

# Anglo-American Elements of Constitutional Organization in the Constitutional Arrangement of Bosnia and Herzegovina: An Influence on Rule of Law through Legislative Function

Zlatan Begić<sup>1</sup>

<sup>1</sup> Faculty of Law, University of Tuzla, Bosnia and Herzegovina

Correspondence: Zlatan Begić, Faculty of Law, University of Tuzla, Bosnia and Herzegovina. E-mail: zlatan.begic@untz.ba

Received: May 13, 2023

Accepted: July 2, 2023

Online Published: July 3, 2023

doi:10.5539/jpl.v16n3p21

URL: <https://doi.org/10.5539/jpl.v16n3p21>

## Abstract

The current constitutional arrangement of Bosnia and Herzegovina as well as model of the constitutional regulation is the result of peace agreements – Washington Peace Agreement and General Framework Agreement for the Peace in Bosnia and Herzegovina (so called – Dayton Peace Agreement) that were imposed under the dominant influence of the US administration. Thanks to this influence, some elements that are close to the Anglo-American legal tradition and understanding of law have been implemented in the constitutional system of Bosnia and Herzegovina, such as the framework model of constitutional normative regulation based, in most cases, on general legal principles and framework norms of a general nature that regulate constitutional matters in a framework way and without entering into details. This paper, at the first place, contains considerations related to model of constitutional normative regulation in Bosnia and Herzegovina as well as adopted centralized model of protection of constitutionality. This model of constitutional regulation, as will be seen from the following text, is not close to European-continental legal tradition and understanding of law. Second part of this paper considers implementation principles of constitutionality and rule of law – in general through performing legislative function in the condition of American model of constitutional normative regulation in Bosnia and Herzegovina as result of imposed peace agreements. The third part contains considerations regarding organization and structure of political parties in Bosnia and Herzegovina and their influence on legislative function in the condition of actual constitutional arrangements. The results of the research and consideration contained in this paper show that the combination of elements of constitutional arrangements and regulations that belong to the Anglo-American legal tradition and understanding of law with elements that belong to the European-continental legal tradition do not give an adequate result in Bosnia and Herzegovina from the standpoint of constitutionality and the rule of law.

**Keywords:** constitution, constitutionality, rule of law, Dayton Peace Agreement, model of constitutional normative regulation, legislative function, political parties

## 1. Introduction

The current constitutional arrangement of Bosnia and Herzegovina (hereinafter: BH) is the result of peace agreements that were imposed under the dominant influence of the US administration. It is about Washington Peace Agreement (hereinafter: WPA) and the so-called Dayton Peace Agreement – or the General Framework Agreement for Peace in Bosnia and Herzegovina (hereinafter: DPA). The primary goal of these peace agreements was not to establish an efficient and functional government and a constitutional system based on democratic values, but to stop the war and aggression against the Republic of Bosnia and Herzegovina. Because of this fact, these peace agreements were based on numerous unprincipled compromises, which directly reflected on the internal organization and functioning of the entire system in BH to this day. With these agreements, the internal reorganization of the constitutional organization of BH was carried out, BH moved from a unitary to a complex internal organization, that is, two entities were formed as internal administrative units of BH internal organization - the Federation of BH, which is organized as a federation of cantons, and the Republika Srpska entity (hereinafter: RS), which is organized on a unitary principle. In addition to the two entities, there is also the so-called Brčko District (for details on the BH internal constitutional order, WPA and DPA see: Begić, 2022: 34-65; Begić and Idrizović, 2015: 77-87; Reilly, 2001:143-144; Manning, 2008: 73-85; Chandler, 2000: 66-89; Kožar, 2022: 257-301; Chollet, 2005: 133-181; Bieber, 2006: 40-86; Friedman, 2005: 60-76; Graham, 1998: 204, 217-220; Cox,

1998: 599, 603-616; Caspersen, 2004: 569, 572-583; Ibrahimagić, 2005: 79-84; Papayoanou, 1997: 101-109; Singer, 2000: 31-35; Conces, 2005: 139, 162-174; Barnes, 2001: 86-94; Horowitz, 2003: 25, 42-43; Schneckener, 2002: 203, 209-210; Trnka, 2022: 19-24; Trnka, 2006: 103-106; Pehar, 2022: 52-63; Šehić, 2022: 209-249 etc.).

