance with their political directives. The federal units do not have equal representation: the number of delegates (approximately 3–6) depends on their population (Art. 51.2) This body functions as an intergovernmental collegial organization, which is characteristic of German constitutional tradition. Voting in the Federal Council is bloc voting, so that it is the delegation that has one vote. Accordingly, although there are currently 69 members of the Federal Council, the number of votes is always equal to the number of federal units (16). The Bundesrat is considered the key institution of cooperative federalism (Colomer, 2007, p. 74).

Legislative competence is shared, but the Bundestag is dominant, which is why German bicameralism is considered imperfect. Pursuant to Articles 70–82 of the Basic Law (2024), 5% of the members of the Bundestag have the right of legislative initiative. On the other hand, the Federal Council has the right of legislative initiative only as a body as a whole; it may propose a bill if the required majority in the Council votes in favor. However, if the legislative initiative originates from the Federal Government, it is obliged to submit the proposal to the Federal Council for an opinion and only thereafter, together with that opinion, forward the bill to the Bundestag. Regardless of the prior opinion, the Federal Council votes on the bill after it has been adopted by the Bundestag. Every bill must be adopted by the Bundestag, while the real power of the Federal Council lies in its right of veto. This veto may be of an absolute or suspensive character, depending on the nature of the subject matter regulated. Namely, there are areas (so-called *Zustimmungsgesetze*) in which the consent of both chambers is necessary for the adoption of a law (absolute veto). These include laws amending the Basic Law (2024), laws on the financing of federal units, laws affecting the organizational and administrative autonomy of the federal units, and laws relating to the

European Union. With regard to legislative proposals in other areas (so-called *Einspruchsgesetze*), the Federal Council has only a suspensive veto (König, 2001, p. 418). If the Federal Council raises an objection to a bill adopted by the Bundestag, a “conciliation committee” is formed, consisting of an equal number of representatives from both chambers, tasked with reconciling the text of the bill with the objections of the Federal Council. If mediation fails, the Bundestag may re-adopt the bill in the same wording. In that case, the majority required in the Bundestag must correspond to the majority in the Federal Council that adopted the objection to the bill. Thus, if the Federal Council adopted the objection by a two-thirds majority, the Bundestag must adopt the law by a two-thirds majority in the renewed vote in order to override the veto. Cooperativeness is further confirmed by the institute of “legislative emergency”, as a temporary state, which, upon a proposal by the Government, is proclaimed by the President with the consent of the Bundesrat. At the request of the Government, the Bundesrat may then adopt a bill without the consent of the Bundestag. This state may be proclaimed only once during the Chancellor’s term of office (Article 81). A similar function is performed by the Advisory Council of the Bundesrat, composed of delegates of the Länder, through which internal coordination and contact with the Federal Government are achieved (see more in DB, 2024).

The Federal Council participates in the election of the Federal President and the Constitutional Court, but not of the Federal Government, the latter is elected by and is responsible solely to the Bundestag. The chambers do not have the same mandate, and dissolution applies only to the Bundestag. These constitutional solutions direct the chambers toward cooperation, which is why procedures related to the veto of the Federal Council are not frequent. Namely, it is not so difficult to achieve a two-thirds majority in the Federal Council to object to an adopted bill, as it is difficult to secure a two-thirds majority in the Bundestag to adopt the law in a renewed vote. In addition, political parties almost always operate at the federal level, so it is common that the coalition forming the majority in the Bundestag also forms the majority in most federal units, thereby securing a sufficient number of votes in the Federal Council (De Vergotini, 2015, p. 448). Constitutional solutions direct one house to the other, thus the cooperation between the two levels of government (Swenden, 2006, pp. 49–57), making German bicameralism relatively strong and cooperative.

4. Bosnian-Herzegovinian Bicameralism – Complexity as Destruction or Balance

Bosnia and Herzegovina (BiH) represents one of the most complex states in terms of constitutional and political structure. However, the cause of this complexity does not lie in the Constitution (2009) itself. The Constitution is a reflection of political relations, a compromise of different interests, with historical, identity-related and international determinants. Nevertheless, constitutional solutions have a feedback effect on society, political relations and processes, institutionalizing them through acceptable mechanisms of articulation, confrontation and implementation. At the same time, inadequate constitutional solutions, as well as their mere nominal existence, may intensify even the smallest conflict potential within a political community. Rarely can the circumstances of the outbreak of an armed conflict be linked to the constitutional process to such an extent as in the case of BiH. Majorization of a constituent people, outside the theory and practice of self-managing socialist constitutionalism (Jović, 2024, p. 441), the vagueness and abuse of constitutional solutions, the blockage of federal bodies, demands for the territorialization of constitutiveness, and a comprehensive constitutional crisis resulted even in armed conflict, following the disintegration of Yugoslavia² and, consequently, some of its republics, most notably BiH.³

The Constitution of Bosnia and Herzegovina forms part (Annex IV) of the General Framework Agreement for Peace (the Dayton Peace Agreement) of 1995, which brought the armed conflict within it to an end. The concept of the constitutiveness of three peoples, inherited from socialist constitutionalism

² On the legal aspects of the concept of the dissolution of, Yugoslavia, see Kreća, 1994, pp. 213–223.

