

Key Shortcomings of the Constitutional-Political System Perpetuate the Disorganization of the State-Entities

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Abstract: In 1995, Croats, Bosniaks, and Serbs stopped their war, under international coercion, in the preamble, and negotiated a provision according to which they, as constituent peoples, negotiated the Constitution of BiH. This provision represents a principle of constitutiveness of the Constitution and all other constitutional principles are its derivatives, i.e. without it (consent of the Constitution-makers) there would be no Constitution and then without its normative concretization into a case study there is no viable or maintained state. Since this agreement was created under coercion, then the (constitutive principle) the Constitution or BiH as a complex state is of an artificial character, which results in constant instability caused by conflicts over the status of constituent peoples. The status of constituent peoples is not ensured by equal rights of the two entities or equal influence in joint institutions. While one people has the right to adopt a constitution as an act exercising the right to self-organize its own entity, the other two peoples do not have that right. The asymmetric character, powers and functions of the House of Peoples in the two entities, and then inconsistent election rules and their interpretation, violation of suffrage, circumvention of the principle of parity and influence of the constituent people in the House of Peoples and in the institution of the collective Head of State, undermine the federal and constitutive principle of state - entity organization.

Keywords: De Facto Civil State, Principle of Constitutiveness of Constitution, Collective Political Rights, Suffrage, Political Rights, Nationally Organized Citizens, Subjective Political Rights of Citizens, Constituent Peoples

1. Introduction

In 1995, Croats, Bosniaks and Serbs ended the war in Bosnia and Herzegovina (BiH) under international coercion, and in the preamble of the constitution they determined the change of their mutual war relationship into a constitutional relationship, by an agreement that reads: “*Recalling the Basic Principles agreed in Geneva on 8 September 1995 and in New York on 26 September 1995, Bosniaks, Croats and Serbs, as constituent peoples (along with Others), and citizens of BiH hereby determine the Constitution of BiH:*”¹ This clause represents the cessation of the war relationship and then the emergence of a new constitutional relationship by unanimous manifestation of the will of the representatives of the constituent peoples, the signing of the constitution. In addition,

it represents a principle of constitutiveness of the Constitution (three constituent peoples), while all other principles represent (fundamental) constitutional principles. This means that any normative concretization [19] of any other constitutional principle in a *case study* must be done through the prism of the principle of constitutiveness, e.g. announcing the results of the General Elections.

Problem of the paper: Application of the results² of the General Elections held in BiH on 7 October 2018.³ Elections

1 Constitution of BiH (Translation confirmed by – Office of the High Representative).

2 Decision on confirming the results of the 2018 General Elections in BiH. www.izbori.ba/ of 6 November 2018. “Article 2.(1) An integral part of this decision is the Report on the results of voting for each election level referred to in Article 1, paragraph 1, items a), b), c), and f) with the assigned mandates and names of candidates within political entities.”

3 The number of 3,352,933 citizens is registered in the voter list: 2,092,336 in the FBiH and 1,260,597 in the RS [citizens living in the BD BiH vote in one of the entities]. 77,814 persons were registered to vote outside BiH, of which 76,729 were registered to vote by mail, and 1,085 were registered to vote in diplomatic missions.

were held for: Presidency of BiH, House of Representatives of the Parliamentary Assembly of BiH (HoR of PA of BiH), House of Representatives of the Parliament of the Federation of BiH (HoR of PA of FBiH), President and Vice Presidents of Republika Srpska (RS), National Assembly of RS (NA of RS) and cantonal assemblies in FBiH. A total of 518 mandate holders were elected in the elections, as follows: Presidency: 3, HoR of PA of BiH: 42 of which 28 from FBiH (21 direct and 7 compensatory mandates).

In fact, the problem with the results of the General Elections is the Decision on determining and publishing the final results of the General Elections, which has not been fully implemented. The appointment of the (Deputy) President of the FBiH and the Government of the FBiH has been blocked, as has the appointment of judges to the Constitutional Court of the FBiH, and the Government of the Herzegovina-Neretva Canton (HNC) has not been appointed either, that is, the Assembly of the HNC is not working even though it has been constituted, the work of the PA and the Council of Ministers of BiH (CoM) is occasionally blocked. It is all the more problematic that constitutions do not know legal mechanisms of unblocking, so the search for out-of-legal means of getting out of the blockade remains available. These are political agreements between the ruling parties, which, as a rule, do not end in a political compromise, but in a political strengthening of the imposed blockade, due to latent separatist and unitarian goals. Elaborating variants of this problem are presented in the (sub)headings of the paper.

The main hypothesis of the paper is: the status (rights and duties) of a constituent people does not exist only because it is determined by a provision of the constitution or by the fact that the constituent people is represented in the institutions of the constituent unit / state and by the fact that influence over decisions is guaranteed to such a constituent people, or by the fact that such a constituent people is authorized to participate directly in the performance of particularly important functions. The status of a constituent people exists if these and other fundamental constitutional principles and institutes are harmonized with the principle of constitutiveness of the constitution, as effective mechanisms for equalizing the equal exercise of citizens' political rights.

The first working hypothesis is: Violation of constitutive status by restricting the right to use the official language and violating passive suffrage (passive voting right). The results for the Presidency are disputed, as not every citizen could run for office, or for a member of the Presidency from the RS entity constituency or for 2 members of the Presidency from the Federation constituency, which violated the passive voting rights of citizens.

The second working hypothesis is: The election of the Croatian member of the Presidency is disputed because (he/she) they were not elected on the basis of the results of the voting of the citizens of the Croatian constituent people. These citizens have exhausted their active suffrage by voting, because their total number of votes is not the result of the people's will to elect the candidate on the list of Croats for a member of the Presidency;

The third working hypothesis is: The election of delegates to the HoP of FBiH from individual cantonal assemblies was challenged because the election rules provide for a guaranteed one seat in the HoP for each of the three constituent peoples in 10 cantons, regardless of the fact that in certain cantonal assemblies not a single representative from one of the three constituent peoples was elected in the general elections to the cantonal assembly. The election of 7 delegates of the "Others" as an instrument of decomposition of the composition of the Federal House and annulment of its role (powers and functions) was also disputed, that is, a mechanism has been established for excluding delegates of the constituent people from the HoP decision-making process, given the fact that there are enough other delegates for a quorum and the required majority of decision-making.

The fourth working hypothesis is: The powers and functions of federal houses and constituent peoples / units are asymmetric, which causes the collapse of the federal principle of organization of the state - entities.

The aim of this paper is to develop scientific expertise as *support* to constitution-makers in order to resolve disputes in the process of normative concretization of the principle of constitutiveness on amendments to the constitution and electoral legislation, that is, challenging scientific research with articulated structural problems whose solution requires questioning the reception of authentic federal solutions in the process of fundamental revision of the constitution and doctrines on the incompatibility of individual and collective concept of human rights protection.

2. Artificial Character of Complex State

Not only is the name "BiH" compound or composed of the names of two geographical regions ("Bosnia" - "Herzegovina"), but Bosniaks, Croats, and Serbs, although under international coercion, agreed to organize themselves in 2 entities, 10 cantons and the BD BiH. Given that BiH was formed under coercion⁴, its nature is artificial - *ubi vis imperat, non prodest ratio*.

It is necessary to transform the artificial character into the natural one, because the functions of a complex state, by the nature of things, are reduced to the common interests of the constituent peoples, which they pursue through the federation. Without articulating a common interest, no *ad hoc* amendments to the text of the constitution will help maintain a complex state. Moreover, politics and ideology and even the instant science of BiH multiculturalism instead of proclaiming the objective existence of various collective human rights / interests and their realization, it suppresses them with political phrases about a conflict-free multiethnic and cultural society with three monotheistic religions. Instead of phrases, it is necessary to balance the criteria that produce the artificial character of a complex state.

The permanent population of BiH is composed of three

4 Article II of Annex 10 of the Dayton Peace Agreement directs the High Representative to monitor the implementation of the peace settlement.

peoples. The most numerous people is 2/3 more numerous than the least numerous people or 1/3 more numerous than the second numerous people. The second most numerous people is half as numerous as the least numerous people. This imbalance can be assessed, without any doubt, as a geometrically progressive imbalance, because the relations between the three peoples are expressed by geometric progression. In terms of the postulate *ius naturale*, this means that the people that is twice as numerous or the people with higher number of population is in a position of quantitative dominance, which is a natural *causa* of latent articulation of the requirements for the establishment of institutional dominant influence.

The status of quantitative domination always leads to a dominant institutional influence, even with the fact that the classical federal principles of organizing joint institutions are widely accepted. In fact, even if the federal principle of organizing entity parliaments is consistently derived, it is theoretically almost impossible to limit the people in a position of quantitative domination through the institutional principle of parity, in processes leading to the establishment of dominant political, military or economic power. Simply put, higher number of people is appropriating or possessing more power. For example, military power first depends on the number of soldiers, so who could recruit the largest number of soldiers other than the people in a position of quantitative dominance. Therefore, the actions or deeds of the subjects in the position of quantitative domination for the realization of institutional domination are irrational.