At the state level, a very complex system of institutions has been established with the numerous mechanisms of ethnic and entities blockades that violate the principle of efficient and normal functioning of the system as well as democratic values. Besides, the entire system is impregnated with discriminatory norms that directly discriminate the citizens of BH on ethnic grounds and five judgments of the European Court of Human Rights in Strasbourg have been passed regarding this discrimination.

In addition to the above mentioned, elements of model of the Anglo-American legal tradition and understanding of law have been incorporated into the constitutional system of BH – which traditionally belongs to the European legal tradition. Such a combination of elements of the Anglo-American and European-continental legal tradition, in addition to the aforementioned inconsistent constitutional solutions, led to numerous other problems in the functioning of the BH constitutional system.

This paper, at the first place, contains considerations related to model of constitutional normative regulation in Bosnia and Herzegovina as well as adopted centralized model of protection of constitutionality. This model of constitutional regulation, as will be seen from the following text, is not close to European-continental legal tradition and understanding of law. Second part of this paper considers implementation principles of constitutionality and rule of law – in general through performing legislative function in the condition of American model of constitutional normative regulation in BH as result of imposed peace agreements. The third part contains considerations regarding organization and structure of political parties in Bosnia and Herzegovina and their influence on legislative function in the condition of actual constitutional arrangements.

## **2. American Model of the BH Constitutional Regulation Vs. European Centralized Model of Protection of Constitutionality**

The Constitution of BH is an integral part of the DPA - as its Annex 4. By the WPA and DPA a radical transformation of the BH internal constitutional order in terms of transition from unitary to complex constitutional order was provided.

By DPA, at the first place, a model of constitutional regulation, which is not close to the European-continental legal tradition which BH belongs to, also was imposed. Thus, the Dayton Constitution consists of only twelve articles that regulate the constitutional matter in a significant part without entering into the any details and in a general manner. Contrary to that, the constitutions in the countries belonging to European-continental legal tradition contain hundreds of norms that regulate the matter of constitutional law in a precise manner at the level of the constitutional act and imply a detailed approach regarding the regulations and norms contained in constitutions as legal acts of supreme legal power. It also should be noted that the Dayton Constitution refers for direct application of the most important international instruments for the protection of human rights and freedoms.

Thus, in accordance with Article II/2 of the BH Constitution, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols are directly applied in BH and have priority over all other law. Article II/6 of the BH Constitution stipulates the obligation for the consistent application of this Convention for the BH state institutions, all courts, institutions, authorities, entity authorities and bodies indirectly managed by entities. The provision of Article II/3 of the BH Constitution prescribes a catalog of rights and freedoms. In the very text of the Constitution, therefore, the essence of each of the rights and freedoms, different forms and the possibility of their enjoyment and restriction in the public interest are not elaborated - as is the case in the constitutions of European legal tradition, but it indicates to the application of international instruments for the protection of human rights and freedoms, which contain detailed provisions in this regard, and even the rights and freedoms which the BH Constitution explicitly does not guarantee in its text. Thus, Annex I to the Constitution of BH lists 15 international agreements that are directly applied in BH (see: Annex I to the BH Constitution). The Constitution of the Federation of BH, which is part of the WPA, similarly regulates very important field of human rights and freedoms. In the Article II.A.2. of this Constitution a catalog of human rights and freedoms is prescribed, and it also does not enter into more detailed regulation when it comes to every right and freedom individually. The Annex to this Constitution lists 22 international instruments that are applicable in this entity, and which have the legal force of constitutional provisions (see: Annex to Constitution of the Federation of BH). In addition, Article VII.3 of the Constitution of the Federation of BH stipulates as follows: „International treaties and other agreements in force in BH and the Federation of BH and the general rules of international law form part of the legislation of the Federation of BH. In the event of a non-compliance with the international treaty, that is, the agreement and the legislation, the international agreement prevails.” As could be seen from the previous text, the WPA and the DPA

did not only introduce a radical change in the internal constitutional order, but also a change in the model of constitutional regulation which is not close to the European-continental legal tradition and understanding of law. It necessarily implies, from the standpoint of rule of law, at the first place, a different model of protection of constitutionality. Different from the traditional centralized model of protection of constitutionality usually presented in the European-continental countries as well as in BH.

