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**ETHNO-NATIONAL BICAMERALISM - THE HOUSE OF
DISCRIMINATION OF THE PARLIAMENTARY ASSEMBLY:
A COMPARATIVE ANALYSIS OF THE SECOND CHAM-
BERS OF SWISS, BELGIAN AND BOSNIAN-HERZEGOVI-
NIAN NATIONAL PARLIAMENTS**

ABSTRACT

The House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina is expected to be reformed due to the discriminatory constitutional provisions on its composition. This paper will compare the House of Peoples with the institutional arrangements of the second chambers of the national parliaments in Switzerland and Belgium. All three observed federal states treat the representation of their constituent units differently within their second chambers, offering different empirical models to the theory of bicameralism. This paper seeks lessons to be learned from the two Western European examples that could be useful in finding novel solutions for the long-expected reform of the second parliamentary chamber of Bosnia and Herzegovina.

Keywords: multi-ethnic federations, bicameralism, second chambers, House of Peoples, constitutional reform.

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“Union is strength.”

(Belgian motto – Article 193 of the Constitution)

“The strength of a people is measured by the well-being of its weakest members.”

(Preamble to the Swiss Constitution)

INTRODUCTION

The parliamentary system is nowadays confirmed as a determinative presumption of a political democracy. It represents one of the basic forms of a representative democracy, sometimes even considered equal to democracy itself. Within such a system, parliament is the most important institutional element, a tangible embodiment of the will of the people. In multinational/ethnic, multicultural, plural, segmented or divided societies/countries, the structure of the parliament is (almost as a rule) based on federal bicameralism¹, where the first (lower) house of the parliament represents unity and all citizens, while the second one (upper) stands for specificities and represents constituent units/formative entities.

Bicameralism is thus a common feature of federalism, but the composition of second/upper chambers varies widely, with indirectly elected, directly elected and unelected members (the so-called aristocratic type of second chamber). Second chambers may be established with the characteristics of a senate (a deliberative and advisory body) or a council (where members represent federal units). The mandate of the second chamber can be imperative/obligatory or independent².

Second chamber powers may also vary greatly; from relative “coequality” or “symmetry” between the chambers, with the second chamber having an absolute veto over all or most bills (absolute or egalitarian bicameralism), to systems which establish mechanisms for overriding the second chamber’s objections to proposed bills (non-egalitarian bicameralism)³. A common function of such second chambers, according to the federal the-

1) K. Trnka *et al.*, *Decision-making process in the Parliamentary Assembly of Bosnia and Herzegovina: status, comparative solutions, proposals*, Konrad Adenauer Stiftung, Sarajevo 2009, 10.

2) *Ibid.*, 16.

3) M. Russell, *Elected Second Chambers and Their Powers: An International Survey*, *The Political Quarterly*, 83, 1/2012, 128.

ory, is the representation of the constituent units of the federation in the central legislative structure⁴. As second legislative chambers are “ubiquitous features of the institutional architecture of federations, they receive regular attention from those who study these political systems. However, the degree to which these bodies are able to fulfil their functions in parliamentary federations remains an open empirical question”⁵.

This research paper, using descriptive and analytical methods with a comparative approach and perspective, aims to investigate at the structural level: the composition, method of selection of members and the powers and procedures of second/upper chambers of the national parliaments of Switzerland, Belgium and Bosnia and Herzegovina (hereinafter “BiH”). The aim of the research is to come up with certain conclusions and proposals on the basis of the rendered observations that could be used in BiH’s context to accomplish the goals sought in the widely-discussed constitutional reform, which has come to the centre of attention especially after the European Court of Human Rights (“ECtHR”) rendered its decision in the case of *Sejdić and Finci v. BiH* in 2009⁶. The issue in question represents one of the most prominent contemporary legal, institutional and political challenges in BiH. It deals with the specific composition of the BiH Parliamentary Assembly’s House of Peoples where federal and ethnic elements are combined, resulting in inconsistency between the constitutional principles on citizens’ rights and international standards of human rights protection. A solution to this challenge, as part of the wider and comprehensive constitutional revision, would have paramount consequences for the political system and society in BiH by completely changing the constitutional and legal paradigm.

This work is based on the comparative analysis of legal documents (the respective national constitutions) and available secondary literature (books and articles) which address the topic of bicameralism in general and more specifically the parliamentary system of BiH. Of the latter, the most notable attempt to use such a comparative method, though exclusively des-

4) G. W. Horgan, „Book Review on Federalism and Second Chambers – Regional Representation in Parliamentary Federations: the Australian Senate and German Bundesrat Compared (by Publius Wilfried Swenden)“, *The Journal of Federalism*, 37, 4/2006, 613.

5) *Ibid.*

6) European Court of Human Rights, *Case of Sejdić and Finci v. Bosnia and Herzegovina*, appl. nos. 27996/06 and 34836/06, judgment of 22 December 2009.

criptively, has been tried in a study from 2009 on the process of decision-making in the Parliamentary Assembly of BiH⁷.

As for the structure of the paper, first the composition of the second parliamentary chamber of BiH will be presented and analysed, while constantly drawing parallels from the second chambers of the Swiss and Belgian parliaments. Second, the, law-making procedures and competences will be elaborated in the same way.

Using a comparative and prescriptive method, certain institutional recommendations and proposals for the reform of the House of Peoples will be presented at the end of both main sections (2. 4. and 3. 4.), adding novel ideas to the bundle of different relevant proposals and variations presented by political parties, scholars and analysts, as well as international institutions (most notably the Venice Commission of the Council of Europe).

These proposals aim at tackling shortcomings permeating the BiH's parliamentary system, most notably by:

a) facilitating legislative procedure by making it faster, simpler, more efficient and rational, and introducing mechanisms for avoiding legislative blockages;

b) evaluating the effectiveness and justification of BiH's second chamber in the light of ideas to abolish the current bicameralism;

c) questioning the structure of BiH's second chamber and its representation of BiH's constituent units, in the light of discriminatory provisions regarding the election of the members to the House of Peoples.

1. Why Exactly These Examples? Links and Relevance

The reason for including the selected countries (BiH, Switzerland and Belgium) in this comparative research is that all three are federal, multi-cultural and consociational democracies. According to Lijphart's theory of consociational democracy, Belgium and Switzerland are the most important examples given that they are still considered as successful examples of consociational democracies⁸. On the other hand, in the international

7) K. Trnka *et al.*, *Decision-making process in the Parliamentary Assembly of Bosnia and Herzegovina: status, comparative solutions, proposals*, Konrad Adenauer Stiftung, Sarajevo 2009.

8) N. Stojanović, „Consociation – Switzerland and Bosnia and Herzegovina“, *Pregled - Časopis za društvena pitanja*, 85, 3-4/2009, 66.

scientific literature, the present constitutional system of BiH is considered a classic model of consociationalism, even an ideal type. Some scholars go even further, characterizing BiH's system as the "consociation plus", given that it not only satisfies all the elements of the consociational model, but it goes even beyond it: institutionalizing a very rigid veto-power, entrenching an ethno-national scheme consistently in the institutional structure, etc.⁹

The two most important elements of the Lijphart's consociational model are: (a) power sharing in government among the most important segments of the pluralist society, and (b) the autonomy of those segments, especially territorially and on a federal basis. The latter, however, has been questioned in the case of BiH, given that three nations/constituent groups do not formally exercise territorial autonomy throughout the entities¹⁰. Two additional elements are: (c) the capacity for a minority veto, and (d) proportionality, e.g. in the electoral system, or proportional representation of all segments in the state's institutions (which implies "more-than proportional representation" of minorities in the common institutions)¹¹.