³ A turbulent political debate, a crisis, and subsequently the collapse of the constitutional institutions of the then BiH were triggered by the issue of decision-making in its Assembly. The obstruction of the Council for the Realization of Equality (Amendment LXX to the Constitution of the SR BiH, 1990), as a constitutional mechanism, the ignoring of provisions on initiating the protection of equality before the Council, and the adoption of political documents with constitutional pretensions (the proclamation of the sovereignty of the Republic and the de facto withdrawal from the Federation), by a simple majority in the Assembly, led to the formation of the Assembly of the Serb People in BiH, a plebiscite on remaining in Yugoslavia, and finally the proclamation of the Republic of the Serb People of BiH on 9 January 1992. Political conflicts and the collapse of institutions also led to armed conflicts.

of which the state of BiH is a product⁴, represents the fundamental principle of the Dayton constitutional order. The constitutiveness of peoples was asymmetrically territorialized through the Washington (1994) and Dayton agreements, by establishing an ethno-federation (of Bosniaks and Croats) and an atypical federal-confederal state between the Federation of Bosnia and Herzegovina (FBiH) and the Republika Srpska (RS).⁵

The Constitution of BiH does not determine the form of state organization; however, from the structure and decision-making methods of its institutions, the division of competences between BiH and the entities, as well as the participation of the entities in the institutions of BiH, the conclusion is drawn as to its atypical and extremely complex nature. The Constitution of BiH is an annex to an international agreement, whose signatories are the entities; with the exception of monetary policy, BiH is competent only in international or inter-entity matters; under the Constitution of BiH it does not even possess an apparatus of force; the right of veto exists in all political institutions; entity participation is maximal. On the basis of the totality of

⁴ Without entering into historical debates, it is necessary to emphasize that the statehood of medieval Bosnia definitively ended with the Ottoman conquests (by 1463), and that later geographical or administrative notions of “Bosnia/Bosnian” have no state-legal connotation whatsoever, nor any connection with medieval subjectivity, except for partial territorial overlap. Its multi-confessional structure, geographical position, as well as Austro-Hungarian aspirations toward the east or agreements among European powers on the division of spheres of interest in the Balkans, created a notion—an illusion—a deception of the distinctiveness of a territory approximately corresponding to present-day BiH. This notion—illusion, deception (Bosnia. Short of History) of distinctiveness also acquired its political dimension; however, the statehood of BiH has no historical or political continuity whatsoever (Ekmečić, 2011, pp. 544, 546, 549–551), but rests solely on the decisions of ZAVNOBiH and AVNOJ, and on the constitutions of socialist Yugoslavia, as a federal unit of three equal peoples. With its disintegration/dissolution and the international recognition of the new situation, BiH nominally became an independent state. That process was “legitimized” by the opinion of the Badinter Commission (1 and 14), as well as by disputed political documents of the Assembly of BiH and the 1992 referendum. The recognition of independence and membership in the UN in 1992 were not accompanied by internal legitimacy or territorial-political consolidation, while the dominant political and state views of its peoples were completely different; their armed conflict was resolved by the peace agreement on which BiH rests, preserving international-legal continuity and a fundamentally altered internal structure, as well as the factual condition of “international” intervention to the extent of a protectorate.

⁵ The interpretations and decisions of the Constitutional Court of BiH concerning the constitutiveness of peoples as a principle contained in the Preamble of the Constitution (2009), according to which it extends to the entities as well, are not based on the normative part of the Constitution; however, they served to create the Court’s practice and to justify the imposition of decisions by the High Representative through which the constitutional order of the entities was altered, without any foundation in the Dayton Peace Agreement, thereby strengthening consociationalism at the entity level, and federal, in some cases even centralist, arrangements at the state level (judiciary, electoral law).

elements used to determine the form of state organization, Savić (1999, p. 39) states that: “BiH is a specific, complex state community with predominant elements of a confederal, but also with certain elements of a federal form of state organization”, (Kuzmanović also states similarly, 2004, p. 204). Bearing in mind this mixing of elements, we will use the formulation (con)federation.