When it comes to the model of constitutional regulation, the influence of the American legal tradition has actually come to light, as the WPA and DPA have been concluded under the supervision of the USA. Such a change in the constitutional normative model, in the first place, meant the necessity of a change in approach when it comes to the direct application of international instruments for the protection of human rights and freedoms in the internal legal order-and those provisions which, according to the Constitution, have legal force stronger than the other law. The holders of judicial functions in BH, in addition to belonging to the European-continental legal circle and tradition, are mainly recruited from the system of the former Yugoslavia where the courts applied exclusively domestic Acts of Law, and if the ratification of an international agreement would take place - it would be transformed into very precise provisions of internal Acts of Law (for the details of constitutional model of normative regulation and BH normative order see more: Begić, 2017: 60-73).

It also could be concluded that the combination of normative model of constitutional regulation with a model of protection of constitutionality in BH is incompatible. The American model of constitutional normative regulation is also required by the US decentralized model of protection of constitutionality, where constitutionality is protected through ordinary judiciary. Thus, the principle of the rule of law is protected in an effective and very strong way. However, in BH the model of American constitutional normative regulation was inadequately combined with the European-continental model of protection of constitutionality in which there is only the Constitutional Court, which is solely responsible for the protection of constitutionality, while the ordinary courts apply Acts of Law in individual proceedings regardless of its content, but also the possible unconstitutionality as well (for the different models of protection of the constitutionality see: Albrecht and Podolnjak, 2009: 30-32).

The problem arises when a legislator goes beyond the boundaries of the Constitution, in conditions of indicative and insufficiently precise norms at the level of constitutional norms, and adopts Acts of Law in the key areas of regulations that directly violate human rights and freedoms to the extent that it undermines the principles of the rule of law and constitutionality itself. Such a possibility is more certain under conditions of framework and imprecise constitutional regulation - which does not enter into details, and which stops at the level of the principles and norms of general nature and meaning, and is significantly smaller in the conditions of the European-continental model of constitutional regulation, in which at the level of the constitutional norms, in a very precise way regulate key relationships, leaving considerably less space for lawmakers to violate the constitution or exit beyond its borders.

Under such circumstances, BH citizens do not have effective protection in the ordinary judicial system because ordinary courts in the system of a centralized European-continental constitutionality protection model apply Acts of Law as long as they are in force until they are changed, and have not jurisdiction to protect constitutionality. True, in case of doubt, ordinary courts can stop the proceedings in individual cases and ask for the opinion of the Constitutional Court, but as practice shows, such possibility was used insufficiently, and it did not significantly affect the strengthening of the rule of law. When such a practice of the legislator - especially in societies with a low level of development of democratic institutions and democratic awareness - becomes more frequent, due to its own incompetence regarding the interpretation and application of constitutional values through a legislative function or for other reasons and interests, then it puts into question the realization of the constitutionally guaranteed rights and freedoms - the values for which the concept of modern constitution, constitutionality and rule of law were theoretically designed and practically established (for the different theoretical standpoints regarding theoretical justification of state power and gradual development of idea of rule of law through different epochs of history, see: Kolpston, 1988: 270- 271; Plato, 2002: 237-267; Aristotle, 1988: 87-88; Luscombe, 1997: 10-11; Maurer, 1982: 17; Saunders 2002: 187-198; Schulze, 2002: 28; Snyder, 2004: 215; Lahtinen, 2009: 10-11; Duignan, 2011: 66-67; Weinert, 2007: 35-36; Collins 2005: 12-13; Llojd, 2009: 134-136; Fekete, 2009: 151; Mueller C. Dennis, 1996: 346-347; Locke, 2002: 298-304; Rousseau, 1993: 44;Lutz, 2000: 131; Ackerman, 2000: 645; Begić, 2021: 73-127 etc.).