The third element (or first additional) of Lijphart's classical model of consociationalism – the minority veto – has been applied in the House of Peoples of BiH's parliament, where each of the "constituent peoples" has the same number of representatives (five), and it is possible to block every decision that could be characterized as negatively affecting the vital national interest of one constituent group¹².

At this point however, one thing ought to be stressed: a comparison of federations and their institutional arrangements requires caution because there is no single, pure model of federalism that is applicable everywhere¹³. However, literature usually describes different rationale for introducing federal elements in a state's architecture: (a) to enhance democracy, through empowering the regional and local levels of government, bringing

9) *Ibid.*, 65.

10) *Ibid.*

11) *Ibid.*

12) For a complete analysis on this issue see: N. Stojanović, „Consociation – Switzerland and Bosnia and Herzegovina“, *Pregled - Časopis za društvena pitanja*, 85, 3-4/2009.

13) R. L. Watts, *Comparing Federal Systems in the 1990s*, Queen's University Kingston Ontario – Institute of Intergovernmental Relations 1996, 1.

decision-making processes closer to the citizen, and delivering more democratic accountability to politics; (b) to improve good governance and efficiency of public policy formulation and delivery, by addressing local diversities and direct concerns of the people; and (c) to better manage diversities, through providing territory/culturally-based communities a degree of autonomy in managing their own affairs¹⁴.

Even though selected three examples of second parliamentary chambers are not completely and utterly identical, they do share certain common ideas which will be assessed throughout this comparative analysis. Additionally, the emergence of these federal countries differs. For centuries Switzerland experienced a process of successful federalization, which was accomplished in 1848 by the convergence of the confederation into the federation of cantons. On the other hand, at the end of the 20th century (in 1993) Belgium, out of a unitary monarchy, reached its contemporary federal structure after a few consecutive constitutional reforms. Finally, BiH established its asymmetric, hybrid, quasi-federal structure in 1995 with the Dayton Peace Agreement which put an end to the war. The main difference here are the starting points and directions of the federal dynamics. In the Swiss case, we witnessed a “bottom-up” process of federalization, and aggregation of previously independent cantons. The Belgian experience was a “top-down” federalization process, emerging as an outcome of a struggle towards more disaggregation, i. e. where a once unitary nation-state gradually and increasingly transferred competences to the regional authorities¹⁵. Importantly, after transferring competences in culture and education to regional levels, central authorities in Belgium were left with few policy instruments to promote a shared Belgian culture or identity¹⁶. In the end, BiH federalization process could be characterized as an “outside-in”, where the federal structure was imposed by the international community as a result of peace negotiations, in order to reconcile and balance aggregate and disaggregate trajectories of the constituent units in a post-conflict institutional architecture.

14) J. Erk, „Federalism and Decentralization in Sub-Saharan Africa: Five Patterns of Evolution“, *Regional and Federal Studies*, 24, 5/2014.

15) J. Wouters/S. Van Kerckhoven/M. Vidal, “The Dynamics of Federalism: Belgium and Switzerland Compared”, Leuven Centre for Global Governance Studies, Institute for International Law, KU Leuven Working Papers, 138/2014.

16) *Ibid.*

Based on a large international survey on second parliamentary chambers, following are some preliminary data in tabular form for the initial comparison of the three second chambers selected¹⁷.

National second chambers by composition:	
Switzerland	- directly elected members
Bosnia and Herzegovina	- indirectly elected delegates ¹
Belgium	- combination of directly elected, indirectly elected, appointed and hereditary members ²

Powers of the second chambers:	
Switzerland	Powers equal to those of the lower chamber, with a joint committee included in the designated conciliation process.
Bosnia and Herzegovina	Powers equal to those of the lower chamber, with no overriding power of the respective lower chamber.
Belgium	Subordinated to the lower chamber; it can amend, but cannot reject proposed bills.

2. Composition and Structure

2. 1. The BiH House of Peoples

The second chamber of the Parliament of BiH (Parliamentary Assembly) – the House of Peoples – is comprised of fifteen delegates¹⁸. These seats are distributed equally among the three “constituent peoples”. Two-thirds of the delegates (ten) come from the territory of the Federation of BiH (of which five must be Croats and five Bosniacs), and one-third comes from the territory of Republika Srpska (all five of whom must be of Serb

17) M. Russell, „Elected Second Chambers and Their Powers: An International Survey“, *The Political Quarterly*, 83, 1/2012, 120-122.

18) *Constitution of Bosnia and Herzegovina* 1995, Article IV §1.

nationality). Such an arrangement implies that a less numerous constituent group is “more than proportionally represented” at the expense of more numerous constituent group(s)¹⁹.

Designated Croat and Bosniac delegates from the Federation of BiH are elected/appointed, respectively, by the Croat and Bosniac delegates from the House of Peoples of the Federation of BiH (“FBiH”). Delegates from the Republika Srpska are elected/appointed by the National Assembly of the Republika Srpska (“RS”)²⁰.

Citizens of BiH who are not of Serb, Croat or Bosniac nationality cannot stand for the elections to the House of Peoples. As result of this arrangement, citizens belonging to the constitutional category of “others” have been disenfranchised throughout BiH. This practice has been recognized as discriminatory and in violation of basic human rights by the ECtHR in a landmark case of *Sejdić and Finci v. BiH* from the late 2009. Following this judgment, BiH’s authorities were asked to conduct a reform of the state’s Constitution, *inter alia* with regards to the structure and composition of the House of Peoples, in order to assure compliance with the European Convention on Human Rights (“ECHR”), which seven years afterwards is still pending²¹.

Moreover, Croats, Serbs and Bosniacs living in the “wrong entity” (i.e. where they constitute a quantitative minority) are denied the right to be candidates for this chamber²². This restriction of passive voting rights is most obvious in the FBiH, where Croat and Bosniac representatives are being elected by the Croat and Bosniac clubs of delegates in the House of Peoples of the Parliament of FBiH. Citizens of Serb nationality cannot

19) N. Stojanović, „Consociation – Switzerland and Bosnia and Herzegovina“, *Pregled - Časopis za društvena pitanja*, 85, 3-4/2009, 76.

20) *Constitution of Bosnia and Herzegovina* 1995, Article IV §1(a).

Members of the House of Peoples of the FBiH are appointed by the cantonal parliaments (ten cantons in the FBiH). Members of the cantonal parliaments are directly elected. Members of the National Assembly of the RS are directly elected.

21) Similarly to *Sejdić and Finci case*, this issue was addressed by the ECtHR in its judgment in the case of *Zornić v. Bosnia and Herzegovina*, *appl. no. 3681/06, judgment of 15 July 2014*, where the applicant was denied her right to stand for election to the House of Peoples because of not declaring affiliation with any of the “constituent peoples”, but rather declaring herself as a citizen of Bosnia and Herzegovina.

22) C. Steiner *et al.*, *Constitution of Bosnia and Herzegovina – Commentary*, Konrad Adenauer Stiftung, Sarajevo 2010, 572.

play any role in the election procedure of the representatives to the state's House of Peoples from the territory of FBiH²³.