All the more problematic, in the entity of the Federation and in 51% of the territory two peoples were organized in 10 cantons, while the Entity of RS was organized in 48% of BiH territory for the Serb people. The existence of an institutional fact for entity domination is obvious, with the dominant application of the principle of entity representation and decision-making in the institutions of the Entity of RS and joint institutions. Such an odd (asymmetric) position of the entities is a distortion of the principle of parity, in classical federations, especially in terms of institutionalizing the right to adopt a constitution [16] as the right to self-organization of their own entity. In the other two peoples, this deduced/derived right is limited by the exercise of the right to enact the constitution of FBiH as the exercise of a common right to organize an entity, instead of two entities.

The entity dominance has such a degree of independence that the constitutional provision (Article 1/3 of the Constitution) under which: "BiH shall consist of the two Entities, the FBiH and the RS" is mostly shown as a form without content. The entity veto on the work of joint BiH institutions which might be imposed by the Entity of RS would lead to blockade of constitutional system of BiH. It is about an absolute veto, or constitutions do not know the legal mechanisms of unblocking (implementation of the specific provision), so out-of-legal means of overcoming the entity blockade remain available. These are political agreements between the parties in power, which usually end in failure or political strengthening of the imposed blockade, due to hidden

separatist and unitarian goals. There is not even a real military force as an intervention threat in case of menace to the principle of constitutiveness of the constitution, with the exception of the international coercion mechanism.⁵ Truth be told, the violation of this principle may be committed by the people in a position of quantitative domination, while the constituent people who do not have a dominant influence have the instrument of blockade, but in most cases, only in the process of constituting state bodies. The instrument of blockade without the envisaged legal mechanism of unblocking represents the movement of federalism towards confederalism, which is retrograde for the survival of the state.

In complex states, the presented imbalance is resolved by applying the principle of federalism, which means the consistent application of parity representation of the constituent peoples in the federal house, without amending/supplementing this principle of federalism with anti-federal principles (proportionality and guaranteed mandates), which will ostensibly eliminate immanent shortcomings and will in fact neutralize the purpose of the parity principle. The application of the parity principle in the constitution of federal houses of bicameral parliaments is a price that must be paid in the name and for the account of one principle of higher constitutional order – the principle of equality of constituent peoples / units.

2.1. Common Interest

BiH should have been organized in the common interest of all the three constituent peoples, and not under coercion, in order to have a natural character, the *per se* stability. When established as a state, it must exist and operate, not only in the common but also in the general interest of a single state, as a whole. This should be ensured by the mechanisms of holism, indisputably, but in practice the state acts predominantly in the special interest of individual constituent peoples (oligarchy) or in the common interest based on the saying "*do ut des*." It is about a mathematical summation of special interests (of political elites) based on a temporary compromise "favour for a favour", and further on presented as a common interest of the three constituent peoples.

When it comes to the relationship of the constituent peoples in the FBiH, the constitution does not recognize the phrase "common interest", let alone list their forms, which is typical for federations. This also applies to the general interest, although many inadmissibly treat it as a synonym for the phrase "common interest". At the same time, they forget that the general interest is not agreed upon, but is implied in the federal principle determined in the constitutions of the constituent units, but first in the constitution of the state. The consequence is that, even titled as "joint institutions", they are

⁵ The international coercive mechanism is ensured by agreeing upon Article 2 of the General Framework Peace Agreement for BiH, which reads: "*The Parties welcome and endorse the arrangements that have been made concerning the military aspects of the peace settlement and aspects of regional stabilization, as set forth in the Agreements at Annex 1-A and Annex 1-B. The Parties shall fully respect and promote fulfillment of the commitments made in Annex 1-A, and shall comply fully with their commitments as set forth in Annex 1-B*".

not actual state bodies, but basically gatherings of representatives of constituent units or, what is even more retrograde, both representatives, constituent peoples and "Others". In principle, state bodies are a community of entities rather than a single community of institutions. It is necessary to reaffirm the categories of common and general interests in the constitutional text in appropriate places.

However, articulating and then defining a common interest is a special problem (and necessity) because there are three different ethnocultural and religious identities, two of which are divided nations, or where one nation is crossed by the border of two states and parts of that nation are reorganized with a third people in the FBiH.⁶ This means not only that it is very difficult to agree on a common interest on this premise, but it cannot even be articulated as a necessity in terms of the multinational composition of the country. Comparatively, although the reasons for the formation of federations are very different, among all of them, one dominates, and that is the multinational composition of the country. However, the realization of this reason in the form of BiH federation as one of the forms of state organization was annulled by the practice of mutual war relations between the three peoples (1992-1996). This would mean that there is no actual common interest in the emergence of a federal form of government.

The common interest, not only is it not determined, it is neither defined as an interest in which all peoples would express an objectively different interest (national, economic and protection of the right to language, i.e. the corpus of human rights and fundamental freedoms). The common interest is not even clearly indicated as common functions, but common functions are randomly standardized, let alone specified through the distribution of competencies between the federation and the constituent units as a reconciliation of special and common and general interests. The objection to this statement is that these interests are, in fact, the consent to the expression of the will of the representatives of the constituent peoples, by signing the constitution which established precisely these interests and only in this way can they be changed. However, this objection is flat because the constitution was signed according to an atypical, contractual constitutional procedure, and under coercion. All the more so, it can be said that the common interest was expressed in the question posed in the referendum held on February 29 and March 1, 1992: "*Are you in favor of a sovereign and independent Bosnia-Herzegovina, a state of equal citizens and nations of Muslims, Serbs, Croats and others who live in it.*" Out of the total number or 64.31% of citizens, the number of 99.44% voted for the referendum question. However, this objection is not completely grounded either, because mostly members of the Serbian people boycotted the referendum, and in the end, this question expresses a general, and then a common interest.

If there is no common interest of different identities as an

instrument of reaffirmation and reorganization of divided ethnopolitical identities, then such a complex state is artificial and will disintegrate very quickly. In other words, when duress/coercion disappears (military, financial, political - OHR, etc.), the state is automatically unstable. E.g. the disintegration of the federal system of ex-Yugoslavia, which Constitution of 1974 did not stand the test of reality" [9]. Then the disintegration of the Kingdom of Serbs, Croats and Slovenes in 1918 due to attempts to introduce a unitary system. Although the shortcomings of this system began to be corrected in 1939, with the introduction of an asymmetric state system, i.e. the establishment of the Banate of Croatia, the Kingdom of Yugoslavia collapsed in the war of 1941, as did USSR, Czechoslovakia, Serbia and Montenegro, Serbia and Kosovo, etc.

2.2. *Constituent Peoples (Along with Others) and Citizens Did Not Agree on Constitution*

The syntax of the provision from the preamble of the constitution "*constituent peoples (along with others), and the citizens of BiH have established the Constitution of BiH*" does not correspond to the semantics of the term. The syntax of this provision consists of two expressions and its semantics express one meaning or semantic unit. Therefore, the phrase "*along with others*" should be removed from this provision. In fact, in this provision, Croats, Bosniaks and Serbs, as constituent peoples and citizens, negotiated the constitution and did not establish it. The phrase "*along with others*" is a mere phrase, because the adjective "*constituent*" with the noun "*peoples*" explicitly identifies Croats, Bosniaks, and Serbs as constituent peoples and citizens as negotiators/contractors of the constitution. The phrase "*along with others*" is a slogan because *others* were not, nor are they now, the signatory party to the constitution.⁷

The term "along with others" is indefinite. This means that this term is unknown or it does not identify anyone or implies citizens who do not declare themselves as members of the constituent peoples. One can only assume that this is about members of national minorities, and then again, the question arises, why it was not written. The answer is given by the current practice. According to the results of the census of population and households published on 30 June 2016, only 96,539 or 2.73% of citizens stated that they belong to the group of "others" while 27,055 or 0.77 did not declare themselves ethnically. This means that about 97% of the population declared themselves members of one of the three constituent peoples.⁸

6 This raises the following question: Why would two of the three (political) ethnic groups detach from their identities, (artificially) by a state border that marks a fundamentally conflicting and underdeveloped state composed of 3 different constitutive/constituent identities without a clearly defined common interest?

7 The Dayton conference took place from 1–21 November 1995. The main participants from the region were the President of the Republic of Serbia (whom the Bosnian Serbs had previously empowered to represent their interests), President of Croatia and President of BiH with his Foreign Minister. The General Framework Agreement for Peace in BiH, also known as the Dayton Agreement or the Dayton Accords, is the peace agreement reached at Wright-Patterson Air Force Base near Dayton, Ohio, United States, on 21 November 1995, and formally signed in Paris, on 14 December 1995. - "Summary of the Dayton Peace Agreement on BiH". www.umn.edu. 30 November 1995. Retrieved on 16 January 2022.

8 Institution of the Human Rights Ombudsman of BiH, Special Report on the

The phrase "along with others" has no special constitutional meaning because it is in fact synonymous with the phrase "national minorities". However, among 15 international legal documents in Annex I of the Constitution of BiH, as many as 5 directly relate to the protection of national minorities. Among others, the 1994 Council of Europe Framework Convention for the Protection of National Minorities explicitly guarantees the rights of national minorities, while nowhere is it guaranteed that the "others" have the exclusive right to elect 7 delegates to the federal house.