In the case of BH, as will be seen from the following text, such Acts of Law are applied for years in BH, and even for more than a decade before the Constitutional Court considers them unconstitutional. Even after the Constitutional Courts declare a certain law or part of it unconstitutional, it can be decided by the ordinary courts that the unconstitutional provisions are applied until they are changed by Parliament and until the Constitutional Court's judgment is implemented, where this period can last even a number of years. This went so far that, for

example, the Constitutional Court of the Federation of BH had to take a specific position, pointing out the inadmissibility of such an approach of ordinary courts from the standpoint of rule of law, which will be discussed more in the following chapters.

Besides, in the Federation of BH, the circle of authorized applicants for the initiation of a constitutional review procedure of laws before the Constitutional Court is very narrow. Thus, this procedure can be initiated only by the highest officials, that is, those who, either directly or through the political party which they belong to, participate in the adoption of controversial Acts of Law and other general acts (for example, regarding the laws at the level of entity of the Federation of BH – President and Vice-Presidents of the Federation of BH, prime minister and deputy prime minister, one third members of any House of the Parliament of the Federation BH). A similar situation is with regard to the circle of authorized applicants for the initiation of proceedings for review of the constitutionality of the Acts of Law and other general legal acts before the BH Constitutional Court – at the state level. This significantly complicates access to the constitutional courts of BH and the Federation of BH to those who suffer the consequences of the unconstitutional Acts of Law for the simple reason that it is highly unlikely that the highest entity or state officials will appear as an applicant for the review of the constitutionality of Acts of Law and other general acts whose adoption they themselves participated in or where the Acts of Law were passed by the political parties to which they belong. However, citizens can approach to the Constitutional Court of BH in individual cases but not in the cases for review of the constitutionality. BH Constitutional Court bases its jurisdiction in this individual cases on the ground of appellate jurisdiction and under certain conditions, but this constitutes a mechanism for the protection of constitutionally guaranteed rights at the individual level in individual cases and in an complicated procedure and very long time period since this proceedings can only be initiated if all other remedies have been used already, where the decision is valid only in that individual case and has no influence in general sense.

In this way, the functioning of the rule of law and constitutional justice in BH is seriously jeopardized through performing legislative function in circumstances of unclear, undetailed constitutional regulation consisted in most cases of principles and norms of general nature as well as through inadequate model of protection of constitutionality which do not correspond to the American model of normative constitutional regulation. Thus, Acts of Law and other general acts, instead of being a mechanism for achieving constitutionally guaranteed freedoms and rights of citizens, in to many cases have become a mechanism for degradation of the fundamental values which one democratic society should be based on, especially with regard to the importance of relations that are covered by such a kind of regulation.

In this regard, it could be concluded that the model of constitutional normative regulation in BH, as a result of mentioned peace agreements, is not close to European-continental legal tradition and understanding of law as well as centralized model of protection of constitutionality. It has a negative effect on the protection of constitutionality and rule of law in BH.

### **3. Legislator and Legislation: Procedural and Substantive Omissions**

In such a state of normative constitutional regulation, which lacks precision and details, as well as prohibitions and restrictions at the level of the Constitution for all authority holders, the legislator often behaves excessively, considering that everything that is not expressly prohibited is permitted and that what is not written can hardly exist -which is part of the legal tradition, especially in the Balkans, post-socialist countries, and especially in the conditions of a weak institutional system and insufficiently developed democratic society. This kind of legal attitude and behavior in practice led to numerous violations of the law-making process in procedural and substantive sense, which greatly affected the rule of law. An Act of Law, as a reflection of the general democratic will, in order to be regarded as such, must be passed in a procedure prescribed by legal norms of a constitutional character. This is a process – legislative procedure that is of particular importance to the society as a whole. It reflects the level of the democracy of the society, and it is especially necessary to express the connections between the citizens as the original holders of sovereignty and elected representatives in the legislative body.