2. 1. 1. The Concept of “Constituent Peoples” and the “Others”

The BiH Constitution makes a distinction between “constituent peoples” – ethnic Bosniacs, Croats and Serbs (or persons who declare affiliation with one of these groups) – and “others”. The latter are members of national/ethnic minorities who have lived in BiH for centuries; persons who do not declare affiliation with any particular ethno-national group because of intermarriage, mixed parenthood, or other reasons²⁴. A decision of the Constitutional Court of BiH in 2000 declared these three groups constituent on the entire territory of BiH, which was intended to ensure equal legal treatment²⁵.

The electoral law introduces a relative obligation for every state-level candidate to declare one's ethnicity: a “statement on affiliation with constituent peoples or group of others”²⁶. In BiH there is no system of confirming a person's affiliation with “constituent peoples” or “others” as there exists in Southern Tyrol, for example²⁷. Therefore, this system can be misused for narrow political interests, and easily manipulated with. A person's ethnic affiliation is thus exclusively a personal decision made through a system of self-classification. Therefore, no objective criteria are required, such as knowledge of a certain language or belonging to a specific religion. There is also no requirement of acceptance by other members of the ethnic group in question. The Constitution also contains no provisions regarding the determination of one's ethnicity, such as language, religion, race or any

23) *Ibid.* Pending before the ECtHR is another case, *Ilijaz Pilav v. Bosnia and Herzegovina*, appl. no. 41939/07, lodged on 24 September 2007, which deals with the situation of „constituent peoples in the wrong entity“, albeit with regards to the different state institution (Presidency of BiH), and which is expected to be resolved in line with the previous jurisprudence of the Court in *Sejdić-Finci* and *Zornić case*.

24) More information on this issue in: E. Hodžić/N. Stojanović, *New-old constitutional engineering? Challenges and implications of the judgment of the ECtHR in the case of Sejdić and Finci v. BiH*, Analitika - Centar za društvena istraživanja, Sarajevo 2011, 51-52.

25) A. Arapović, *Electoral system of Bosnia and Herzegovina – Critical analysis and compilation of the electoral legislation*, Centri civilnih inicijativa, Tuzla 2012, 19.

26) E. Hodžić/N. Stojanović, *New-old constitutional engineering? Challenges and implications of the judgment of the ECtHR in the case of Sejdić and Finci v. BiH*, Analitika - Centar za društvena istraživanja, Sarajevo 2011, 79.

27) *Ibid.*

other criteria which one has to comply with in order to be considered as a member of a particular ethnic group in BiH.

2. 1. 2. Further Analysis

Bicameral systems are typical for federal states and it is therefore not surprising that the BiH Constitution opts for two chambers, both having the same powers. The structure of the House of Peoples reflects the principle of the absolute equality of three “constituent peoples” and a complex state’s structure, due to the fact that BiH is comprised of two entities²⁸. However, the arrangement of the BiH House of Peoples is inconsistent with the usual composition of the second parliamentary chambers where the federal units are represented and a stronger representation of the smaller entities is ensured. Thus, in a second chamber either all entities have the same number of seats (e.g. Switzerland, USA) or smaller entities are overrepresented (Germany). Here it is obvious that the BiH House of Peoples represent only the interests of the “constituent peoples”, and partially of the territorial units, while it completely neglects the interests of the “others” (minorities). It is therefore not a reflection of the federal character of the state but an additional power-sharing mechanism favouring the interests of the “constituent peoples”.

The inconsistency of such an arrangement is strengthened by the designated way of electing members to the House of Peoples. Mixing ethno-national representation (with reserved seats for the “constituent peoples”) with the particular territorial division (two-thirds of delegates from the FBiH, one-third from the RS) severely limits the representation of the interests of whole national body of each of the “constituent peoples”. In this way, the House of Peoples does not represent the national interests of (and thus discriminates against) the Serbs living (or registered as voters) on the territory of FBiH, nor the interests of Bosniacs and Croats from the territory of RS. Consequentially, according to the national structure based on the 1991 census almost one-third of the electoral body of BiH cannot elect or influence appointment of their representatives to the House of Peoples²⁹.

As yet another interesting characteristic of BiH’s bicameralism, the Constitution of BiH is one of the rare examples where the length of the

28) K. Trnka *et al.*, *Decision-making process in the Parliamentary Assembly of Bosnia and Herzegovina: status, comparative solutions, proposals*, Konrad Adenauer Stiftung, Sarajevo 2009, 39.

29) *Ibid.*, 40.

mandate for the members of the Parliament is not defined³⁰. Additionally, the number of delegates to both chambers – the House of Representatives (forty-two) and the House of Peoples (fifteen) – is not proportional to the size of the electorate, nor does it provide enough opportunities for the adequate expression of political pluralism³¹.

2. 2. The Swiss Council of States

The second chamber of the Swiss Parliament (Swiss Federal Assembly) – the Council of States/Cantons (*Ständerat/Conseil des Etas/Consiglio degli Stati*) – represents cantons, and is composed of forty-six representatives³². Following the federal principle of the equal representation of all cantons, it is composed of two members from every full canton (and one member from each of the half-cantons³³), regardless of their geographic or demographic size³⁴. The cantons themselves determine the modes of electing their members to the Council of States. Before direct election by the popular vote became the rule, many cantons allowed their parliaments to nominate their representatives. Today, however, members of the Council of States from most of the cantons are elected directly by majority rule³⁵.

The Council of States consistently affirms the territorial-federal principle of “one canton – two representatives”. This territorial-federal principle guarantees smaller cantons “more than proportional representation” in the Council of States³⁶. As Stojanović argues, Switzerland is to be considered as a linguistic consociation, given that cantons do not coincide with

30) The question was delegated firstly to the Interim Electoral Commission, and after that it was regulated by the Electoral law. On the first three parliamentary elections (1996, 1998, 2000) delegates were elected for the two-years-mandate, and after the 2002 elections mandate was extended to four years.

31) K. Trnka *et al.*, *Decision-making process in the Parliamentary Assembly of Bosnia and Herzegovina: status, comparative solutions, proposals*, Konrad Adenauer Stiftung, Sarajevo 2009, 141.

32) *Federal Constitution of the Swiss Confederation* 1999, Article 150 §1.

33) The Cantons of Obwalden, Nidwalden, Basel-Stadt, Basel-Landschaft, Appenzell Ausserrhoden and Appenzell Innerrhoden.

34) W. Linder, *Swiss Democracy – Possible solutions to conflict in multicultural societies*, Palgrave/Macmillan 2010, 50.

35) *Ibid.*

36) N. Stojanović, „Consociation – Switzerland and Bosnia and Herzegovina“, *Pregled - Časopis za društvena pitanja*, 85, 3-4/2009, 75.

language communities³⁷. Observed in the light of this, the structure of the Council of States reveals that even here linguistic groups are represented proportionally to their total percentage of Swiss citizens; i.e. every canton is indeed represented by the same number of representatives, but linguistic groups are (unintentionally) represented proportionate to their numerical size. This means that the Council of States does not guarantee linguistic minorities that they will not be outvoted, nor does it give them veto rights³⁸. On the other hand, in the House of Peoples every “constituent people” has the same number of representatives, which implies that quantitatively minority nations are “more than proportionally” represented³⁹.

2. 3. The Belgian Senate

The second chamber of the Belgian parliament (the Federal Parliament) – the Senate – is composed of sixty senators⁴⁰. Its composition reflects a mixture of directly elected, indirectly elected, and co-opted senators, plus a variable representation specified for each unit⁴¹. Elected members of the Senate (as well as of the lower parliamentary house – Chamber of Representatives) are divided into a Dutch-speaking linguistic group and a French-speaking linguistic group⁴².