Furthermore, principles of consociation are strongly embedded in the structure of every institution of BiH. The model of consociation is more rigid than in Belgium, and especially than in North Macedonia and Switzerland, where it is more a matter of political practice (Kasapović, 2005; Stojanović, 2007, pp. 63–87). Lukić (2017, p. 246) states: “The application of parity of the constituent peoples instead of ‘pure’ proportionality in the composition of the highest joint constitutional institutions of BiH testifies to the fact that the framers of its Constitution were fully and acutely aware of the very deep political fragmentation of society in BiH, and that they understood parity representation to be an indispensable instrument of national balance, as well as of consociational democracy in BiH.” Consociationalism has historical and political foundations, and its scope and level compensate for the inconsistent territorialization of constitutiveness. The concept of 3 peoples and 2 entities,⁶ which constitute the political and territorial structure of BiH, where two peoples jointly form one federalized entity, has conditioned and further complicated the structure of BiH institutions (Golić, 2020). These institutions are composed of representatives of peoples and entities, which are equated in the case of the Presidency, the House of Peoples and the Constitutional Court, while in the House of Representatives the (con)federal principle is dominant. The interpretation of the majority of judges of the Constitutional Court of BiH (5:4) was different with regard to constitutiveness.

The Parliament of BiH, under the unusual name “Parliamentary Assembly”, is bicameral. Constitutional solutions classify it as a form of bicameralism characteristic of complex states and consociations. An analysis of its composition, election and decision-making reveals a degree and type of complexity that encompasses all complexities encountered in comparative constitutionalism, which, when combined in this manner, produce a new “quality” from the standpoint of legal theory and political practice. These

⁶ The Preamble contains the fiction that “the constituent peoples (together with others), and the citizens of BiH hereby determine the Constitution of BiH”. The Constitution is the result of a peace agreement concluded by representatives of the peoples. Orlović concludes that civic elements are contained in the principled provisions and provisions on human rights; nevertheless, “the overall value impression is that the greatest specificity of this constitution actually lies in the ‘national provisions’ combined with provisions protecting the rights of the entities” (Orlović, 2017, pp. 313–314).

solutions function more as instruments of protection⁷ than of representation – they are intended to protect what, due to divergent political interests, is potentially (and often) subject to endangerment: entity jurisdictions, equality of peoples, the consociational order, common functions, especially with regard to the extensive interpretation of the provisions on additional competences (Art. 3(5)) of the Constitution, 2009). No matter how complex, these solutions sustain BiH – a collection of several communities lacking any internal political compactness, yet existing within a single whole, even though such compactness is, at least minimally, a prerequisite of every political community. The triple representative function of the bicameral parliament, accompanied by protective mechanisms, should serve the building of trust and a minimum of commonality. Institutional security against majorization in complex states, especially those with a conflictual past, is a prerequisite for political action and stability. However, this also requires an appropriate political culture.⁸

The Parliamentary Assembly consists of the House of Representatives and the House of Peoples. According to Lijphart's criteria, the BiH model of bicameralism would be classified as extremely strong (Lijphart, 1999, pp. 205–211). The chambers are equal,⁹ except with regard to the election of the Council of Ministers. Even in terms of oversight of the work of this body and decision-making on the termination of its mandate, equality between the chambers exists.¹⁰ The primacy of the House of Representatives was subtly introduced by the Law on Filling a Vacant Seat of a Member of the Presidency of BiH from 2000. In the event that the office of one of the members terminates before the expiration of

⁷ The fear of “becoming a minority” is one of the more significant factors that shaped the entire Yugoslav crisis, and it remains relevant today as well (see more in Jović, 2024, pp. 460–466).

⁸ Stanić (2018, p. 45) states: “Swiss democracy is characterized by the desire to achieve compromise and to include as many actors as possible, rather than mere outvoting. Therefore, Swiss parliamentarism and Swiss democracy must serve as a model example for other states developing in that direction, and especially for societies burdened with severe social conflicts.”

⁹ The example of the equality of chambers in FR Yugoslavia was illustrative. In case the law is not adopted in the same form in both chambers, a parity commission is established. If it does not agree on the text within one month, or if the agreed text is not adopted by both chambers, the text adopted in the Council of Citizens is temporarily applied, and if it is about laws relating to areas of special interest to members, the text adopted in the Council of Republics is temporarily applied, for a maximum of one year. If it is not adopted within that period, the mandate of the Federal Assembly ends (Art. 91-93). This was an example of strong bicameralism.