The preamble to the constitution should read: "*Bosniaks, Croats, and Serbs, as constituent peoples and citizens, agreed upon the Constitution of BiH.*" This formulation is a typical formulation that is found in terms of content in constitutions of complex states, and as such guarantees a sustainable basis for a consistent and functional constitutional structure. Vice versa, it is an instrument of instability in such a way that members of the people from the position of quantitative domination can declare themselves as "others" on electoral lists for representatives in cantonal assemblies. As a rule, they do this by increasing their number of delegates in the cantonal assembly, i.e. besides the exercised right to elect 17 of their delegates to the HoP, they can elect 7 more delegates as others. This can increase the total number of delegates to 24. If we add to this the *lex lege* possibility that each canton must have at least 1 delegate in the HoP, regardless of whether representatives of that people are elected in the cantonal assembly, then it is quite clear that the majority decision-making principle and the parity principle of constituting the HoP and its role have been called into question. Therefore, the phrase "along with others" is an instrument for canceling the role of the HoP.

3. Constituent Peoples

3.1. Term "Constituent Peoples"

The term "constituent peoples" and not the term "others" (national minorities) is a consequence of the idea of constitutionalism. We talk about the constitutionalism of the ancient world, the Middle Ages and the constitutionalism of the modern world. The roots of constitutionalism go back to Greco-Roman and Judeo-Christian ideas about law and the state" [11]. The word *constitutio* first appears in the Roman state and the term *constitutionalism* was first used in 1832 by the English poet R. Southey in his critique of radical reformers. After that, the term began to be applied to the principles underlying the state of the 20th century and under which the head of state is subordinate to the principles of the constitution.

Constitutive means the people who establish something, the founder of the state; basic act; constitution; action, rule, etc. The term "constituent peoples" consists of the descriptive

adjective "constituent" and the noun "people." The descriptive adjective "constituent" determines the meaning of the noun "people". It expresses abstract qualities of the people, mental, spiritual and psychological.

In the classical doctrine of constitutional law, *pouvoir constituant* means the creator of the constitution, the power of the people to create the first fundamental law, which signifies the transition from the factual to the legal state or the emergence of a new legal order. *Pouvoir constituant* is also linked to the principle of representation or the implementation of the constitution (*pouvoirs constitués*). "*The constitution of a people is and can only be the constitution of its government and the authorities that have the order to give laws to the people and the government*" [8]. Legal positivists after H. Kelsen use the term *Grundnorm*, based on the assumption of order efficiency.

In the modern theory of institutions, the notion of constitutivity is related to *constitutive rules*. "*The central thesis of the theory of constitutive rules is summarized in the claim (made by G. E. M. Anscombe, and developed by J. Rawls, J. R. Searle, T. A. Honoré and N. McCormick) that there are facts whose existence depends on rules. These facts are said to be "institutional facts"* [14]. The main thesis of this theory of constitutive law is summarized in the claim that there are facts that depend on rules and are called constitutive rules or institutional facts. The assertion of the theory of institutions actually signifies constitutivity in terms of the content of the expression. It exists when the largest number of individual wills represents the general will in the electoral and decision-making process. Classical and modern political doctrine under constitutionalism understands the constitution as the foundation of the state and statehood. The central component of constitutionalism is the constituent units or (constituent) peoples / nations.

In BH constitutional political practice, the special content, range and reach of the term "constituent people" arises with the Washington Treaty, by adopting the Constitution of the FBiH.⁹ This term is defined by the definition in the preamble and Article 1, Amendments II and III to the Constitution, and it means the transformation of the legal internal structure of the Republic of BiH, that is, transformation of two organizations of government over areas with a majority Croat and Bosniak population (Croatian Republic of Herceg-Bosna + RBiH = FBiH) into 10 organizations of government (four of which are cantons with a majority Croatian population, including the HNC with a special regime¹⁰ and 6 cantons with

9 The Washington Agreement was a ceasefire agreement between the Republic of BiH and the Croatian Republic of Herceg-Bosnia, signed in Washington, D.C. on 18 March 1994 and Vienna. Under the agreement, the combined territory held by the Croat and Bosnian government forces was divided into ten autonomous cantons, establishing the Federation of B&H and ending the Croat-Bosniak War. The cantonal system was selected to prevent dominance by one ethnic group over another. Washington Agreement of March 18, 1994 contained: 1. The Constitution of the Federation; 2. The Preliminary Agreement of the Confederation between the Republic of Croatia and the proposed Federation; 3. (...) - See more United States Institute of Peace, www.usip.org

10 Decision on Promulgation of Amendment I to the Constitution of FBiH, Sarajevo, 23 June 1994.

a majority Bosniak population, including the Central Bosnia Canton with a special regime) by Croats and Bosniaks as constituent peoples who reorganized into the FBiH.

The Federation of FBiH consists of federal units, counties / cantons with equal rights and responsibilities established by the constitution at the session of the Constituent Assembly held on 30 March 1994.¹¹ The term constituent people covered slightly more than 50% of the territory of the Republic of BiH. The scope of the term has been extended to the Serbian people. The Constitution was amended by Amendment XXVII that contains the definition of constituent peoples:¹² *"Bosniaks, Croats and Serbs, as constituent peoples, together with others and the citizens of FBiH, which is an integral part of the sovereign state of BiH, are determined to ensure full national equality, democratic relations and the highest standards of human rights and freedoms..."*¹³ The presented change of the constitution represents the fulfillment of the obligation of reintegration of BiH statehood, harmonization of the Constitution of FBiH with the Constitution of BiH.

Amendment XXVIII specified: *(1) FBiH is one of the two entities of the state of BiH and has all the powers, competencies and responsibilities that are not given to the exclusive competence of BiH institutions by the Constitution of BiH. 2) Bosniaks, Croats and Serbs as constituent peoples, together with others and citizens of the FBiH, equally regulate the FBiH defined by Annex II of the General Framework Agreement for the Implementation of Peace in BiH.*¹⁴ Then, the scope of the term was expanded by the decision on the constitutional status of the territory of the Republic of BiH with a majority Serb population in 1996. This was done in the manner that the organization of government on the territory of RBiH with the Serb-majority was added to the FBiH, with the name indicated in the Constitution of BiH (FBiH + RS = BiH).

3.2. Relationship Between Principle of Constitutiveness and (Fundamental) Constitutional Principles

The principle of constitutiveness (three constituent peoples) of the Constitution of BiH is the principle of the highest constitutional order, regardless of the fact that it is in the preamble of the Constitution and that there is no consistent mechanism for its implementation in the normative part of the Constitution. This is due to the fact that without it (consent of the constitution-makers), there would be no constitution in the normative sense, and then, without its normative

concretization on the case study there is no viable or maintained state structure.

As the political representatives of Bosniaks, Croats and Serbs in the preamble expressed the agreement of their general wills with the provision according to which they established the constitution, this provision represents an agreement by which the constituent peoples negotiated the constitution. Negotiating a constitution is negotiating a peace agreement, because it marks the end of the war and the freedom to negotiate the common state based on expressions of general popular will. *"There is only one law that, by its very nature, requires general consent; it is a social contract. The general will, if it really wants to be like that, should be general in its subject matter and essence; it needs to start from everyone in order to apply to everyone. [...] Except for that original treaty, the majority vote binds everyone else"* [15]¹⁵.

The Constitution of BiH has not been adopted as a fundamental law, has not been translated into official languages, nor has it been published in the "Official Gazette of BiH."¹⁶ Representatives of the three constituent peoples of BiH, Croatia and Serbia agreed and signed the constitution. Therefore, the constitution has the character of an international treaty as a form of peace treaty. *"An international treaty consists in the agreement of the will of two or more subjects of international law with the purpose of achieving a certain effect under international law, creating a relationship of law and duty between its parties. Agreements can therefore be bilateral and multilateral, they can be drawn up in one document (with possible annexes), or in several interrelated documents in exchanged notes"* [3].¹⁷ The contractual nature of the constitution, with elements of foreignness, is the basis for the legal understandings according to which BiH is an agreed community, that is, an agreed community does not represent a complete or final form of government, rather the obligation to reintegrate BiH statehood must be implemented, by consistently and correlatively performing the structure of the normative part of the constitution on the principle of constitutiveness of the constitution, by adopting the constitution as the basic law: *"The constitution is not definitive. Constituent peoples can always change or repeal it"* [8].

The place of the principle of constitutiveness of the constitution in the preamble raises the question of legal nature of the constitution and the preamble. In the classical doctrine of constitutional law, the preamble refers to the expression of closer and further goals of state development in the form of the most general rules as instruments for the interpretation of norms from the normative part of the constitution, while its

11 Decision on the Promulgation of the Constitution, Official Gazette of FBiH, 1/94.

12 The adoption of this amendment was preceded by the Decisions of the Constitutional Court, Official Gazette of BiH, 5/98; 11/00; 17/00; 23/00 and 36/00 of 31 December 2000.

13 This amendment replaces the last indent of the preamble, which was amended by Amendment II to the Constitution of FBiH.

14 This Amendment amends Article I.1, which was amended by Amendment III to the Constitution of FBiH. Amendment XXIX "(1) The official languages of the Federation of Bosnia and Herzegovina shall be: Bosnian language, Croat language and Serb language. The official scripts shall be Latin and Cyrillic. (2) Other languages may be used as a means of communication and instruction. This amendment amends Article I.6 of the Constitution of FBiH."