The Belgian federal structure is based on a compromise of regional/territorial and communal/cultural elements⁴³. Belgium’s specific mix of national and linguistic diversity with its monarchist (aristocratic) elements in the structure of the Senate makes it unique in comparison to any other contemporary parliament⁴⁴.

37) *Ibid.*, 80.

38) *Ibid.*

39) *Ibid.*, 76.

40) *Constitution of the Kingdom of Belgium* 2014, Article 67 §1.

41) R. L. Watts, *Comparing Federal Systems in the 1990s*, Queen’s University Kingston Ontario – Institute of Intergovernmental Relations 1996, 27.

42) *Constitution of the Kingdom of Belgium* 2014, Article 43 §1.

43) Belgian federation is defined as federal state composed of (cultural) communities and regions. There are three communities: French, Flemish and German-speaking community. There are three regions: Walloon, Flemish and Brussels. There are also four linguistic regions: French-speaking, Dutch-speaking, German-speaking and bilingual region of Brussels-Capital. Each of these has its separate territorial and personal jurisdiction; however, often those jurisdictions are overlapping and intertwining.

44) K. Trnka *et al.*, *Decision-making process in the Parliamentary Assembly of Bosnia and Her-*

Similar to the BiH House of Peoples, the composition of the Belgian Senate is a peculiar combination of federal and ethnic principles, where⁴⁵:

a) a number of senators is elected by: the Dutch electoral college (including the members of the Dutch linguistic group of the Parliament of the Brussels-Capital Region) and the French electoral college (including the French linguistic group of the Parliament of the Brussels-Capital Region), respectively;

b) a number of senators is appointed by: the (Dutch-speaking) Parliament of the Flemish Community (called the Flemish Parliament), the Parliament of the French Community (the Walloon Parliament), and the Parliament of the German-speaking Community;

c) a number of senators is appointed jointly by: the senators of the Dutch electoral college and the Flemish Parliament, and the senators of the French electoral college and the Parliament of the French Community; the so-called co-optation method.

In addition, before the latest constitutional amendment in 2014, the children of the King of Belgium (or in the absence of King's children, the Belgian descendants of the royal family who reign) were senators by right from the age of eighteen. They were, however, not entitled to take part in voting until the age of twenty-one. They were also not taken into account to ascertain whether a quorum is established⁴⁶

Other interesting elements of Belgian bicameralism are that senators do not receive a salary, but they only have the right to be compensated for expenses (this compensation is fixed⁴⁷), and that there are special requirements (quotas) for a certain number of senators to be residents of the bilingual the Brussels-Capital region⁴⁸. Also, it is expressly stated that members of both houses of the Belgian parliament represent the entire nation, i. e. every citizen, not only those who voted for them or belong to their community or region⁴⁹. This is an important specificity of Belgian

zegovina: status, comparative solutions, proposals, Konrad Adenauer Stiftung, Sarajevo 2009, 33.

45) *Constitution of the Kingdom of Belgium* 2014, Article 67 §1.

46) *Constitution of the Kingdom of Belgium* 2014, Article 72 §1 (repealed).

47) *Constitution of the Kingdom of Belgium* 2014, Article 71 §1.

48) *Constitution of the Kingdom of Belgium* 2014, Article 67 §2.

49) *Constitution of the Kingdom of Belgium* 2014, Article 42.

federalism which is not characteristic of the classical bicameral structure of a state parliament⁵⁰.

Following the sixth state reform in 2014, a thorough reform of the bicameral system has been implemented, whereby the composition and legislative powers of the Senate were revised⁵¹. The new Senate has become smaller, and positioned as primarily representing the interests of the federated entities, rather than communities, on the federal level. That is why the number of directly elected senators is minimized, to emphasize the appointment rather than election of the senators to the upper parliamentary house. The sixth state reform in addition curtailed the powers of the Senate and transformed the institution into a non-permanent body⁵². The unicameral procedure, in which the legislative power is vested in the Chamber of Representatives and the King without involvement of the Senate, became the ordinary legislative procedure⁵³. However, the critics are doubtful whether the newly-devised Senate will be able to adequately act as a full-fledged chamber of the federated entities, due to the very limited scope of powers⁵⁴. In practice, it will have almost no substantive work. Therefore, the challenge for the Belgian Senate remains to assume a more “proactive role of an institutional bridge-builder between the regions and communities, as well as to act as a think-tank regarding the further institutional reforms”⁵⁵.

2. 4. Proposals for Reform of the Composition and Structure of the House of Peoples

In comparing BiH upper parliamentary chamber to its Swiss and Belgian counterpart, it becomes apparent that the institutional design in BiH is inconsistent with a basic principles of representation of territorial/ethnic/linguistic constituent units. Thus, as an answer to the institutional

50) K. Trnka et al., *Decision-making process in the Parliamentary Assembly of Bosnia and Herzegovina: status, comparative solutions, proposals*, Konrad Adenauer Stiftung, Sarajevo 2009, 34.

51) J. Goossens/P. Cannoot, „Belgian Federalism after the Sixth State Reform“, *Perspectives on Federalism*, 7, 2/2015, 38.

52) J. Goossens/P. Cannoot, „Belgian Federalism after the Sixth State Reform“, *Perspectives on Federalism*, 7, 2/2015, 39.

53) *Ibid.*

54) J. Goossens/P. Cannoot, „Belgian Federalism after the Sixth State Reform“, *Perspectives on Federalism*, 7, 2/2015, 40.

55) *Ibid.*

challenge of reform of the BiH House of Peoples regarding disenfranchised members of minority groups, as well as the “constituent peoples” living in the “wrong” entity, our proposal is to look at the Belgian system where a combination of methods for election of senators is applied: indirect appointment and direct election (until recently also including the hereditary seats).

The Belgian Senate was originally composed of a certain number of hereditary senators who were entitled to vote, but not taken into account to establish a quorum. This monarchist legacy served as counterbalance and neutral factor to the often contradictory interests of two main communities (Flemish and French-speaking). The idea proposed here is to break the tension between the BiH “constituent peoples” in the House of Peoples via a similarly neutral conciliation factor. This could be the element of socio-economic bicameralism; i.e. professional groups which could represent society’s interests and be entitled to vote, while unrelated to reaching a quorum or to the procedure of protecting vital national interests. This way, representatives of the “others” could be eligible to stand for election to the House of Peoples⁵⁶.

In the Belgian Senate, the interests of different but often compatible groups being represented within the communities and regions overlap (e.g. French-speaking community and the Walloon region). Therefore, one set of representatives is elected jointly by these complementary representatives of regions and communities together (e.g. the Dutch electoral college and the Flemish parliament appoint a number of senators). In an attempt to translate this concept into BiH’s context, the proposal given here is that the Croat/Bosniac club of delegates from the FBiH House of Peoples, along with the Croat/Bosniac members of the RS National Assembly jointly elect additional Croat/Bosniac delegate(s) from the territory of RS to the state’s House of Peoples, and *vice versa*, i. e. Serb delegates in the RS National Assembly along with Serb delegates from the FBiH House of Peoples jointly elect additional delegate(s) of Serb nationality from the FBiH to the state’s House of Peoples. In this way, the interests of Croats/Bosniacs from the RS would be represented in the BiH House of Peoples, as well as the

56) Similar solution of the second parliamentary chamber’s composition in the comparative law is seen in the Slovenian parliament, where interests of six professional/social classes are represented: local government, employers, workers’ unions, non-commercial stakeholders, farmers-craftmen-traders and independent professionals.

interests of Serbs from the FBiH.