¹⁰ In Switzerland, there is equality of chambers. In case of disagreement, “various decisions go from one chamber to another until an agreement is reached. During conciliation, only issues on which there are differences are discussed. If an agreement is not reached after 6 readings – 3 in each chamber, a special parity commission is established to reach agreement, with the task of drafting a compromise solution, which is submitted to each chamber for a final vote.” (Stanić, 2018, p. 44). There is a similar concept in BiH, with the approval of the Collegium.

the mandate, the Constitution provides that the vacant seat shall be filled *from the relevant entity*, in accordance with the law. The Constitution determines that the *entity performs the replacement*, not that it merely represents the territory from which the replacement is made. The Law, however, prescribes that the election of a new member is carried out by the members of the House of Representatives elected from the given entity, and that any of its members belonging to the people whose seat has become vacant may stand as a candidate, while confirmation is carried out by the delegates of the relevant national caucus in the House of Peoples, by a majority of votes, but their right of veto has been limited (by a decision of the High Representative). If the election from the House of Representatives is not confirmed twice, on the third occasion its members adopt the final decision, without confirmation by the House of Peoples (Arts. 4–6).¹¹ Instead of being the subject of election, the entities thus become electoral units, which reflects a practice whereby, under the pretext of imprecision of solutions and the elasticity of translations from English, the constitutional text has consistently been adapted to the expansion of the competences of BiH and the reduction of the role of the entities. Given the system of government, this has strengthened the so-called civic principle in relation to the consociational one, and in the filling of a vacant seat from the FBiH, the third election does not guarantee national legitimacy, thereby opening possibilities for majorization (Golić, 2020).

The standard solution of bicameralism in complex states presupposes a representative (lower) chamber as a general civic representation, directly elected on the basis of equal suffrage, where representation of minorities or territories may also be ensured through a statutorily designed electoral system (electoral districts, thresholds, candidacies, lists) (Kutlešić & Golić, 2023, p. 244). In conditions of pronounced inequality (territorial, population-based, historical), or for the protection of certain ethnic groups, it is possible to constitutionally guarantee minimum representation in the lower chamber (Canada, Switzerland). Nevertheless, each member of this chamber represents society as a whole, which is a consequence of the concept of national (*demos*) sovereignty. In BiH, the House of Representatives is, with regard to its *composition*, conceived as a predominantly civic representation, but not a general one. The Constitution (2009) guarantees the representation of representatives elected from the territory of the entities in a ratio of 28:14 in favor of the FBiH. The Constitution guarantees representation of members elected

¹¹ In BiH, decisions are not made at joint sessions. In some countries it exists, but as an exception (with the election of the head of state, constitutional judges in Italy, declaration of war in Austria; confirmation of election results in the USA, conflicts of jurisdiction, pardons and elections in Switzerland, and due to the difference in the number of houses, depending on the importance of the issue, it can represent an expression of imperfect bicameralism).

from the territory of the entities in the ratio of 28:14 in favor of the Federation of BiH. Although this proportion has at times *approximately* corresponded to the population distribution among the entities, it was neither a model nor a measure for this constitutional ratio.¹² It is based on a rigid principle derived from Yugoslav *(con)federal constitutionalism*, according to which constitutiveness implies parity in all constitutional institutions;¹³ thus, two peoples forming an entity grant that entity the right to elect two-thirds of the members of the House of Representatives, without determining the national or other affiliation of voters or candidates. Within this chamber, the principle of asymmetrically territorialized constitutiveness is combined with the civic principle, where the proportion is a constitutional category of 2:1 (rather than a product of statutorily created electoral districts), and elections are general within the *entities*. Furthermore, the nature of representation is open to discussion. “Members of the House of Representatives shall be elected directly from their entity, in accordance with the election law to be enacted by the Parliamentary Assembly” (Article 4.2.a). From this and the preceding constitutional provision, the following conclusions arise: 1) members of the House of Representatives do not have a general representative function of representing the entire population of BiH (citizens as a whole); rather, they represent the citizens of the entity from which they are elected, meaning that a unified civic representation of BiH *does not exist* – instead, there exists a joint (aggregate) civic representation of the citizens of the

¹² The constitutions of complex states contain principles on which direct elections are based (limitations regarding the statutory formation of electoral districts and the allocation of mandates), but never a fixed distribution of mandates among them. Such provisions in rigid constitutions do not serve either the civic or the federal principle. In the lower house in Austria, the allocation of mandates is carried out at three levels (region, province, state). “The federal territory shall be divided into territorially contiguous electoral districts, the boundaries of which may not cut across provincial boundaries; these electoral districts shall be subdivided into territorially contiguous regional electoral districts.” The number of representatives is allocated according to the number of citizens with voting rights within such an electoral body (Article 26 of the Constitution). In Switzerland (Article 149), in elections to the lower house, the cantons are electoral districts; the number of representatives elected from them is determined according to the number of inhabitants of the canton, with the proviso that each elects at least one representative. The Constitution of Italy prescribes the direct election of both chambers; the allocation of mandates among electoral districts is proportional to the number of inhabitants, in both chambers. The allocation of mandates is regulated by law. The Constitution designates the diaspora as a special constituency. In the upper house (the Senate), a minimum representation of regions as electoral districts is guaranteed. Former Presidents of the Republic are senators by virtue of office, and the President may appoint five life senators for outstanding merits (Articles 56–60).