If one considers the principle of the rule of law and constitutionalism as well, in the first place, as a state in which the public authority is constrained by norms of a constitutional character in the exercise of powers entrusted to it by citizens through a social contract - the Constitution, then that principle implies, above all, compliance with procedures in exercising authority prerogatives. This special significance is gained in the phase of legislative activity and the adoption of Acts of Law as acts that should represent a synthesis of public interest, while respecting the rights, freedoms and interests at the individual level in different areas of life, and which should be animated through a legal act. The lawmaking procedures have provided a specific institutional guarantees that elected representatives in legislative bodies will not be alienated from citizens as the original holders of sovereignty, that

they will not abuse the mandate that they have received, and the guarantees that Acts of Law will respect the general interest and rights and freedoms of citizens who, as authorized subjects, should also participate in the legislative procedure in the course of the public hearing, together with the elected representatives and through them as well.

However, as the legislative practice in BH at all levels shows – including the cantonal legislature and both entities legislature – the RS and the Federation of BH, the legislative procedure is often carried out by violating the prescribed procedures, and in a significant number in areas that are of key importance, with the complete exclusion of citizens and other subjects by disqualification of the ordinary legislative procedure, and by passing laws on urgent or shortened legislative procedure or violation of the procedures prescribed by the Rules of Procedure of the representative bodies. Thus, for example, at the level of the Federation of BH only in the period 2015 - 2017 twenty-five very important Acts of Law were adopted under the urgent procedure, twelve Acts of Law under shortened procedure, and thirty-two laws under regular - ordinary procedure. Normally, enacting of the Acts of Law in an urgent and shortened procedure means the exclusion of a public (public hearing as well), and a significant reduction in the rights and opportunities of all elected representatives in representative bodies to participate equally and adequately in the legislative process, especially within the shortened time period given to them to elaborate and react on the proposal of the Act of Law in procedure. The legal possibility of suspending the regular - ordinary legislative procedure is especially abused by the ruling political parties, which in this way exclude the public and members of the opposition from the objective possibility of influencing the content of the Acts of Law.

This, although the Rules of Procedure of the legislative bodies in BH explicitly prescribe that, as a rule, Acts of Law must not be adopted in an urgent procedure. In accordance with the provisions of the Rules of Procedure of legislative bodies in BH, an urgent procedure generally may only be provided if the adoption of some Acts of Law in the ordinary procedure could cause harmful consequences.

Therefore, when it comes to the possibility of adopting the law by urgent procedure, bearing in mind the previous and the importance of the legislative function for a democratic society as a whole - from whose adequate exercise the principle of legal certainty of participants in social relations and preservation of public interest in the exercise of legislative function is decisively dependent, enacting of Acts of Law in urgent procedure is an exception that can only be accepted with the prior cumulative fulfillment of two conditions. The first condition refers to the need for the adoption of legislation to regulate relations and issues for whose regulation, as prescribed by the Rules of Procedure – “there is an urgent need”. Therefore, the essence of this possibility in a society that pretends to be a democratic and well-regulated can be exhausted in the possibility of adopting legislation on an urgent basis on two grounds. The first concerns those relationships that are not regulated by Acts of Law, i.e. where there is a legal vacuum, and whose existence, even in a short period of time, can produce irreparable damage to the established and determined public interest - which must be objectively and reasonably justified. The second basis may imply the possibility of enacting laws under an urgent procedure in relation which are already regulated by law, but which, due to certain / changed circumstances, necessarily require different regulations in an objectively short time, in the function of preserving the very specific public interest, constitutionally protected values, and the rights and freedoms of citizens at the individual level.

However, both possibilities can be taken into account only under precisely defined circumstances and if there is a clearly defined and justified legitimate aim that is in function of supporting the constitutionally protected values. The second cumulatively conditioned requirement relates to the real existence of very specific circumstances which, beyond any doubt, must be of an extraordinary/urgent character and whose existence requires an urgent reaction of the legislature - in combination with the lack of adequate legislative and other regulations, in order to prevent the occurrence of harmful consequences.