3. Law-making Procedures

3. 1. The BiH House of Peoples

Regarding procedures, the Constitution of BiH requires all legislation to receive the approval of both chambers. The House of Peoples therefore has an absolute legislative power and is effectively able to support or veto any proposed legislation. Having almost the same constitutional competences as the BiH House of Representatives, given that no law can be passed or changed without the approval of the simple majority of the both chambers and, additionally, a decision must be accepted by both chambers in the identical form, BiH's parliament is an example of almost perfectly symmetrical bicameralism⁵⁷. The parliamentary chambers also have the identical rights regarding the initiation of new legislation.

However, although both chambers do participate equally in the legislative process, the House of Peoples has an additional, exclusive competence via the procedure for protecting the vital national interests of the "constituent peoples", which is indeed its primary goal. According to a comparative study from 1997, this makes the House of Peoples and the US Senate the only upper houses in the world with greater competences than their respective lower houses⁵⁸. It is interesting in this context that BiH House of Peoples is even given primacy of order in the articles of the Constitution.

The Constitution provides that nine members of the House of Peoples comprise a quorum, provided that at least three Bosniac, three Croat, and three Serb delegates are present. This makes for another inconsistency in comparison with the classic bicameral arrangements given that a quorum in the lower house is established when a simple majority of representatives is present (twenty-two out of forty-two in total).

The Constitution introduces complicated and controversial provisions regarding legislative procedures which can be blocked by certain mecha-

57) N. Stojanović, „Consociation – Switzerland and Bosnia and Herzegovina“, *Pregled - Časopis za društvena pitanja*, 85, 3-4/2009, 75.

58) E. Hodžić/N. Stojanović, *New-old constitutional engineering? Challenges and implications of the judgment of the ECtHR in the case of Sejdić and Finci v. BiH*, *Analitika - Centar za društvena istraživanja*, Sarajevo 2011, 107.

nisms, resulting in one of the most complicated parliamentary processes in the world. It tries to secure a balanced representation of citizens' interests, the equality of entities, and the equal protection of the vital interests of the "constituent peoples"⁵⁹. By regulating parliamentary procedure in this way, numerous legislative initiatives failed due to obstructions, blockages and boycotts.

Decisions in the House of Peoples are regularly made by the qualified majority of votes by the delegates present. However, a further constitutional provision lays down an additional limitation, by introducing the requirement of the so-called entity vote. Moreover, a simple majority requirement is also limited by the mechanism of the protection of vital national interests. These two mechanisms are elaborated in more details under the following heading.

3. 1. 1. Entity Voting and the Vital National Interest Veto

Even though the entity voting requirement is in theory applicable in both parliamentary chambers, it is most often used in the lower chamber. However, the entity vote is still important in the procedure of the House of Peoples where it can also become a tool for protecting the interests of the "constituent peoples", even though it was originally intended to safeguard the interests of the entities.

The requirement of entity voting includes a three-step-procedure. In the first round of voting, both chambers seek to include in the majority a minimum of one-third of the votes of delegates from the territory of both entities. This provides an opportunity for delegates from one entity to block the legislative procedure in the first step of the process simply by not showing up to the session of the chamber. If the legislation is blocked in this first step, its second round involves a commission which tries to reach consensus.

If these efforts do not succeed, the third step presents another vote on the proposal, where a decision is allowed to be made by the majority of votes, but under one condition – that votes against the proposal do not include two-thirds (or more) of delegates elected from one entity. Here the entity veto to prevent the passing of legislation can be exercised by two-

59) K. Trnka *et al.*, *Decision-making process in the Parliamentary Assembly of Bosnia and Herzegovina: status, comparative solutions, proposals*, Konrad Adenauer Stiftung, Sarajevo 2009, 43.

thirds of the delegates from one entity.

In this third round of voting, emphasis is shifted from the percentage of votes from the entities in favour of the proposal towards the percentage of votes from the entities against the proposal. Counting positive votes for one decision instead of counting negative votes against that decision means that a lack of entity support for a certain proposal can prevent passing the law in the first round of voting. However, a lack of the same entity support does not have to prevent its passing into law if opponents do not secure two-thirds of the entity votes against the proposal⁶⁰.

The most important mechanism ensuring that no decisions are taken against the interest of any “constituent peoples” is the vital national interest veto. If the majority of Bosniac, Croat or Serb delegates in the House of Peoples declare that a proposed decision of the Parliamentary Assembly is endangering a vital interest of their people, the majority of Bosniac, Serb and Croat delegates would have to vote in favour of the decision for it to be adopted.

Every national club in the House of Peoples can declare a proposed decision to be endangering their vital national interest. The BiH Constitution does not define the notion of a vital national interest (unlike the entities’ constitutions which provide excessively broad definitions⁶¹), nor do the Rules of Procedure of both parliamentary chambers. When a vital national interest veto is invoked, a simple majority is no longer sufficient to pass a law; the decision can be approved only when it is voted in by the majority

60) Complete analysis of the entity voting mechanism in: C. Steiner *et al.*, *Constitution of Bosnia and Herzegovina – Commentary*, Konrad Adenauer Stiftung, Sarajevo 2010, 576-577.

61) Identical Amendments to the entities’ constitutions (XXXVII to the Constitution of the FBiH, LXXCII to the Constitution of the RS) defined vital national interests of the constituent peoples as follows: right of the constituent peoples to be adequately represented in the legislative, executive and judicial state institutions; identity of particular constituent people; constitutional amendments; organization of the public authority organs; equal right of the constituent peoples in the decision-making process; education, religion, language, culture, tradition and heritage; territorial organization; system of public informing; and other questions treated as vital to the national interest, if two-thirds of one of the delegations in the House of Peoples consider so. The BiH Constitutional court with its jurisprudence contributed to a precise definition of the vital national interest, analyzing it in the context of all constitutional values and former reasonings. However, because of the few number of cases, the question of interpretation is still left open. Further details on this issue in: K. Trnka *et al.*, *Decision-making process in the Parliamentary Assembly of Bosnia and Herzegovina: status, comparative solutions, proposals*, Konrad Adenauer Stiftung, Sarajevo 2009, 93-94.

of each group – Bosniac, Croat and Serb – of delegates who are present and voting⁶².

When one national club of delegates declares their vital national interest to be endangered, another national club may, with a majority of votes, submit an objection. In that case, a common commission is set up comprising three delegates (one from each national club) with the task to solve the problem and approximate interests⁶³. If the commission fails to reach an agreement, the case is submitted to the Constitutional Court of BiH which in urgent procedure questions procedural admissibility of the invoked vital national interest veto.

The Constitutional Court acts preventively as a mediator and controls the constitutionality of proposed acts in parliamentary procedures, with the task of assessing and eliminating the alleged destructivity of vital national interests⁶⁴. Following its decision, the law-making process should not be terminated, but unblocked. If the Constitutional court finds that a proposal is destructive of national interests, the House of Peoples can still approve the proposed decision if it can reach a majority of delegates of each of the three national clubs. This is another shortcoming of the BiH's constitutional system, given that the parliamentary chambers by qualified majority may agree on a law whose provision was previously declared in breach of the vital national interests, hence unconstitutional, by the Constitutional court. It also negatively affects the principles of separation of powers and institutional balance, diminishing the role of the Constitutional court as the guardian of the Constitution. However, if the House of Peoples cannot reach this majority, the proposal is unable to complete the parliamentary procedure. But if the Constitutional Court finds the proposal not to be destructive towards vital national interests, it can be adopted by the principle of a qualified majority, including the requirement of the entity vote⁶⁵.