¹³ While the Yugoslav Constitution (1974) emphasized the constitutiveness of federal units, their parity and the right of veto, thus introducing the confederal principle into a hybrid state system, without consociationalism, the BH Constitution links parity to peoples and entities, through which constitutiveness is territorialized (see Stanković, 2025).

entities, which is not a classical federal principle; 2) according to the Constitution, only members of this chamber are elected in accordance with the election law of BiH (2001); 3) the election law is adopted by both chambers. That consociationalism was also taken into account in the case of the House of Representatives is evident from the example of the leadership of this chamber. Political bodies of BiH do not have a leader with autonomous powers, but a chairperson, whose role is of a protocol and procedural nature. Each chamber elects from among its members one Serb, one Bosniak and one Croat as the chairperson and deputy chairpersons – the Collegium – *with special powers* in cases where the majority does not include the prescribed *entity votes*. They rotate in the position of chairperson. National affiliation is not explicitly tied to entity affiliation.

The House of Peoples has a dual function – the representation of peoples and of the entities (their parliaments) – which is constitutionally emphasized both with regard to its composition and election, as well as the nature of the mandate and the method of decision-making. The parity composition of 5+5+5 consistently reflects the consociational principle, yet not at the general, state level, but rather in an aggregate manner. Each of the delegates of the constituent peoples is elected by the parliaments of the entities: Serb delegates are elected by the National Assembly of the Republika Srpska, while Bosniak and Croat delegates are elected by the caucuses of those peoples in the House of Peoples of the Parliament of the Federation of BiH. The election of the House of Peoples confirms (as in the case of the Presidency) that constitutiveness is territorialized, but asymmetrically (2:1), which results in different modes of election in the FBiH (House of Peoples) and the RS (general representation). The same principle applies to the leadership of this chamber. The Constitution uses the term “delegate” for the members of the House. This formulation is inherited from socialist constitutionalism and implies an imperative mandate. Since the Constitution prescribes that only the election of members of the House of Representatives is regulated by the law of BiH,¹⁴ by the method of *argumentum a contrario*, as well as from the meaning of a delegate mandate,

¹⁴ Federal constitutions almost always regulate the subjects responsible for the election of the upper chamber, whether the election is carried out by citizens or by the parliaments of federal units, governments, or the Governor General upon the proposal of the Government of Canada. Switzerland (Article 150 of the Constitution), however, due to its confederal past, leaves the issue of election and the duration of the mandate to the cantons (Petrov & Simović, 2018, pp. 394–395). The Constitution of BiH determines the subjects of election and does so asymmetrically—the National Assembly as a general representative body and the caucuses of peoples in the upper chamber of the Federation of BiH—but not the duration of the mandate of delegates. The Election Law, by the breadth of its regulation, is more characteristic of regional states; its solutions are often contrary to the constitutions of the entities, introducing confusion into the hierarchy of legal acts.

it is concluded that the entity parliaments are competent, at a minimum, to regulate the procedure for the election of delegates, but also the duration of the mandate, which may be imperative, thereby emphasizing the cooperativeness of the constituent elements (the example of Germany). It is the constitutional right (denied in practice) of the entities to regulate their relationship with the electoral body, and they may also opt for a free mandate. The Election Law of BiH (2001) (not the result of a legislative process, but of imposition), however, equalizes the position of delegates and members of the lower chamber. A free mandate, generally and especially in mono-national federations, may lead to a deformation of the role of the upper chamber. Nevertheless, the consociational character does not support this, nor does the formation of genuine “civic” parties at the level of BiH; instead, large coalitions are formed (Belgium case). The right to nominate and elect Serb delegates belongs to all members of the National Assembly of the RS. From this constitutional provision it follows that the constitutiveness of the Serb people relates to the RS, and in an aggregate manner, through the House of Peoples and other institutions, to BiH as a whole. From the physiognomy of this chamber it follows that Serb delegates protect both the interests of the Serb people and of the RS (quorum and veto). At the level of BiH, through a minimal number of competences, the interests of peoples and entities were to be formulated and confirmed through harmonization and consensus. However, through the usurpation of competences, the National Assembly has been reduced to an electoral unit whose members nominate and vote, while the Central Election Commission carries out the certification of candidate lists and the allocation of mandates.