15 On treaty as form of constitution: Zweig (note 34), 29ff, (constitution as peace treaty); Schmitt (note 3), et al. ii (obtained from Isensee, 2004: 151).

16 The Constitution of BiH is Annex 4 of the General Framework Agreement for Peace in BiH (Established in Dayton on 21 November 1995, signed in Paris on 14 December 1995), <http://www.osceB&H.org/overview/gfap/eng/annex4.asp>

17 Article 2-1-a of Vienna Convention on the Law of Treaties Done at Vienna on 23 May 1969, also prescribes: *"treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."*

contractual nature is unjustifiably neglected (consent of the expressed wills of the subjects of the constitution). This doctrine considers that if the constitution does not explicitly stipulate that the preamble is an integral part of it and that it is given the force of normative provisions of the constitution, then its strength is assessed from the point of view of the formal and substantive features of the preamble. In that sense, the Constitutional Court of BiH also ruled that the provisions of the preamble are not only descriptive, but have normative force, "... they represent a valid standard for judicial review of the Constitutional Court"¹⁸

Formally, the preamble is an integral part of the constitution since it was agreed by the representatives of the constituent peoples according to the same negotiating/contracting procedure as the normative part of the constitution. Equally, given that the text of the preamble is below the term "Constitution", it means that it is about one text (the text consists of the preamble and the normative part of the constitution). In terms of content, the preamble is an integral part of the constitution and has the same legal force as the normative part of the constitution.

The preamble to the constitution is an agreement of the constituent peoples, a "*form of treaty*" [8]. This means exercising the right of the constituent peoples to constitute state bodies, first by electing their representatives in the election process to state bodies and then by the decision-making of those representatives in such state bodies. In fact, the first and fundamental feature of the preamble as an agreement of the constitution-makers is that the three constituent peoples, their representatives who signed the constitution, identify the constitution-maker. The adoption of the constitution as a basic normative act - law (e.g. the Constituent Assembly) imposes an obligation on the constitution-makers to implement it, as a rule by passing laws and other acts within the competence of state bodies.

The question of legal relationship between the principle of constitutiveness of the constitution and other (fundamental) constitutional principles continues to arise, first of all the principles of federalism, equality, parity, proportionality and equality of citizens. This relationship can be most authoritatively determined by discussing the structure, composition (manner of education), powers and functions, i.e. the representation of the constituent peoples in the federal houses and the manner of decision-making. The existence of a bicameral structure of parliament is an expression of the application of the principle of federalism. The parliament of a complex state should be composed of two houses, on the principle of equality of houses - a bicameral way of passing laws. First House or House of Representatives (HoR) composed of elected representatives in general and direct elections with equal voting rights (principle of equality of citizens). Therefore, it has the character of the first house or house of citizens. The second house or House of Peoples (HoP) is composed of delegates of constituent peoples / units, on the

(in)direct electoral principle (e.g. US Constitution, 1787) and the parity principle of representation of constituent peoples / units, regardless of factual inequality, e.g. population number. So, both houses of parliament are constituted on the application of the principle of equality. First, it is about the equality of citizens in HoR and then about the equality of constituent peoples / units in HoP. The principle of equality of constituent peoples / units is a fundamental principle of a complex state, be it a (con) federation or some other form of state organization of a complex state.

The constituent people in the preamble of the Constitution of BiH denotes the possessor *pouvoir constituant* while the real and legal situation of the people as a subject of (sovereign) decision-making is suppressed, the subject of organizing a disorganized state, i.e. the holder of the right to adopt a constitution as an act exercising the right to self-organization of a common state. This means that the hidden constitutional and political basis of the sovereign and only reconstitutionalized collective political rights of the constituent peoples is relativized or limited to reinstrumentalizing the right to self-determination of each of them for themselves and by themselves, with others. The Constitution was passed in the war by three undefeated peoples that were self-organized, sovereign, able to work and territorially established.

The principle of constitutiveness of the constitution, by its nature, although enshrined in the constitution itself, has no legal character because there are no consistent legal mechanisms for its implementation, there are no legal elements of accountability, including political accountability. No entity is envisaged before which constituent units (e.g. entity) are liable/accountable, no sanctions have been identified that accompany this accountability/responsibility, including the entities that impose and enforce these sanctions. The absence of elements of legal liability/accountability makes reference to any liability illusory. After all, the current practice of developing the relationship between the constituent units and the state as a whole shows the irresponsibility of the constitution-makers for the disintegration and non-functioning of the state.

4. Violation of Status of Constituent People

As the status of a constituent people is acquired and maintained by the exercise of collective rights, it is necessary to determine the (non)existence of a correlation between the collective and political rights of citizens – suffrage/voting right. The violation of the individual suffrage of citizens is a *causa* of sustainability and effectiveness of collective mechanisms that ensure uniform application of the principle of equality in the exercise of individual human rights. The correlation between collective and individual rights is (perfectly) positive because there is a correlative relationship between collective human rights and individual political rights.

18 Third Partial Decisions of the Constitutional Court of BiH, Official Gazette of BiH, 25/00, items 25 and 26.

4.1. Collective Rights of Peoples or Political Rights of Nationally Organized Citizens

From the name "collective rights" it can be concluded that the holder of these rights is the collective and the beneficiaries are (members) of collective(s) - people(s). Namely, although the concept of human rights from the very beginning (J. Locke) is based on the individual as the bearer of legal powers and legal obligations, the practice has shown a strong connection between the realization of some of these rights only with other members of a group. For example, an individual exercises the right and freedom to associate in a political party by practicing this right or acquiring the status of a member of a political party. Then, the right of the individual takes collective form by exercising the right of a political party in the manner that a political party participate in elections, and only then can a party member be elected a member of parliament, that is, to exercise one's individual right. Therefore, these rights can be named as collective human rights because it is quite clear that they cannot be realized without the active participation of the collective. These are, first of all, collective human rights, such as: the "right of the people to self-determination" [1].¹⁹, including also *ius separationis*; political rights (e.g. suffrage/voting rights); the right to local self-government; rights of national minorities; the rights of linguistic and other groups, the right to peace; the right to freedom of religion; the right to different treatment; the right to de facto recognition, the right to maintain and develop personal culture, etc.

The rights to self-determination are classified in the "third human rights generation". They arise as a proclamation of Woodrow Wilson's "Fourteen Points" of 1918, or a demand for the right of the "nation to self-determination." These rights are regulated in Article 1, and Article 55 of the UN Charter but are not in the Universal Declaration of Human Rights of 1948. They are explicitly set out in UN Resolution (No. 1514, 1960): *"All nations have the right to self-determination: by this right they freely determine their political form and strive freely for economic, social and cultural development."*

While Wilson's concept of the right to self-determination of the people was understandable, linked to democracy and the liberal protection of the individual from state invasion, this is not the case with legal regulation. In the UN conventions, this relationship was confusing, which often raised the question of the relationship between the right to self-determination of the people and individual human rights. Theoretically, this relationship was understood as equal, while the current regulations gave stronger legal force to the right to self-determination to already individual human rights. This tendency is further reinforced by the declaration of "collective" rights as a human right to development (recognized by the UN General Assembly in 1981), the human right to peace (formally proclaimed in 1984) and the demand for the human right to the natural environment. To that extent, in the actual development of the Convention on Human Rights it is a

question of rights that have been predominantly understood or are understood as collective rights in the stated sense" [10].

As presented, the right to self-determination appears first as an objective right; in principle, every right is composed of objective and subjective right. The objective law understands international and domestic regulations. The subjective right is a right that belongs to a certain subject and is exercised at their personal request. However, while the right to self-determination is not disputed as an objective right, it is disputed as a subjective right. First from the aspect of the second generation of human rights holders, and then it was stated that they are not as absolute as the rights of the first generation. In fact, their subject and content are not predominantly one legislative mechanism (program), but one set of standardized legal powers and legal (obligations) rules. This means that the content of collective rights can be exercised directly and gradually depending on the existence of an effective legal mechanism and the fulfillment of material conditions as obligations that the state / people must perform and actions that must be taken in accordance with the power at its disposal. For example, after the First World War, many nations demanded the exercise of the right to self-determination (Croats, Ukrainians, Catalans, etc.) on the basis of objective law within the meaning of Article 1 of the International Covenant on Civil and Political Rights, which reads: *"All peoples have the right to self-determination."* However, in paragraph 2 it is added *"All peoples may, for their own ends, freely dispose of their natural wealth and resources..."*, which would imply that the possibility of realization depends on real power.

All the more so, demands for the exercise of collective human rights lead to confusion in concepts, due to the lack of legal mechanisms. The problem is general. The imperative principle of equality of establishment of all subjective rights of citizens is in the same way applicable to the holders of legal authority and legal obligation. Collective rights are limited in that they do not violate individual human rights. The problem of uncertainty in the legal content of collective rights is already as complex as in other political rights of citizens, even if we consider them not as subjective rights but also as freedoms, demands or privileges, as a mechanism of collective realization of political rights of citizens.

Conceptual debates on rights, including this one, regularly refer to Hohfeld's classic study of Fundamental Legal Conceptions, in which he established a distinction between special types of rights: freedom, claiming exemptions and powers. Thus, the term *"right"* is on one occasion used in the business sense according to which the right holder is entitled to something that represents a correlative duty of another person, and on the other occasion, the term *"right"* is used to preserve immunity from changes in legal status. Sometimes the term means the privilege to do something and sometimes it refers to the government to create a legal relationship." [7].²⁰

19 See this author's elaboration of the right to self-determination as a national and ethnic criterion for the transformation of existing states.