In practice, the mechanism of vital national interest protection has rarely been exercised. On the contrary, the mechanism of entity voting has

62) C. Steiner *et al.*, *Constitution of Bosnia and Herzegovina – Commentary*, Konrad Adenauer Stiftung, Sarajevo 2010, 577.

63) *Ibid.*, 578.

64) Similarly to the role of the French Constitutional council/*Conseil Constitutionnel*, which has the same competence, i. e. preventive jurisdiction in an urgent procedure.

65) K. Trnka *et al.*, *Decision-making process in the Parliamentary Assembly of Bosnia and Herzegovina: status, comparative solutions, proposals*, Konrad Adenauer Stiftung, Sarajevo 2009, 45.

been used very often. It follows that entity voting serves as a substitute for the mechanism of protecting a group’s vital national interests.

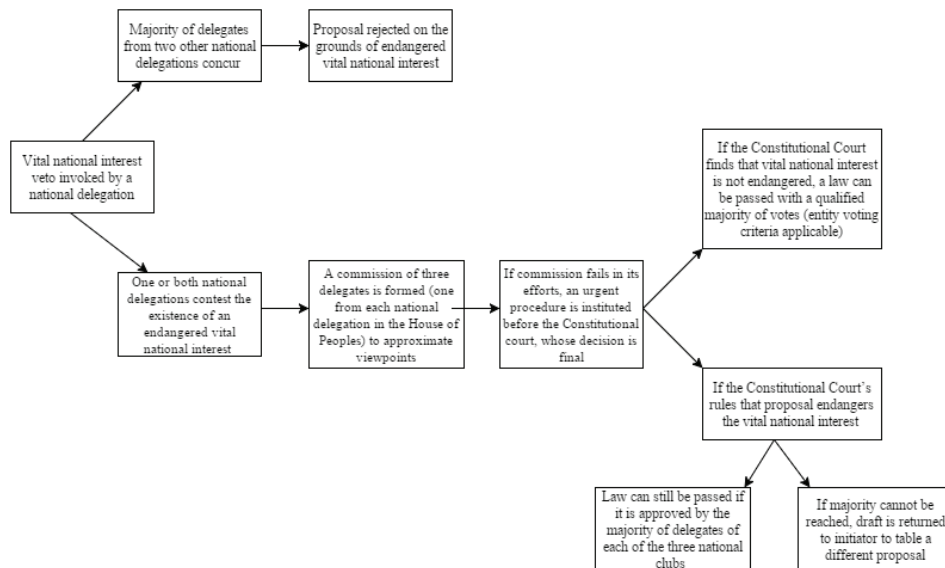


Diagram 1. Vital national interest procedure

3. 2. The Swiss Council of States

The law-making procedure in the Swiss parliament reflects the principle of an absolute equality of the two chambers in all matters of legislation, where the agreement of both chambers is required – a so-called cooperative federalism⁶⁶. This implies that the Council of States enjoys the right of an absolute veto with regards to any legislative proposal. Both chambers may also initiate constitutional amendments, new bills and regulations, as well as propose the revision of existing laws and regulations. All bills must be passed by the committees and floors of both chambers, with a common bureau deciding which chamber should consider the bill first. Every proposal or bill destined to become federal law has to be approved by a relative majority in both chambers⁶⁷. The equality of the two chambers is lost at joint sessions of two chambers, since the National Council has several times

66) *Ibid.*, 19.

67) W. Linder, *Swiss Democracy – Possible solutions to conflict in multicultural societies*, Palgrave/Macmillan 2010, 51.

more members than the Council of States⁶⁸.

The Council of State has a quorum if a majority of its members is present and decisions are taken by the majority of those who vote. However, the consent of an absolute majority of the members of each of the two Councils is required for: a declaration that a federal act is urgent; provisions on subsidies, guarantee credits or spending ceilings under certain conditions; and an increase in overall expenditure in the case of extraordinary financial requirements⁶⁹.

In the event of a disagreement between the councils, a joint parliamentary committee is established to negotiate and resolve the inter-cameral dispute and try to reach a compromise. This committee is convened automatically, and the subsequent procedure on the discussion of a committee's decision requires the equal approval by both chambers⁷⁰. If the conflict nevertheless remains, the proposal must be discussed in the both councils until they agree on a final version or until it becomes apparent that the councils cannot agree⁷¹.

3. 3. *The Belgian Senate*

The Belgian Constitution provides each branch of the federal legislative power the right to propose legislation. However, the Senate does not enjoy veto power on just any question, and it is subordinate to the lower chamber; it can only amend proposed bills, but cannot reject them.

When a draft bill is sent to the Senate from the House of Representatives, the Senate may, within no more than sixty days, decide not to amend the draft bill or may adopt the bill after having amended it. If the Senate does not pronounce on the bill within the time allotted or if the Senate has informed the House of Representatives of its decision not to amend, the bill is sent by the House of Representatives to the King, who promulgates

68) *Federal Constitution of the Swiss Confederation* 1999, Article 157. Joint proceedings are held in order to: conduct elections; decide on the conflicts of jurisdiction between the highest federal authorities; decide on applications for pardons, for special events and to hear declarations made by the Federal Council.

69) *Federal Constitution of the Swiss Confederation* 1999, Article 159.

70) M. Russell, „Elected Second Chambers and Their Powers: An International Survey“, *The Political Quarterly*, 83, 1/2012, 126.

71) K. Trnka et al., *Decision-making process in the Parliamentary Assembly of Bosnia and Herzegovina: status, comparative solutions, proposals*, Konrad Adenauer Stiftung, Sarajevo 2009, 31.

bills. If the Senate amends the bill, it proceeds to the House of Representatives, which makes a final decision by either adopting or rejecting all or some of the amendments adopted by the Senate⁷². All resolutions are passed by an absolute majority of the votes cast, and if the vote is tied, the proposal submitted for discussion is rejected. Neither of the two houses can pass a resolution unless a majority of its members is present⁷³.

The Constitution in addition envisages a special legislative procedure – the “alarm bell” procedure⁷⁴ – whose initial goal was to protect the minority French-speaking representatives in the parliament. Except for budgets and laws requiring a special majority, a motion signed by at least three-quarters of the members of one of the linguistic groups and tabled prior to the final vote can halt the parliamentary procedure, declaring that the provisions of the bill could gravely damage relations between the communities. At this point, the proposal is sent to the Council of Ministers who makes recommendations to the house where the proposal originated. Representatives of one linguistic group can initiate this procedure only once with regards to the same law or proposal.

A special qualified majority is necessary for the changes or corrections of the territorial boundaries of four linguistic regions, and this requires majority of the votes cast in each linguistic group in each house, on condition that a majority of the members of each group is present and provided that the total number of votes in favour cast in the Dutch and French linguistic groups is equal to at least two thirds of the votes cast⁷⁵.

A parliamentary consultation committee composed equally of members of the House of Representatives and the Senate settles conflicts of competence that may arise between the two chambers. If no majority exists in the two groups composing the committee, the House of Representatives can impose its decision by a majority of two-thirds of its members.

3. 4. Proposals for Reform of the Law-making Procedure of the House of Peoples

A comparative analysis of the law-making procedure in these three se-

72) *Constitution of the Kingdom of Belgium* 2014, Article 78.