Bearing in mind that in states of a multinational character majorization may represent a problem for their functioning and legitimacy, as well as a factor for activating conflict potential, especially when the state is not consolidated—which, after all, caused the crisis and collapse of BiH institutions in 1991–92 (Kuzmanović, 2004, p. 136) – solutions are institutionalized to ensure a sufficient level of consensus in decision-making. Classical instruments of federalism (bicameralism, constitutional distribution of competences, participation in federal institutions and in constitutional amendment procedures) provide more effective protection in systems with a larger number of federal units. However, the specificity of relations among ethnic communities, is also addressed through consociation (Belgium). Asymmetrical territorialization of constitutiveness, taking into account the practice and shortcomings of pre-war solutions, careful gradation, avoidance of any potentially contentious situations, and the endeavor that the minimal functions of BiH be exercised by consensus of representatives of peoples and

entities, have conditioned a complex system of protective instruments. In decision-making within the Parliamentary Assembly, three levels of protection are ensured: 1) entity interests; 2) constituent peoples; 3) cumulative protection of both interests where they intersect.

All decisions in both chambers are adopted by a majority of those present and voting. “Delegates and members shall make their best efforts to ensure that the majority includes at least one-third of the votes of delegates or members from the territory of each entity.” If the majority does not include this, the members of the Collegium shall endeavor to reach agreement within three days. “If such efforts fail, decisions shall be adopted by a majority of those present and voting, provided that the votes against do not include two-thirds or more of the delegates or members elected from each entity” (Article 4.3). Is such decision-making destructive? In a complex state, the participation of its parts in the majority should not pose a particular difficulty if there is minimal respect for the specific interests of those parts. Namely, a majority of those present and voting should include at least 5 members from the Republika Srpska and 10 from the Federation of BiH, that is, 2 from the RS and 4 from the FBiH; however, no decision is adopted if two-thirds of those elected from the territory of an entity vote “against” (10 from the RS or 19 from the FBiH; 4 from the RS or 7 from the FBiH). This means that these two-thirds *have an absolute veto*.¹⁵ Nevertheless, homogenizing two-thirds of members in a plural society is possible only if the particular interests of those they represent are endangered, because entity interest does not arise in every political issue. Given that the chambers are fundamentally equal, the intention of a high level of protection of the entities is clear. However, the veto is a last resort, since a positive vote of one-third, or agreement of the members of the *Collegium*,¹⁶ or abstention, is sufficient for a decision to be adopted. Only through the cumulative application of protective instruments—the right

¹⁵ An example of a suspensive veto is Article 90 of the Constitution of Spain: Once the Congress of Deputies has adopted a proposal for an ordinary or organic law, its President shall immediately notify the President of the Senate, who shall submit the proposal for debate to the Senate. Within two months of the date of receipt of the text, the Senate may, by reasoned recommendation, veto or amend the text. The veto must be adopted by an absolute majority. The proposal may not be submitted for the King’s sanction until Congress, in the event of a veto, has confirmed the original text by an absolute majority, or by a simple majority if two months have elapsed since the Senate’s intervention; in the event of amendments, Congress shall accept or reject them by a simple majority.

¹⁶ The Collegium of the House may reach agreement with regard to *such* a decision, thereby concluding the procedure, or propose *a new solution*; however, the decision on the new solution is adopted by the prescribed majority, with the right of veto.

of veto of two-thirds of members or delegates, and the requirement that in the House of Peoples the quorum consists of a majority of delegates from each people (three each)—is full protection of entity and national interests ensured. This, however, necessarily implies a high level of agreement (two-thirds) that a certain interest is endangered. Therefore, the decision-making process does not have a destructive potential. In the House of Representatives, the absence of a majority of entity members does not represent an obstacle to decision-making. Since the election of the Council of Ministers is its exclusive competence, the intention of this solution is that, even in the event of a blockage of the House of Peoples, the minimal functions of government are ensured through the Council of Ministers.¹⁷ The entities do not have the right of direct legislative initiative, nor do they participate directly in the adoption of acts of this parliament, (Austria, Germany, Spain). Nevertheless, the described instruments ensure a higher level of their protection. Constitutional solutions do not give rise to claims of the supremacy of the state level, but rather of pronounced cooperativeness, which is developmental by nature.