For example, in accordance with the provisions of the Rules of Procedure of the House of Representatives and the House of Peoples of the Parliament of the Federation of BH, the passing of a law by a shortened procedure, with no possibility for the serious and comprehensive public debate/hearing - in which citizens and other interested subjects (NGO, companies, associations, etc.) should have a possibility to participate in adequate way and give their suggestions, may be taken into account exclusively when it is not a complex and comprehensive Acts of Law. Under these circumstances, the submitter of the draft of Act of Law may, instead of the draft, submit unofficial proposal and suggest that the proposed Act of Law be considered in shortened procedure under shortened deadlines.

Therefore, the adoption of an Act of Law in a shortened procedure, outside the ordinary procedure, is an exception that can be acceptable only with the cumulative fulfillment of two conditions. In the first place it must be an Act of Law that is not “complex”. The complexity of a legislative act must first of all be viewed from the point of view

of the social relations in relation to which the act is made, and their complexity, and from the point of view of the consequences that this act can produce within social relations *in concreto*, but also in terms of cyclical influence on other relations and the overall legal order, including the protected values - public interest, legal certainty, rights and freedoms of citizens, etc. Thus, the “complexity” of the any Act of Law in the terms of the Rules of Procedure is at least related to the nomotechnic or technical issues, but it is generally about the complexity of the social relationships into whose regulation it is entered and which are the cause of the adoption and the existence of a specific standard as such. For example, in the linguistic and / or nomotechnical sense, it is a very simple, for example, to introduce a death penalty, or to relieve the functionaries of judicial functions at all levels. However, from the point of view of the subject matter of the regulation, and constitutionally protected values and principles (right to life, judicial standing, judicial independence, legal certainty, rule of law, etc.) these are very complicated relations whose regulation should not undergo the procedure of adoption by using extraordinary – urgent or shortened procedures, with the exclusion of the democratic public - primarily of citizens and other interested subjects, and with the absence of the entire phases that regular legislative procedure foresees within which the mentioned subjects, but also the elected representatives, can take part in adopting of the legislative act in an efficient, responsible and customary way, within the set deadlines guaranteed by the regular legislative procedure. On the contrary, passing a law by means of a shortened or urgent procedure - implies the exclusion of the key and most sensitive phases in the adoption of a legislative act and public as well. In addition, under this procedure, the legislative act is directed towards the adoption in the legislative body in the form of official proposal by excluding the democratic public, and by limiting the rights of the representatives in the legislature in the exercise of their function in an adequate and regular way. Normally, the regular legislative procedure, before determining the draft of any Act of Law, necessarily implies the implementation of the procedure for determining this draft and the public hearing in cases of existing of common interest, and when the broadest debate among interested bodies, scientific and professional institutions and citizens is indispensable on a particular issue.

The scope of the Act of Law is another requirement laid down in the provisions of the Rules of Procedure of legislative bodies in BH. However, it is quite clear that this condition can only be considered if the previously fulfilled requirement is not a “complex” law that affects key social relationships in a decisive way. For example, the Rules of Procedure of the House of Peoples of the Parliament of the Federation of BH, stipulates that the adoption of the Act of Law by a shortened procedure, as a procedure belonging to the category of extraordinary mechanisms in the exercise of the legislative function, must be planned and, as such, provided by the Work program of this House. This is to avoid the possibility of resorting to it on a daily *ad hoc* basis, preventing the abuses, as well as the negative consequences of the non-selective use of this mechanism by ruling political parties – to concrete social relationships and their participants, and beyond the context of the purpose of prescribing. Additionally, precisely because it is an extraordinary mechanism for performing the legislative function, its putting into operation requires a dual system of double checking - when adopting the Work program of the House of Peoples which this activity is planned with, and when it is used in adopting a specific Acts of Law by a shortened procedure. This is to overcome the negative impact on the principle of legal certainty in resorting to extraordinary mechanisms of legislative function - such as a shortened legislative procedure. The introduction of emergency / urgent procedures in the exercise of the legislative function implies inevitably the fulfillment of the above mentioned conditions, which requires valid reasons and reasoned explanation. Similar abuses of procedural opportunity to suspend the regular legislative procedure are widely represented both at the entity level and at the level of the cantons - which have significant competencies as well.