20 This author's distinction between freedom and the right to claim suggests a distinction between negative and positive rights, separation of the negative freedom from the positive freedom.

Having in mind the presented discussion, it follows that it is more accurate to call collective political rights subjective political rights of nationally organized citizens, because subjective political rights, suffrage/voting rights, can be exercised only collectively [18]. The 1981 African Charter on Human Rights equates individual human rights with the right of peoples to self-determination. In this regard, it is of particular interest to support the sovereignty, unity and territorial integrity of BiH *based on the principles of equality and non-discrimination of all citizens and constituent peoples*, in accordance with the Constitution of BiH and the reform process on its European path.²¹ In fact, the institutionalization of collective political rights is the unification of the application of the principle of equality of all people in the exercise of their subjective rights in complex states or multinational societies.

Although the postulate of liberal state neutrality results in all individual interests being considered equal, there are cases where equal respect for individual interests destroys the community. For example, passive voting right for a member of the Presidency, as a fundamental political right of citizens, may be regulated by law in such a way that all citizens or only citizens of constituent peoples have such a right, as is the case in BiH. Assuming that groups are not an end in themselves, but are created for the purpose of articulating and realizing the will of their members, it is clear that they have an instrumental character, that collective rights are deduced from the rights of individuals as members of the collective. This statement does not call into question the legal nature of collective rights, but leaves open the question of how much they can be considered true human rights" [13].

This view, the legitimization of collective human rights as an instrument for unifying the application of the principle of equality in the process of exercising the subjective rights of citizens in a complex state, is advocated by *Will Kymlicka*, in many forms of group-differentiated state-building rights, individuals appear as their beneficiaries. He therefore introduces the notion of "group-differentiated rights" and its three categories, among others, the right to special representation in national parliaments [5].

4.2. Restriction of Right to Use Official Language

In BiH election practice, in addition to the word *canton* [*kanton*], the word *county* [*županija*] is also used. In the Washington Agreement published in English, the term "*canton*" /'kæntən/ is used. This term was translated in the published texts of the constitution in Croatian and Bosnian languages (Official Gazette of FBiH) as *canton*. In the constitutional-electoral practice, the term "*county*" is used. What is it about? "It is about taking over and using the term that is in use in the Republic of Croatia. Traditionally, and in

the current organization of the Republic of Croatia, county is a decentralized form of central government exercise, and, in part, a form of local self-government. In the constitutional system of the FBiH, the cantons are much more than that - they are federal units with very wide autonomy" [21].

Having in mind the presented statement on the "controversial" use of the words "*canton*" and "*county*", it is necessary to point out that these are equivalents, because they do not question (semantics of content and scope of the term) equal status of all the 10 constituent units of the Federation of FBiH²². Dual name is the baptized name of a constituent unit by its constituent which is inscribed in the preamble and Article 1 of Amendments II and III to the Constitution. Therefore, the interventions of the Constitutional Court of FBiH are very dubious, given that the Constitution recognizes the right to an official language, that is, the right to protection from violation of freedom of expression (Article 10 of the ECHR), which includes the protection of the expression of the name of the constituent unit.

In terms of the principles of constitutionality and legality, the Constitutional Court could intervene in terms of replacing the word *canton* with the word *county* in the text of the constitution in the Croatian language, which is the solution of the law.²³ This would then be a constitutional protection of the political freedom of expression of the name of the constituent unit, because it is not about exercising the freedom that violates or restricts other freedom of expression - *canton*, in the text of the constitution in another official language. Any state intervention, including the intervention of the Constitutional Court to protect the name "*canton*" from its synonym, the Croatian term "*county*", is generally meaningless and inadmissible. First of all, the word *canton* is a foreign word taken from the English language, and therefore all lexicographers are professionally obliged to replace it with an expression from the mother tongue. It is the term "*county*" in Croatian and "*canton*" in Bosnian language.

The development of (political) freedom of expression is impossible to stop, because it is a living expression of the people, or the people cannot be seen without negative freedom of expression.²⁴ In fact, the constitutionally recognized right to an official language is the right to protection from the violation of political freedom of expression, which includes the protection of the expression of the name of the constituent unit. Article II.2. (H) of the Constitution of BiH guarantees freedom of expression, and the same Article under item 4 also prohibits discrimination on the grounds of language.

4.3. Restriction of Suffrage/Right to Vote

In the BiH electoral system, there are restrictions on active and passive suffrage/voting right. A typical restriction on

21 The Ministers of Foreign Affairs and Defense of the EU Member States adopted the document on 21 March 2022, which is entitled "Strategic Compass", vision of EU defense development over the next 5-10 years. Following the adoption of the EU Council, the document was also adopted by the European Council at the summit in Brussels held on 24 and 25 March 2022.

22 The Constitutional Court of the FBiH has determined that the name Herzeg-Bosnia County is not in accordance with the Constitution of the FBiH - Decision of the Constitutional Court of the FBiH, no. U-11/97.

23 Law on Federal Units (cantons - counties), Official Gazette of FBiH 9/96.

24 The Constitutional Court of the FBiH assessed the use of the term "*county*" as unconstitutional - Decision of the Constitutional Court of the FBiH, No. U-12/97, U-7/98, U-24/98.

suffrage, as a rule, applies to foreigners and citizens. It also regulates the conditionality of passive suffrage by a certain period of residence in the constituency for which the person is running, and by standardizing the principle of incompatibility of the electoral function, e.g. member of the Presidency and delegate to the House of Peoples (HoP). The atypical and logical limitation of passive suffrage is also reflected in the fact that no person serving a sentence imposed by the ICTY and no person indicted by the Court, who did not respond to the order to appear before the Court, can be a candidate for public office, nor exercise it on the territory of BiH.

However, there are also inadmissible standardizations of certain differences between active and passive suffrage, by prescribing ethnic determinants as a condition for acquiring candidate status. It is about the inability of all citizens in both entities to run for a member of the Presidency. The legitimacy of elected members of the Presidency is limited, or the passive suffrage of citizens who do not belong to Croats, Bosniaks and Serbs is limited in the manner that they could not run for a member of the Presidency in both Entities as constituencies. This is because Article V of the Constitution stipulates: "The Presidency of BiH consists of three members: one Bosniak and one Croat, each directly elected from the territory of the FBiH, and one Serb, directly elected from the territory of the RS. The members of the Presidency are elected directly in each entity (so that every voter votes to fill one seat in the Presidency), in accordance with the election law passed by the Parliamentary Assembly (PA). Any vacancy in the Presidency shall be filled from the relevant Entity, in accordance with the law to be adopted by the Parliamentary Assembly."²⁵

Article 21 of the UN Universal Declaration of Human Rights proclaims that "everyone has the right to take part in the government of his country, directly or through directly elected representatives". *"The will of the people is the basis of the authority of government"*. This act explicitly specifies that the will of people should be expressed *"in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures"*. Article 25 of the International Covenant on Civil and Political Rights stipulates that every citizen has the right and opportunity, without any discrimination and without unreasonable restrictions, to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors." The ECHR also stipulates the obligation for Contracting States/Parties *"to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature"*.²⁶

25 Election Law of BiH, Official Gazette of BiH, 23/01, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13; 7/14 and 31/16.

26 A similar provision is contained in the 1969 American Charter of Human Rights and the 1981 African Charter on Human and Peoples' Rights, while this right is not treated in the ECHR, nor in its "Protocols", Nos. 3, 5, 8, 2, and Protocols no. 1, 4, 6, 7, 9, 10 and 11. Official Gazette of RBiH, Supplement: International Treaties, no.

The standardization of ethnic determinants as a condition for running for the three-member presidency in the constitution and election law has been sanctioned by numerous court rulings since 2006 as a violation of citizens' passive suffrage guaranteed by international standards.²⁷ It follows from the presented electoral standards that the suffrage of citizens must be expressed and ensured on certain principles, which are precisely the condition for the will of the (constituent) people to be the foundation of state power.²⁸ Thus, for example, the suffrage / right to vote is not achieved with the act of voting or being on the list of candidates for a particular state body, it is the total number of votes as the result of people's will that matters. The right to vote, although an individual right of citizens, can only be exercised collectively - as a result of the total number of votes. It also means that in a certain state body, the elected person has the possibility of actual influence. Vice versa, the purpose of the right to vote and the elections themselves would not be fulfilled, because the will of the people would not be expressed by the act of voting and accepting candidacies for a particular state office. The will of the people must be expressed as a result of the total number of votes, and as such only is the foundation of state power.

For example, the voting right of the citizens of the Croatian constituent people is exhausted by the act of voting, because their total number of votes is not the result of the people's will to elect a Croat candidate for a member of the Presidency. This means that the elected candidate has no legitimacy, which results in a restriction on the exercise of constitutional powers, e.g. on the vital national interest under Article V (2), point (d) of the Constitution of BiH, which reads: *"A dissenting member of the Presidency may declare a Presidency decision to be destructive of a vital interest of the Entity from the territory from which he was elected, provided that he does so within three days of its adoption. Such a decision shall be referred immediately to the National Assembly of the Republika Srpska, if the declaration was made*

5/96. 2.1.2.