The instrument intended to protect specifically the interests of peoples has been used more rarely, due to the imprecision of the Constitution (2009), which allowed practice to shape it. Namely, a proposed decision of the Parliamentary Assembly may be declared destructive to the vital interest of a constituent people by a decision of a majority of delegates of that people. For such a decision to be adopted, the consent of a majority of delegates of each people who are present and voting is required. When a majority of delegates of one people raises an objection with regard to invoking destructiveness, the Chair convenes a parity joint Commission, with the aim of resolving the issue within five days. In the event of failure, “the matter shall be referred to the Constitutional Court, which shall, under an urgent procedure, review the procedural correctness of the case”. The deeper rationale of this solution lies in the protection of the will of the majority of members of a caucus when, due to political fragmentation, a majority is formed *ad hoc* or by a majority from one caucus and a smaller number of members from the other two. Furthermore, when there is an interest in adopting a decision but with content different from that proposed (through harmonization), this institute may be distinguished

¹⁷ The creators of these solutions appear to have borne in mind, and sought to prevent, a situation such as the blockage of the Council of Republics and Provinces of the SFRY in 1991. That blockage paralysed the election and functioning of the Federal Executive Council and the adoption of laws on provisional measures (which were enacted in order to prevent the harmful consequences of the failure to adopt laws due to the absence of consent of one of the constituent units – Articles 295, 301-302 of the 1974 Constitution).

from blockade through non-attendance, where, as a rule, insistence is placed on non-adoption of the proposed decision (negative protection). Nevertheless, its elements – the “objection” and the role of the Constitutional Court – render it incomplete. The Constitution refers to “procedural correctness”, for which, by linguistic interpretation and legal reasoning, the Constitutional Court could be the only relevant interpreter and adjudicator. However, the Constitutional Court has, *contra constitutionem*, assumed competence to decide on the merits of violations of vital interests (Lukić, 2017, p. 249), although it is difficult to justify a situation in which a non-political, expert body resolves purely political (interethnic) disputes instead of legitimate political representatives.

Stanić (2024, p. 66) correctly observes that, in theory, it has become a commonplace assertion that parliaments have lost their former significance in relation to the government and have become a kind of “talking shops”. Nevertheless, BiH is also distinctive with regard to this assertion, because through the described institutes within its parliament various interests intertwine, where large coalitions have more of a technical than a political character, so that divisions from the executive branch are further reflected in the functioning of parliament. Through veto mechanisms, in which both the governing parties and the opposition from the entities often participate, a greater power of parliament is affirmed, which often exceeds the power of the “ruling” majority. Taking into account the aforementioned protective instruments and relating them to the competences of the institutions of BiH, one arrives at the conclusion that the content of the so-called state level should consist of those matters, and only to the extent, upon which the entities (BiH consists 2 entities – Article 1.3) and the peoples agree; that is, that the constitutional framework is based on ethno-(con)federal characteristics, even though its order today functions differently, without any change to the Constitution.¹⁸

¹⁸ The distancing of constitutional solutions from practice is most illustratively summarized by Blagojević (2014, p. 157): “What has been lacking in our society all these years is the acceptance and development of a particular form of legal and political culture that may be termed a federal legal-political culture. This deficit (in its political part) is primarily the consequence of the fact that integration processes are being used by certain political forces (primarily of Bosniak political provenance) in an attempt to (also with the assistance of foreign factors) deprive the entities (essentially the RS) of as many competences as possible, thereby rendering the need for their continued existence meaningless.” On changes in the meaning and scope of the Constitution through the intervention of the High Representative, see: Savić (2004); Pilipović (2017). The impact on this (already faltering) process has also taken on a repressive character in the form of “criminal-law” protection of the “decisions of the High Representative”.

The House of Representatives cannot be dissolved, but the Presidency of BiH can dissolve the House of Peoples, which constitutes its discretionary power. Dissolution, comparatively, more frequently applies to the lower chamber, more rarely to both chambers (Italy), and only very rarely to the upper chamber. The purpose of dissolution lies in a dispute between the head of state or the government and parliament, which is referred to the citizens, who arbitrate as to who should prevail within the executive branch (Simović, 2008). Since dissolution does not apply to the House of Representatives, standard theoretical justifications for this institute are not applicable. Bearing in mind the indirect election of the House of Peoples, the fact that it does not participate in the election of the Council of Ministers, and that it does not possess autonomous competences, a possible reason may be conflict between two levels of government or the alignment of its composition with changes in the political composition of entity parliaments. The justification for dissolution cited by Orlović (2018, p. 223) does not apply *here*, namely that by it the executive authority “disciplines parliament by an ultimate measure, bringing their political conflict before the voters.” The Constitution also provides for the possibility of self-dissolution of the House of Peoples, if the decision includes a majority of delegates from at least two peoples. Given that the position of a dissolved House is not regulated by the Constitution, its mandate cannot be extended, nor can it perform its functions (e.g. Italy, where, until the newly elected chambers convene, the mandate of the previous ones is extended, Article 61). A blockade of one caucus or a conflict between two levels of government as a reason for dissolution may also lead to a permanent blockade of the Parliamentary Assembly, as there is no mechanism to compel the entities to carry out a new or different election. Therefore, a change in the political majority in entity parliaments, as a result of which a blockade may become illegitimate, represents the only realistic justification for the application of this institute.