It should be pointed out that the form of regular legislative procedure, which has a special significance in democratic states, is a tool that supports the exercise of the rights and duties of elected representatives of citizens / peoples in the representative body and within the reasonably set deadlines to actively participate in all of its previous phases of the regular legislative procedure before final adopting of the Acts of Law. It is also a guarantor of citizens' participation - as the original holders of sovereignty and other stakeholders in the process of passing laws in key areas of particular importance to society.

In this respect, it is important to emphasize that the parliamentary legislative procedure must be conducted in accordance with the provisions of the Constitution, in the manner and in accordance with the procedures prescribed by the Rules of Procedure of the representative legislative bodies - which represent also a constitutional category of special importance and which in detail regulate the procedure under which the legislative function is performed, as an activity of special importance in a democratic society. In this regard, the Rules of Procedure of the representative bodies and / or their houses are considered as a kind of “continuation” of the constitutional act, both by their constitutional foundation and by the content of regulations that undoubtedly constitute a crucial part of

the *materia constitutionis*. In this regard, the violation of the Rules of Procedure of any representative body at the same time constitutes a violation of the Constitution under which this representative body operates.

Thus, the Constitutional Court of the Federation of BH, in the case no. U-19/12, took the following stand: „In this dispute the question was raised as to the legal force of the Rules of Procedure, or its connection with the Constitution of the Federation of BH... ..The Constitutional Court of the Federation considers that in this case it is necessary to point special status of the Rules of Procedures of the federal authorities in the Federation of BH... ..Having this in mind, the Constitutional Court of the Federation is of the opinion that the Rules of Procedures of the Houses of Parliament of the Federation of BH– which represent the legislative power in the Federation of BH, that deal with the organization and prescribe the procedures for the work of the legislative body in order for them to be able to exercise their constitutionally entrusted function, have, as any general legal act, binding character, narrow and unequivocal connection with the constitutional provisions ... Possible actions (by actions or acts) of the bodies in the Federation of BH contrary to the prescribed and adopted procedures, undoubtedly leads to the violation of the Constitution of the Federation of BH. The Constitution of the Federation of BH is a framework that prescribes the constitutional order and democratic principles and principles of the Federation of BH, as entities within BH, determined to ensure full national equality, democratic relations and the highest standards of human rights and freedoms.”

In the same decision, the Constitutional Court of the Federation of BH specifically emphasized that “... all the authorities in the Federation of BH must be guided by the prescribed procedural rules”. In addition, the Constitutional Court of the Federation of BH in the case no. U-13/16, among other reasons, proclaims the Act of Law on Amendments to the Law on Civil Service in the Federation of BH unconstitutional precisely because of the failure to comply with the regular legislative procedure. In the case no. U-29/15, the Constitutional Court of the Federation of BH also proclaims the Labor Law as unconstitutional and emphasized that the Act of Law adopted without consistent observance of the established procedures by the Rules of Procedure cannot be considered as a constitutional act.

Therefore, in order for any Act of Law to be considered as a legal act adopted in a manner that is characteristic for a democratic society and that, as such, is appropriate to a democratic society - the prescribed procedure for its adoption, based on democratic principles and determinations, must be fully respected. This established legislative procedure is not the purpose for itself. Its creates the necessary preconditions for every democratically elected representative of citizens in the representative body to be able to draw on his democratic rights and duties in terms of effective and responsible participation in the work of that body, regardless of his party affiliation or the position of an independent representative, and regardless of the fact whether it is part of a parliamentary majority or not. In addition, the prescribed legislative procedure is a prerequisite for ensuring the necessary preconditions for the direct participation of citizens - as original holders of sovereignty and other interested subjects in the legislative process through public hearing/debate.