27 Judgments of the ECHR in cases Sejdić and Finci, Zornić, Šlaku, Pilav, Pudarić and Baralija - Judgment in the case of Sejdic and Finci vs. BiH, applications no. 27996/06 and 34836/06; Judgment in the case of Pilav vs. BiH, application no. 41939/07 of 9 June 2016, etc. Execution of these judgments requests changes in the Constitution of BiH and its election legislation.

28 Article 21, paragraph 1 and paragraph 3 of the Universal Declaration of Human Rights, adopted and appointed by the General Assembly by Resolution 217 A (III) on 10 December 1948." Article 25, under b) International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 493 of the First Protocol to the ECHR will ensure freedom of expression and of the press; it will allow and encourage freedom of association (including political parties) and ensure freedom of movement." Article I of the Agreement on Elections (Annex 3) of the General Framework Agreement for Peace in BiH. Paragraphs 7 and 8 of the Document of the Second Meeting of the 1990 Conference on Security and Cooperation in Europe (OSCE Copenhagen Document): 7. Ensure that the will of the people serves as the basis of percentage of government authority, the participating countries will: 7.1. Hold free elections at reasonable intervals, as established by law; 7.2. Allow for free competition in direct voting for all seats in at least one house of national legislation; 7.3. Guarantee universal and equal voting rights for all adult citizens; 7.4. (...).

by the member from that territory; to the Bosniak delegates of the House of Peoples of the Federation, if the declaration was made by the Bosniak member; or to the Croat delegates of that body, if the declaration was made by the Croat member. If the declaration is confirmed by a two-thirds vote of those persons within ten days of the referral, the challenged Presidency decision shall not take effect“.

Poor electoral practice arose with the first General Elections in 1996. The Constitutional Court of BiH took a firm stand in Judgment No. U 23/14 of 1 December 2016, p. 23, point 51, where, among other things, it reads: “...inadequate political representation of those they represent and whose interests they represents leads to a violation of the principle of constituency, that is, the inequality of any of the constituent peoples, and thus the violation of the Constitution of BiH, specifically Article I / 2 of the Constitution of BiH.”

4.3.1. Doubtful Confirmation of Results of General Elections for Presidency

The Central Election Commission of BiH (CEC) adopted the Decision on confirming the results of the General Elections in BiH of 6 November 2018. The announcement of the results of the vote, with the assigned mandate for the Croat member of the Presidency (Table 1), provoked protests in Mostar with slogans: “*Not my president*” and “*RIP Democracy*”, “*Persona non grata*”, etc. The candidate for the Croat member of the Presidency is disputed, because he was not elected on the basis of the results of the total number of votes of the citizens of the Croat people, but by the votes of the Bosniak people.

Table 1. Results Presidency of BiH.

Candidate	Party	Votes	%
Bosniak member			
Š.Dž.	Party of Democratic Action	212,581	36.61
Croat member			
Ž.K.	Democratic Front	225,500	52.64
D.Č.	Croatian Democratic Union	154,819	36.14
Serb member			
M.D.	Alliance of Independent Social Democrats	368,210	53.88

It can be assumed that the CEC circumvented the principle of the constituency of the people and thus violated individual suffrage, which can only be exercised collectively, as a result of the total number of votes of the citizens of the constituent people. The CEC may declare the candidate from the Federation elected as member of the Presidency in terms of the provision of Article 8 of the Election Law, which reads: “(1) *The members of the Presidency of BiH directly elected from the territory of the Federation of BiH –one Bosniak and one Croat shall be elected by voters recorded in the Central Voters Register to vote for the Federation of BiH. A voter recorded in the Central Voters Register to vote in the Federation of BiH may vote for either the Bosniak or Croat Member of the Presidency, but not for both. The Bosniak and Croat member that gets the highest number of votes among candidates from the same constituent people shall be elected.* (2) (...).”

The last provision of this article in paragraph 1 represents, not quite explicitly, the solution for the election, the Bosniak and Croat candidate who gets the highest number of votes among the candidates from the same people is elected. In fact, if this provision is normatively correlated with the principle of the constitutivity of the people, then it will read: The Croatian candidate who gets the highest number of votes among the candidates from the Croatian constituent people shall be elected. The presented provision does not explicitly determine whose “*highest number of votes*” it is, but it is, by the normative concretization of the principle of constitutiveness of the constitution, determinable to the phrase “*highest number of votes*”. This means that the principle of constitutiveness or the principle of the (highest) constitutional order on the constituency of the people must be maintained when determining the “*highest number of votes*” on the list of Croat candidates. This principle can be maintained only if the “*highest number of votes*” on the list of Croat candidates refers to the votes of the Croatian people. Vice versa, if the “*highest number of votes*” refers to all votes in the FBiH, then the principle of the constituency of the Croatian people has not been maintained.

That is why the phrase “*highest number of votes*” must be correlated with the principle of the constituency of the people or with the highest number of votes of the constituent people. It cannot in any way refer (as interpreted by the CEC) to the largest number of votes of all voters in the FBiH. This (simply does not say) would then mean that the FBiH consists of one people and not two as it is written in Article 1 (1) of the Constitution of FBiH: “(1) Bosniaks and Croats as constituent peoples, along with Others, and citizens of Bosnia and Herzegovina from the territories of the Federation of Bosnia and Herzegovina, in the exercise of their sovereign rights, transform the internal structure of the RBiH territory with the majority Bosniak and Croat population into the FBiH that is composed of federal units with equal rights and responsibilities. (...)“ *The world of law is not the closed world presented to us by various jurists, a world separated from reality, an ideal world, but a world of tangible facts that need to be clarified and classified; these are human wills, which should be understood in their concrete expressions; that is, the social effect they produce*” [4].

4.3.2. CEC Is Prohibited from Circumventing Principle of Constitutiveness at All Stages of Election Process

In the preamble of the Constitution, the principle of constitutiveness is established as the principle of the highest constitutional order and is strengthened by the provision of the Constitution of BiH in Article I/2, which reads: “Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections”. This provision signifies the rule of law which implies the principle of constitutionality and legality. All laws must be in accordance with the constitution, and other regulations in accordance with both the constitution and the law, and where no one, not even the CEC, can have more authority than the law permits. An individual is allowed to do everything that is

not prohibited by law, while for the CEC (Vice versa) everything is forbidden except the powers allowed to it by law. The CEC is not permitted, but forbidden, to circumvent the purpose of the law. This is the realization of the status of the constituency of the people in all phases of the electoral process.

According to the general principle of democracy, the right to democratic decision-making is exercised through legitimate political representation. In this particular case, this means that legitimate political representation is necessarily based on the democratic election of the Croat candidate for a member of the Presidency. The link between the Croatian constituent people and the Croat candidate for a member of the Presidency in the voting process is the link established by obtaining the highest number of votes from the Croatian constituent people. Only such a connection ensures the necessary legitimacy of the candidate among candidates for the election of the Croat member of the Presidency.

Interpretive effect has the force of a formal and legal change of law. BiH has accepted the obligation to harmonize legislation in this way (combined or formal and interpretative) even in Article 70/1 of the Stabilization and Association Agreement (SAA), between the EC and their Member States on the one hand, and BiH on the other. Article 70, paragraph 1 of the SAA reads: *The Parties recognize the importance of the approximation of the existing legislation of Bosnia and Herzegovina to that of the Community and of its effective implementation. Bosnia and Herzegovina shall endeavour to ensure that its existing laws and future legislation will be gradually made compatible with the Community acquis. Bosnia and Herzegovina shall ensure that existing and future legislation will be properly implemented and enforced.* The CEC is obliged to implement the contractual obligation in the manner of ensuring proper and appropriate implementation of election legislation. This means exercising the law properly not only by formally adopting new election regulations, but also by interpreting existing electoral legislation in accordance with the principles of European electoral heritage, case law of domestic and EU courts (European and EU courts).

Interpretive effect also implements the obligation from Article 70/1. Through the same interpretations, along with the interpretations of domestic and EU Courts, BiH law should be harmonized with the European electoral heritage in the sense of the Venice Commission Opinion (amicus curiae in Constitutional Court Judgment No. U 23/14). From the above, it can be concluded that the CEC had to declare elected, as member of the Presidency from the territory of the FBiH, the candidate who received the highest number of votes of the citizens of the Croatian constituent people. Given that the constitution is a fundamental legal and political act, this means that, in addition to legal, European political standards formed by European political entities had to also be taken into account when interpreting the provisions of the election law in the manner of publicly declaring the solution to the problem of electing political representatives of the constituent people.

Article II/6 of the Constitution of BiH stipulates that the

rights from the ECHR and other international standards will be directly applied in BiH, while respecting their priority over all other laws. As the provisions of the constitution are not applied directly but indirectly - through the law, this means that the human rights provided for in the ECHR have greater force than the provisions of the constitution: *"Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above"* [17].