73) *Constitution of the Kingdom of Belgium* 2014, Article 53.

74) *Constitution of the Kingdom of Belgium* 2014, Article 54.

75) *Constitution of the Kingdom of Belgium* 2014, Article 4.

cond chambers shows that:

The procedure in the BiH House of Peoples is by far the most complicated among these three examples. Every proposal requires an approval by the House of Peoples; provisions on reaching a quorum in the House of Peoples are inconsistent with those for lower chamber, and are also harder to accomplish (a minimum of nine delegates with a minimum three from each “constituent people”); high threshold is required to pass a decision – the entity vote requirement and the mechanism of the protection of vital national interests are in practice often insurmountable obstacles to the successful realization of the parliamentary procedure.

While the Swiss Council of States has an absolute power to veto any proposal from its lower chamber, the procedure is more concentrated on the joint conciliation committee which is established to resolve conflict between chambers, and is one of the classical features of bicameralism. Provisions on reaching a quorum are standard (a majority of members), as are the criteria for adopting decisions (a relative majority of present members). Specificities of the procedure entail the existence of the joint sessions of both chambers – where the balance is lost and the Council of States has a weaker position – and for important decisions where an absolute majority of all members is required to reach a decision.

In the end, the Belgian Senate has the weakest position in relation to its lower chamber and does not have the right to reject proposals sent from the House of Representatives. It can only make amendments which are again subjected to the revision of the lower chamber, thus the lower chamber has the final decision and can override the Senate’s objections. Therefore, the Senate can only delay the process, which in the law-making procedure signifies postponing the passing of a bill for up to sixty days (otherwise known as a “suspension veto”). Provisions for reaching a quorum, similar to the Swiss system, are classic (requirement of a majority of members), as well as on the decision-making (an absolute majority of senators present). The Senate does enjoy a special mechanism for protecting the interests of communities and regions (the “alarm bell” procedure and the special qualified majority), but has no veto power to contest proposals of the lower chamber.

These comparisons show that the legislative procedure in the BiH Hou-

se of Peoples needs to be improved in order to make the legislature faster, simpler, and more efficient, and to minimize the effects of the mechanisms which lead to deadlocks. Proposals leading to such result would be to:

- a) Eliminate the provisions on the entity voting.

The composition of the House of Peoples may partially and formally reflect the interests of the entities, but in reality its main function is to represent – inconsistently, but exclusively – the interests of the “constituent peoples”. Therefore, there is no need to complicate the law-making procedure with the entity voting requirement when the interests of the “constituent peoples” can be protected by the mechanism of the vital national interest veto. A similar recommendation was made by the Venice Commission’s in its Opinion⁷⁶ which regards entity voting as redundant. The elimination of entity voting would also be in line with requirements of the Council of Europe, whose Resolution 1513 (2006) required BiH’s politicians to ensure that a first step in future constitutional reform would be “at least [the] removal of the entity voting”⁷⁷. A further argument in favour of this proposal could be found in statistics gathered from the first eleven years of practice of the Parliamentary Assembly. A study showed a disproportion of a lack of entity support as compared with using the mechanism of the protection of vital national interests⁷⁸. 156 laws failed to garner entity support, while only in four cases was the mechanism of the protection of vital national interests invoked. Indicative is the fact that delegates from the RS have blocked the legislation process by entity voting in 136 cases, while not once vetoing due to the alleged infringement of a vital national interest. This shows that entity voting has become tool for protection of the interests of Serbs which almost always equals the interests of the RS. Research has shown that entity voting follows a pattern of national voting and has basically become a secondary mechanism for Serb delegates to protect their vital national interests. It is also obvious that entity voting, in practice being applied as an absolute veto, has completely substituted

76) Venice Commission, *The Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative* (document CDL-AD (2005) 004 of 11 March 2005), §35.

77) Parliamentary Assembly of the Council of Europe, *Resolution no. 1513*, 29 June 2006, §18.

78) K. Trnka *et al.*, *Decision-making process in the Parliamentary Assembly of Bosnia and Herzegovina: status, comparative solutions, proposals*, Konrad Adenauer Stiftung, Sarajevo 2009, 100-101.

the mechanism of the protection of vital national interests, which in comparison does not stop the parliamentary procedure, but rather involves the Constitutional Court as a mediating actor.

b) Introduce more radical mechanisms of inter-cameral dispute resolution.

Even though the BiH parliamentary system has certain stages of the law-making process which involve the formation of the mediation committee in the House of Peoples (or situations where a joint board from both chambers is convened to try to unblock the legislative process), efficient mechanisms of inter-cameral dispute resolution are lacking. Other mechanisms than joint parliamentary committees exist, such as: the power to delay passage of a bill, joint sittings of the two chambers, a minimum period of delay which the second chamber may impose to disrupt legislation, a “super majority” of first chamber members to vote down second chamber objections, etc.⁷⁹ Given that even the simplest questions get stuck in the parliamentary procedure in BiH, a proposal from comparative law research is to introduce arrangements as seen in e.g. Australia, where the ultimate resolution of disputes requires an extraordinary “double dissolution” of both chambers of parliament, followed by fresh elections in both⁸⁰. This would positively influence three elements of the parliamentary system in BiH, namely: the incentive within the chambers to collaborate, a higher accountability of political elites, and more direct inclusion of citizens in the decision-making process through more frequent elections.

CONCLUSIONS

After analysing and comparing the three examples of second parliamentary chambers in this paper, concrete ideas for the constitutional reform of the BiH House of Peoples have been presented as follows:

1) Inclusion of elements of the socio-economic bicameralism in the composition of the House of Peoples, through the representatives of certain professional/social groups, with an aim to reduce tension between the “constituent peoples” and serve as a neutral conciliation factor, and in turn include representatives of the “others” in the structure of the second cham-

79) M. Russell, „Elected Second Chambers and Their Powers: An International Survey“, *The Political Quarterly*, 83, 1/2012, 124-125.

80) *Ibid.*

ber, hence eliminating discriminatory provisions.

2) Expanding the representation of “constituent peoples” to the members of those groups living in the “wrong” entity, by introducing new electorates, i.e. mixed national electoral colleges made up of representatives from both entities, which would result in the consistent representation of the interests of the “constituent peoples” from the entire territory of BiH within the House of Peoples.

3) Elimination of the provisions on entity voting, due to the redundancy of this mechanism, in order to facilitate the legislative process and eliminate opportunities for obstruction and blockage.

4) Establishment of a new mechanism of inter-cameral dispute resolution, with the ultimate consequence of an extraordinary “double dissolution” of both chambers, in order to raise the accountability of political elites and improve the efficiency of parliamentary practice.

This analysis also reveals the nature of BiH’s bicameralism. In Switzerland there is a classic federal bicameralism, where upper chamber represents the main constituent units of the state – the cantons. Belgian bicameralism introduced some novelties to the standard model of bicameralism in federal states via a mixture of territorial and cultural/linguistic elements, previously also with monarchist elements stemming from its constitutional legacy. In BiH’s model of bicameralism, even though formally (and only partially) involving territorial elements, it is obvious that it substantially and, through its procedural arrangements, exclusively represents its “constituent peoples”, thus contributing to the idea and practice of federalism by introducing almost completely extraterritorial ethno-national bicameralism.