6. Final Considerations

There are no universal solutions or evaluations of bicameralism, as the needs that institutionalize it differ. A representative body should reflect society as it is, in which, alongside citizens, there exist diverse collectivities that require representation. Bicameralism always reflects a higher level of plurality. Contemporary federalism strives toward cooperation, which is also expressed through stronger models of bicameralism. It constitutes one of the pillars of federal organization and functioning, and in consociational

systems also serves as a protective mechanism in the most delicate form of expressing complexity – political representation. In complex but stable systems, without conflict potential and opposed ethnic interests, simpler solutions may adequately represent society and its constituent parts. In such federal forms, which are predominantly evolutionary, there is a higher level of standardization of solutions. However, where a state contains more complex interethnic relations and a consociational system, by the very nature of such a combination, more complex mechanisms of representation, decision-making and coordination develop. Experience shows that in complex states, in addition to protective mechanisms, it is also necessary to develop a political culture that implies mutual respect and coordination. From the perspective of the analyzed constitutional solutions concerning the Parliamentary Assembly, leaving aside the extra-constitutional evolution of BiH which has further complicated its constitutional system, one arrives at the conclusion regarding the nature of BiH as an ethno-(con)federation. It incorporates and emphasizes all the institutes of both consociational and cooperative federalism. The asymmetrical territorialization of constitutiveness has resulted in the strengthening of consociational elements. The essential characteristic of its parliament, which fundamentally follows the logic of the compared systems, lies in strong bicameralism, consensus among the constituent elements, that is, the highest level of cooperativeness and protection.

Constitutional solutions are intended to ensure the legitimacy of decisions, which in such a complex state manifests itself on three levels, which at times overlap: 1) civic legitimacy, but in an aggregate form by entities (direct election of the lower chamber, the method of decision-making within it); 2) entity legitimacy (equal role of the chambers, election of delegates in the entities and decision-making); 3) legitimacy of the constituent peoples (parity, composition of the upper chamber, quorum, the institute of vital interest, collegia). No matter how complex, these solutions reflect the full complexity of society in BiH, burdened by historical *experiences and differing visions of future political development*. *Balancing among*, these interests, that is, the fear of majorization, in a state that has experienced both dissolution and aggregation and contains a greater conflict potential than other states, requires such a complex mechanism, including strong bicameralism. The extent to which protective instruments will be used depends primarily on acceptance of the fact that the legitimacy of power and governance must be based on established principles of balance, cooperation and consensus. Otherwise, the question arises as to the direction and intensity in which political processes in BiH would unfold. Moreover, imposed solutions require political abrogation at an appropriate moment.

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OSOBNENI PRIMERI FEDERALNOG BIKAMERALIZMA I BOSANSKOHERCEGOVAČKA USTAVNA REŠENJA

APSTRAKT: Svaki bikameralizam sadrži neku posebnost, jer predstavlja odraz posebnosti neke političke zajednice i interesa unutar nje, koje je potrebno institucionalno izraziti. U radu su kao osobeni izabrani primeri sa kooperativnim federalnim i konsocijativnim modelima (Nemačka i Belgija), koji efikasno izražavaju veći nivo složenosti. Ipak, težište je na rešenjima u BiH, kao atipičnim. BiH još uvek predstavlja državu sa politički konfliktnim potencijalom, a ustavni balans uslovljen njenom složenom etničkom strukturom i danas je pred ozbiljnim pravnim i političkim izazovima. Cilj rada jeste da se ukaže na specifičnost i smisao rešenja, odstupanja od uzora ili razlike u odnosu na standardna rešenja. Balansiranje među različitim interesima, tj. strah od majorizacije, u državi

koja je doživela i disoluciju i agregaciju, a sadrži konfliktni potencijal veći nego u drugim državama, iziskuje tako složen mehanizam. Ipak, nužnu složenost mehanizma mora pratiti i odgovarajuća politička kultura – trajno opredeljenje za postizanje dogovora među konstituentima.

Ključne reči: bikameralizam, federacija, konsocijacija, BiH, entiteti.

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