Given that the CEC did not act in accordance with scientific interpretations of the election rules, it is necessary to change the above-cited constitutional provision and other election rules. It is simply necessary to remove the ethnic sign for the three members of the Presidency and to change this provision in the sense that the three members of the Presidency are appointed by the Parliamentary Assembly. This solution is relatively the most common way of representing the constituent peoples in the institution of the Head of State (Switzerland - Constitution of 1874, Austria - Constitution of 1920, Federal Republic of Germany - Basic Law of 1949). Another solution is to remove the ethnic sign and that the Parliament of FBiH appoints two members of the Presidency from the FBiH constituency. The third solution is to remove the ethnic sign and to designate two constituencies instead of one constituency in the FBiH. The fourth solution is to remove the ethnic sign and to elect one President in the Parliamentary Assembly on the principle of rotation and incompatibility.

Any of these solutions, if adopted, will contain normatively concretized international standards that correspond to the European electoral heritage, with the presented actual interpretation of the realization of the constituency of the people in the electoral process.

5. Asymmetric Powers and Functions of People's Houses in Bicameral Parliaments

Article I/3 of the Constitution stipulates that: "BiH consists of two entities, the FBiH and the RS", which would mean that it is a federal state (federation of entities) and not a union of states (confederation).²⁹ BiH, if it is to be a state, must be a federation, because it is imperatively required by its "National Trinity", the three constituent peoples or the "National Three" expressed in one of the highest principle of constitutiveness of the constitutional and social order. Therefore, the federal principle is applied in: constitutional norms governing the right to enact the constitution rather than a confederal treaty; determining the status of the Entity and the organization of the three fundamental state functions (parity composition of CoM; Presidency; PA, HoP, as a principled equal house HR of PA of

29 The EU can be defined: as a confederation in social and economic policy, consumer protection, domestic policy and the EU exit procedure; as a federation in monetary relations, agriculture, trade and environmental protection; as an international organization in foreign policy.

BiH, the Constitutional Court, etc.); the institute of unanimity for the adoption of laws in both houses and in the constitutional norms on the distribution of competencies between BiH and the Entities. In fact, BiH, like other states, was based on four principle of constitutivenesses of constitutionalism (permanent population; territory; government; and the ability to establish relationships with other states³⁰) through the devolution of the former unitary R BiH³¹ which, after a referendum, was recognized by the EC on 6 April 1992 in Luxembourg, by deciding to recognize R BiH as an independent state. Following this recognition, other states have done the same. From what has been presented, it could be said that the federation is symmetrical and stable, which is a *conditio sine qua non* of the existence of a federal state system. However, in order to evaluate this statement, it is necessary to present the results of a comparative legal analysis of the role, i.e. the representation of the constituent peoples in the federal houses of the Entities and the state. (HoP and Council of Peoples of RS).

The Federal House has the character of a representation of the constituent peoples / units, which presupposes the parity representation of the constituent peoples, regardless of their number and power. The members of this house must all the more be elected by the constituent peoples themselves and its powers and competencies should be equal to the powers and functions of the first house [2]. Deviation from the principle of parity representation certainly undermines the federal principle. This is shown by the current BH practice and the practice of the Republic of BiH as a federal unit in the former state. If the mentioned deviation becomes stronger, the more it weakens the feature of the federal house as the representation of federal units, so the meaning of the existence of this house is largely lost as well as the difference between the House of Peoples and the House of Representatives [12]. It must be concluded that the principle of equal representation of constituent peoples/units is a necessary condition not only for the constitution of the HoP, which is the first (not the only, of course) precondition for fulfilling the role and purpose of this House in the parliaments of the federal state, but also for the executive power since its power and role surpassed even itself (legislative power).

Violations of the principle of equality of federal units and parity representation in the federal house, asymmetric powers and functions of the HoP are not accidental, but represent an attempt to revalue the right to history (Kingdom of Bosnia) [6]³², the almost-completed process of revaluation of the

factual and legal condition of the land (see land books) and holders of the right to manage and dispose of state property, and changes in the national structure of the population.

5.1. Federal House

Article 1.2 of the FBiH Constitution stipulates: "*The Federation of BiH consists of federal units (cantons)*". In fact the FBiH is defined as a federation of counties / cantons. This would simply mean the classic application of the principle of equal (parity) representation of the majority population in the number of federal units (entities / cantons), equal representation of federal units with an equal number of representatives in the federal house, regardless of the size of the territory and the number of inhabitants. The principle of equal representation of the constituent peoples of federal units appears both as a logical and as a necessary principle of the constitution of the federal house, given the character and its role in the organization of the bicameral federal parliament (e.g. in the Senate of the US Congress there are two senators from each federal unit - Constitution 1787). Consequently, the federal house should consist of an equal number of delegates from all the 10 counties / cantons. (e.g. 5 delegates from each county) and in order to apply the principles of efficiency, economy and effectiveness ("3E"), these 10 cantons need to be reorganized into a smaller number of constituent units with a majority population.

This would simply mean that an equal number of delegates in the HoP are elected by a majority vote in the constituent unit assembly after the general and direct elections in the constituencies [20]. However, as the number of counties is not equal (6 cantons have a Bosniak majority and 4 cantons have a Croat majority and none have a Serb majority), then the principle of equal representation of federal units in the HoP is in fact the principle of unequal representation of constituent peoples, that is, the principle of parity has been annulled, the principle of (dis)proportional (a)national representation of Others and constituent peoples/units. "*The House of Peoples of the Federation Parliament shall be composed on a parity basis so that each constituent people shall have the same number of representatives. (2) The House of Peoples (HoP) shall be composed of 58 delegates; 17 delegates from among each of the constituent peoples and 7 delegates from among the Others*". (3) *Others have the right to participate equally in the majority voting procedure. Article 8 (1) Delegates to the House of Peoples shall be elected by the Cantonal Assemblies from among their representatives in proportion to the ethnic structure of the population. (2) The number of delegates to the House of Peoples to be elected in each Canton shall be proportional to the population of the Canton, given that the number, structure and manner of election of delegates shall be regulated by law. (3) In the House of Peoples (HoP) there shall be at least one Bosniak, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body. (4) Bosniak delegates, Croat delegates and Serb delegates from each Canton shall be elected by their respective representatives,*

30 Article 1 of Montevideo Convention on the Rights and Duties of States. Done at: Montevideo. Date enacted: 1933-12-26. In force: 1934-12-26.

31 The term devolution means the transformation of the unitary internal organization of R BiH into the federal internal organization of BiH and transfer of certain powers and functions of state bodies of the unitary R BiH to state bodies of BiH, or its constituent peoples / federal units. Given that BiH is a complex state, this process was realized through the constitution, not the law, and thus devolved powers and functions cannot be reassumed. A classic example of devolution is the UK, where in 1997, following a referendum in Scotland and Wales, the central government gave these regions broad legislative and executive powers and functions.

32 The Charter of Ban Kulin was written in 1189 and not only is it the oldest state

document found, but it is the "birth certificate" of BiH.

*in accordance with the election results in the legislative body of the Canton, and the election of delegates from among the Others shall be regulated by law.*³³

The number of delegates representing the counties in the HoP is determined on the basis of the national composition of the population or the number of elected delegates of the constituent people to the county assembly. What is more contradictory is that the principle of guaranteed mandates for "Others" was also regulated, and then the principle of proportionality was relativized, given that individual county assemblies elected at least one delegate from another constituent people, although no representative from that people was elected in those assemblies. Article 10.12., paragraph 2 of the Election Law stipulates that: *"Each constituent people shall be allocated one seat in every canton"* which is contrary to Article 8 (3) of the Constitution in which it is prescribed: *"(3) In the House of Peoples there shall be at least one Bosniak, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body."* In addition, this provision is not in accordance with Article 1/2 of the Constitution of BiH because it calls into question the character of the HoP and ultimately prevents the influence of the constituent people on the decisions made by this House.

The "Others" are also represented in the HoP with 7 delegates, which is all the more problematic. This solution is the instrument that prevents the influence of the constituent people on the performance of the HoP functions. The current composition of the HoP allows the exclusion of delegates of one constituent people from the majority required for quorum and decisions (of 58 delegates in the HoP, of which 17 delegates from each of the peoples and 7 delegates from the "Others"), without influencing them.³⁴ The majority principle includes 7 votes of "Others" who are in fact delegates of the constituent people in the position of quantitative domination. Given that the quorum or absolute majority for decision-making is 30 delegates out of a total of 58 delegates of the HoP, this would mean that decisions can be made, for example, without 17 Croat delegates, which again means that the HoP role is neutralized.

The "Others" are national minorities, citizens, their place is in the HoR. Article IV/a of the Constitution stipulates that the legislative power in the FBiH will be exercised by the HoR and HoP. In terms of Article 1 of the Constitution, the HoR is composed of 98 representatives, with at least 4 representatives of one constituent people represented in the HoR. In terms of Article 3 of the Constitution, the representatives in the HoR are elected democratically in direct elections, by secret ballot, on the territory of the entire FBiH³⁵, and in terms of Article 4,

every voter with the right to vote may be a representative in the HoR. Therefore, it is necessary to remove the exclusive right of "Others" to 7 delegate seats in the HoR.