In BiH’s federal structure, special interests of collectives (constituent nations) have been overemphasized and overrepresented at the expense of common and general public interests. Strong centrifugal efforts complicate consensus of different preferences and decision-making in the interest of all citizens of BiH⁸¹. Although Lijphart’s theory claims that the only hope for deeply divided societies is the consociational model of democracy, based on the failure of power-sharing institutions in BiH, including the

81) K. Trnka *et al.*, *Decision-making process in the Parliamentary Assembly of Bosnia and Herzegovina: status, comparative solutions, proposals*, Konrad Adenauer Stiftung, Sarajevo 2009, 40.

House of Peoples, it is hard to argue that the present problems could be solved by introducing a higher level of consociationalism⁸².

A model of the forthcoming constitutional reform should therefore seek to introduce elements of classical federal bicameralism (the principle of representation of territories) into the institutional arrangement of the House of Peoples in place of ethno-national ones (i.e. the representation of ethno-cultural identities). It is widely recognized that “territorial federalism has many variations and possible options of implementation, while ethnical federalism, according to the modern political science and international human rights law, is necessarily and almost always exclusive and discriminatory”⁸³. Therefore, constitutional reform will hopefully be based on such principles which support and promote citizenship and social cohesion, encourage political participation and representation, facilitate consensus-building and consolidation among the people of BiH and assist in breaking down ethnic divisions⁸⁴.

In the end, after a thorough analysis of BiH’s bicameralism, we recall the justification and purpose of the second chamber in BiH’s parliamentary system. In the nineteenth century, the English constitutionalist Walter Bagehot, when asked how bicameralism works in law-making, noted that “hot tea, poured from a first cup into a second, can be drunk cooler”⁸⁵. Modern political science literature comes to the same conclusion: bicameralism produces decisions closer to the *status quo*⁸⁶. Bearing in mind the effectiveness of the BiH bicameral parliament, the question is whether this model is trapped within the omnipresent *status quo* of the BiH’s political reality. Furthermore, the dilemma of modern parliamentarianism points out that the second parliamentary chamber is unnecessary where it matches the national/citizens’ representation – in other words, if the principles

82) N. Stojanović, „Consociation – Switzerland and Bosnia and Herzegovina“, *Pregled - Časopis za društvena pitanja*, 85, 3-4/2009, 84.

83) E. Hodžić/N. Stojanović, *New-old constitutional engineering? Challenges and implications of the judgment of the ECtHR in the case of Sejdić and Finci v. BiH*, Analitika - Centar za društvena istraživanja, Sarajevo 2011, 119.

84) L. Claridge, „Discrimination and political participation in Bosnia and Herzegovina: Sejdić and Finci v. Bosnia and Herzegovina“, *Minority Rights Group International* 2010, 5.

85) W. Linder, *Swiss Democracy – Possible solutions to conflict in multicultural societies*, Palgrave/Macmillan 2010, 52.

86) *Ibid.*

of representation in the lower and upper chambers are equal, the second one is redundant⁸⁷. The party structure of the House of Peoples in BiH is indeed identical to the composition of the strongest political parties in the lower chamber. Hence, it produces very rare situations of inter-cameral disputes. The main function of the House of Peoples is thus a negative one, as the chamber where the vital interest veto is exercised, and where members see as their task exclusively to defend the interests of their people without consideration for the success of the legislative process. On the contrary, in the lower house all legislative work is done and necessary compromises made. Based on these observations, an ultimate institutional recommendation and proposal for reform would therefore be to:

1) Move from the model of bicameralism with two equal chambers to a new system with a House of Peoples convened only *ad hoc* (so-called incomplete bicameralism) for the situations where the protection of vital national interests is invoked, and composed of representatives from the lower chamber. It would therefore no longer be a full legislative chamber, but rather a corrective mechanism with limited powers to deal mainly with the vital national interest veto.

This partially follows the recommendations of the Venice Commission's in its Opinion⁸⁸ and would streamline law-making procedures, facilitate the adoption of legislation without endangering the legitimate interests of any "constituent peoples", and at the same time solve the problem of the discriminatory composition of the House of Peoples. Similar problem was addressed by the Belgian institutional reform in 2014 as presented above, in which the powers of the Senate were additionally decreased. Belgian political elites at present struggle in arriving at a clear vision regarding the future, and the appropriate role, of the Senate⁸⁹. Many leading political parties advocated a complete abolition of the institution and thus were in favour of the end of bicameralism⁹⁰, where similarly to our proposal the

87) M. Kasapović, „Elections to the Cantonal house of the Parliament“, *Politička misao*, 34, 2/1997, 95.

88) Venice Commission, *The Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative* (document CDL-AD (2005) 004 of 11 March 2005), §35-36.

89) J. Goossens/P. Cannoot, „Belgian Federalism after the Sixth State Reform“, *Perspectives on Federalism*, 7, 2/2015, 40.

90) *Ibid.*

Senate's role would be delegated over to a special institutional committee within the Chamber of Representatives. Moreover, this solution is warranted given that the interests of the communities and regions are already protected by several other instruments⁹¹. In sum, if both institutions – BiH House of Peoples and Belgian Senate – seek to uphold their *raison d'être*, they should eventually either (a) be reformed and adjusted to the role of “consultation platforms of institutional communication”⁹² between their constituent units over sensitive topics (in BiH – issues of vital national interest), and provide an institutional forum for reflections on possible future steps in the evolution of two (con)federations, or (b) be completely abolished, with their functions integrated within the respective lower chambers along the lines of the proposal offered in this paper.

91) Those being: the presence of language groups in the Chamber of Representatives, the language parity of the federal government, and suspension mechanisms such as: the alarm bell procedure and the procedure for conflicts of interest. See complete analysis of the Belgian Senate's reform in: J. Goossens/P. Cannoet, „Belgian Federalism after the Sixth State Reform“, *Perspectives on Federalism*, 7, 2/2015.

92) J. Goossens/P. Cannoet, „Belgian Federalism after the Sixth State Reform“, *Perspectives on Federalism*, 7, 2/2015, 51.

ETNO-NACIONALNI BIKAMERALIZAM - DOM (DISKRIMINACIJE) NARODA PARLAMENTARNE SKUPŠTINE: USPOREDNA ANALIZA GORNJIH DOMOVA ŠVICARSKOG, BELGIJSKOG I BOSANSKO-HERCEGOVAČKOG DRŽAVNOG PARLAMENTA

SAŽETAK

Reforma Doma naroda Parlamentarne skupštine Bosne i Hercegovine je neophodna kako bi se izmijenile diskriminatorne ustavne odredbe o sastavu ove institucije. U ovom radu se uspoređuje Dom naroda sa institucionalnim uređenjem gornjih domova državnih parlamenata Švicarske i Belgije. Navedene federalne države su na različite načine osigurale zastupljenost konstitutivnih jedinica u gornjim domovima državnih parlamenata, pružajući različite empirijske modele i iskustva za proučavanje u okviru teorije bikameralizma. U zaključcima rada se na osnovu usporedne analize prezentiraju dodatne ideje primjenjive za dugoočekivanu reformu gornjeg doma zakonodavnog tijela Bosne i Hercegovine.

Ključne riječi: multietničke federacije, bikameralizam, gornji domovi parlamenta, Dom naroda, ustavna reforma.

1) The members of BiH's second chamber could be classified as "appointed"; however, the authors of the survey in question classify them instead to be "indirectly elected", given that members are chosen by sub-national legislatures. This presents something of a borderline case between election and appointment, but is classified here as "indirect election". More in: M. Russell, „Elected Second Chambers and Their Powers: An International Survey“, *The Political Quarterly*, 83, 1/2012.

2) Before the latest state and institutional reform in 2014.