The consequences include an instrument for manipulating the absolute majority of delegates' votes when deciding on issues of vital interest to the Croat club since there are 17 delegates from 10 cantons in the HoP, which means that 10 delegates in the HoP, out of 17, were elected *ipso jure* and 7 delegates were elected both in general and direct elections. This means that the number of 7 delegates elected in the general election does not represent an absolute majority of the 9 delegates, which is required for the existence of a quorum and decision-making of the House. The consequences are getting more complicated at the level of the PA organization, which has two houses: HoP and HoR, at the level of the HoP PA organization given that Article IV.1 of the Constitution prescribed: *The House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs). The designated Croat and Bosniac Delegates from the Federation shall be selected, respectively, by the Croat and Bosniac Delegates to the House of Peoples of the Federation. Delegates from the Republika Srpska shall be selected by the National Assembly of the Republika Srpska. Nine members of the House of Peoples shall comprise a quorum, provided that at least three Bosniak, three Croat, and three Serb Delegates are present.*³⁶

In the opinion of the Venice Commission given in the capacity of *amicus curia*, the following stands out; *"... the Election Law of BiH seems to depart slightly from what is "proportionality", as mandated by the Constitution of the Federation in case number U 23/14 12 Decision on admissibility and merits of allocation of seats in the HoP. To overcome this issue, the Constitutional Court of BiH might envisage that the provision of the Election Law of BiH ("Each constituent people shall be allocated one seat in every canton") be interpreted as worded in the Constitution of the Federation ("In the House of Peoples there shall be at least one Bosniak, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body"). In its Decision, the Constitutional Court of BiH stated that these decisions of the Election Law "... are not in accordance with Article I / 2 of the Constitution of BiH."*³⁷

The decision has not been implemented to date, i.e. the application of the Judgment of the Constitutional Court No. U 23/14 of 1 December 2016 does not have to be implemented exclusively by changing the wording of the election law or if such a wording does not exist in the applicable law, the judgment should not apply at all. The judgment is in fact an

33 Chapter IV.2 of the House of Peoples, Article 6 (1) of the Constitution of FBiH, Official Gazette of FBiH, 1/94, 13/97, 16/02, 22/02, 52/02, 63/03, 9/04, 20/04, 33/04, 71/05, 72/05, 88/08.

34 Articles 6, 95 and 110 of the Rules of Procedure of the HoP of the Parliament of FBiH, Official Gazette of FBiH, 27/03, 21/09 and 24/20.

35 Every voter has the right to vote for any registered party. Before each election, each registered party publishes an electoral list of candidates. The elected representatives in the HoR from each party are persons on top of the party's list, according to the number of votes received. Substitutions for representatives are made by persons on the rest of the list.

36 Compare Article IV/6, 95 and 110 of the Rules of Procedure of the HoP of the Parliament of FBiH.

37 It is determined that the provision of subchapter B of Article 10.12., paragraph 2 in part: "Each constituent people is given one place in each county" and the provisions of Chapter 20 - Transitional and final provisions of Article 20.16. A paragraph 2, item a-j of the Election Law of BiH (Official Gazette of BiH, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14 i 31/16) are not in accordance with Article 1/2 of the Constitution of BiH." - Decision on Admissibility and Merits of the Constitutional Court of BiH, Case No. U 23/14.

established obligation of the authorized person to implement the law in order to eliminate previous bad practice, flat interpretation of results or to establish good practice in the application of election rules, by formal or teleological interpretation (both the pronouncements and the positions in the reasoning) of the judgment.

5.2. Council of Peoples of RS as Federal House

The Council of the Peoples of the RS (CoP) is not a federal house because the House is not in principle equal to the National Assembly of RS³⁸, i.e. the CoP was added only as an intervening instrument in deciding on issues of vital national interest.³⁹ This means that a bicameral structure of parliament has not been established in this entity, although it is a matter of equal decision-making on the application of the federal principle, i.e. the interests of the constituent peoples and citizens. All the more, given that in the Parliament of FBiH consists of two principally equal houses, the National Assembly of the RS should also consist of two houses with equal powers and functions. However, the CoP does not have the federal character of the HoP, i.e. it does not have the same powers as the powers of the National Assembly. Its function (ensuring the equality of the constituent peoples and their equal influence on the exercise of RS power) presupposes the parity representation of the constituent peoples in the CoP, but also that its members be elected by the constituent peoples themselves and that the powers and functions be equal to the powers and functions of the National Assembly [2].

The Constitution of RS resolved the election of delegates to the CoP in a significantly different way. For this purpose, national clubs of Serbs, Bosniaks and Croats are constituted in the National Assembly from elected representatives. They elect eight delegates each for the appropriate national club in the CoP. However, if there are not at least 8 representatives of a certain nationality among the representatives of the NA, this club will elect as many delegates as the club actually has members. In fact, the NA is not a representation of the constituent peoples, neither in the manner of election nor in the number of delegates. The NA has a total of 30 delegates, 8 from each constituent people and 6 from the "Others"⁴⁰. The representatives/delegates of the "others" participate in majority decision-making, while they have no influence when deciding on issues of vital national interest.

The Constitution implies that a separate club will be formed to elect the remaining delegates, but now from members of municipal assemblies of the appropriate nationality who will propose the remaining number of delegates of that national delegation to the CoP. The Constitution does not prescribe how many members this additional club will have nor who will appoint the composition of that additional club. It could be concluded by analogy that the club will have at least as many

members as the number of delegates to be proposed. It can also be assumed that the members of this additional club should be elected by the representatives of the National Assembly of the appropriate nationality from the group of councilors. "This complicated and undefined procedure is prescribed to compensate for the "deficit" of Bosniaks and Croats in the NA. This is an indirect recognition of the results of ethnic cleansing because, according to the 1991 census, 45% of the non-Serb population lived in today's RS territory. If the current national structure was at least close to the one from 1991, this problem would not have arisen" [21].

In the National Assembly, apart from the dominant principle of representing the interests of citizens, only the national principle of representing the three constituent peoples is marked in the label, stating that there will be at least 4 representatives of each constituent people in the National Assembly, regardless of the votes actually won in the election.

6. Conclusion

The status of a constituent people is acquired and maintained by exercising the right to self-determination. The titleholder of this, or the right to a nation-state, is the people. The exercise of the right to a nation-state is the *causa* of the right to the protection of national minorities. In complex states such as (F)BiH, the deduced form of the right to a nation-state is the right to the status of a constituent people, i.e. Croats, Bosniaks, and Serbs ended their war in 1995 and under international coercion, they agreed in the preamble on the provision according to which they, as constituent peoples, agreed on the Constitution.

This provision represents the exercise of the right to enact a constitution as an act exercising the right to devolution of the former unitary state, that is, the right to the status of constituent peoples / units from which consistent mechanisms for the exercise of collective political rights were to be deduced, in order to ensure this status, namely: parity number of constituent units with a majority population; distribution of competencies between the constituent units and the state regulated on the principle of reconciliation of special - common - general interests; bicameral composition of parliament with equal powers and functions of the chambers; parity representation in the HoP and the institution of the collective Head of State or influence on the election of one President of the State, right to organize clubs of representatives/delegates with the right to elect delegates for the HoP; secured influence on decision-making by absolute majority and/or special qualified majority on issues of vital interest of the HoP, etc.

The instrumentalization of collective political rights is not an end in itself; the goal is to establish a mechanism for harmonizing the application of the principle of equality in the process of exercising the political rights of citizens. Therefore, it is more accurate to call these collective political rights of peoples the political rights of nationally organized citizens in order to establish a *de facto* civil state, in federations. However, regardless of the fact that a mechanism has been

38 Constitution of RS, Official Gazette of RS, 21/92, and Amendment to the Constitution of RS, Official Gazette of RS, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 30/02.

39 Amendment LXXVI to the Constitution of RS amending Article 69, which stipulates: "Legislative power in the RS shall be exercised by the NA and CoP".

40 Amendment LXXVIII, which amended Article 71 of the Constitution of RS.

established to unify the application of the principle of equality, the status of the three constituent peoples is not equally ensured on consistently and coherently organized authentic principles (mechanisms) of federalism. Some of the derived principles are *contradictio in adiecto* to the principle of constitutiveness or the principle of federalism.

The applicable constitutional election rules call into question the role (powers and functions) of the federal houses (HoP of (F)BiH), by hypertrophying the people's representation, which could not be stopped in the cantonal/county assemblies (constituent peoples' clubs), which is in fact its "*negation of negation*" (the effectiveness of the state - entity), created by *ad hoc* amendments of the popular principle of representation – (a)national principles of representation in the HoP (proportionality, guaranteed mandates to "Others" and constituent units / nations), or it can be expressed by a trick question: Is the name "House of the People" adequate to its composition, given that it represents not only one people but also constitutive units on a proportional, instead of parity principle, and "Others", and/or should the HoP be composed of delegates of the constituent peoples and of the "Others", or of delegates of the constituent units and/or (only) of the constituent peoples or only of the constituent units or of the three together? The name "House of Peoples" should correspond to the content and scope of the term, presented in the views, statements and conclusions of the results of this research, the continuation of which we challenge in order to initiate a process of fundamental revision of the Constitution.

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Biography

Stjepo Pranjić, Professor of State Law, using the acquired knowledge, felt the need to present his thoughts on the key shortcomings of our constitutional and political system, given that the current situation is at the last stage of (dis) integration. He attended postgraduate studies in constitutional law and political science, and with its completion he founded a multidisciplinary approach to scientific activity. He participated in the processes of dismantling political "monism" and establishing "pluralism" (democracy). In the 1st General Elections held in BiH, in 1996, he was elected a representative in the HoP of PA of BiH.