The consequences of the abuse of extraordinary urgent procedures in the exercise of legislative function, where they have no place, have a devastating effect on the overall democratic life within the state, the values protected within a democratic society, and on the principle of legal certainty (which is a principle of constitutional character of special importance!). It should be emphasized that elected representatives of citizens in the representative bodies have legality and legitimacy only as they move within the limits of the Constitution, constitutional principles and concrete public interest, as well as the protection of rights and freedoms at the individual level - which is set as an imperative but also a cause why in a democratic society there is public authority as such. When the elected representatives of the citizens, knowingly, or unknowingly, cross the boundaries set by the Constitution and the constitutional order – that they should respect and protect, either by violating the regular democratic procedures prescribed, or by violating constitutional principles and norms in the material sense, they lose both legitimacy and legitimacy. It is quite clear that these boundaries are much easier to cross in the conditions of model of American constitutional regulation, which regulates constitutional matter in a framework manner, without going into details in most cases, and at the level of principles of a general nature that require prior correct interpretation in order to be properly applied. In combination with a low level of democratic awareness and weak institutions, this can lead to dramatic consequences for the rule of law in the phase of legislative activity.

It should be kept in mind that the legislator is not absolutely unlimited in his own assessment of the needed proportionality to introduce extraordinary legislative procedures, and in any particular case of any use of the extraordinary procedures in the exercise of the legislative function, which have a decisive influence on constitutionally protected values and principles in a democratic society, they would have to provide valid arguments and evidence that would support the necessity of such treatment. In addition, the legislative procedure is a *sui generis* procedure in terms of realizing the concept of citizens' sovereignty in this - the most important, but

also the most sensitive phase of exercising public authority and, as such, is the basis for building a society of democratic values. It is precisely in this process that the inextricable link between the citizens - as the original holders of sovereignty, on the one side, and the elected MPs, as their representatives should especially be evident. The democratic nature of each order is reflected in the respect of the rights of the original holders of sovereignty - citizens who appear in the ordinary/regular legislative procedure in the role of stakeholders. In this regard, no one has the right to introduce extraordinary procedures in the legislative practice where they do not have a place, depriving the original sovereignty holders – citizens to participate in the law-making process, either directly through a public hearing, or indirectly through their representatives in the representative body within regular procedures and prescribed and objectified deadlines that guarantee the achievement of the democratic principles in democratic societies.

In doing so, the existence of a procedural possibility of passing of Acts of Law by extraordinary procedures cannot be regarded as an argument that the elected representatives of citizens in the representative body, by the act of election, expropriated the citizens - as the original holders of sovereignty and, thus, consider themselves as absolutes in that sense, arbitrarily and illegally taking over the quality of the original holders of sovereignty during the term of office. This implies the revival of ideas that are incompatible with a society that fosters democratic values based on democratic principles contained in acts of constitutional character and significance. In this regard, society and public institutions that, in accordance with principles and norms of constitutional importance, should function as democratic, by unconstitutional introduction of the extraordinary legislative procedures easily could turn into a tool for managing key processes exclusively in the interests of a narrow group of individuals gathered in a parliamentary majority and / or ruling party whose interests do not converge to the public interest and constitutionally protected values. Such a situation in the field of functioning of legislative power in key areas leads to the transformation of democracy into the oligarchy, based on an unacceptable *de facto* change in the basis of the democratic organization of the state and society expressed by illegal political violence, which is achieved by the introduction of extraordinary procedures in the exercising of legislative function and by suspending regular legislative procedures and violation of the constitutionally protected values.

The normative justification of the constitutional character of extraordinary procedures for the adoption of legislative acts, which in this case are the procedure of a shortened legislative procedure and urgent procedure, is not an option which, as such, is envisaged for the interest of the members of the representative body. The special extraordinary procedures and deadlines established within the ordinary legislative procedure, as stated above, are not the purpose for themselves, but are in the function of the achieving of protected values, interests of citizens and the public interest through legislative function. Thus, the established deadlines within regular law-making procedures (which are a rule in a democratic society!) enable parliamentary bodies and MPs to take a concrete position in an adequate, efficient and responsible manner of preparation, analyze the issue in question, and freely express their opinion in a democratic procedure of the adoption of Acts of Law whose content could depend decisively on the realization of the proper procedural preconditions during the law-making procedure. As mentioned above, within the regular legislative procedure, given the established phases and deadlines, it enables the participation of interested parties and citizens and the formation of public opinion on a certain issue that is the subject of the legislative regulation, which is an inescapable and inseparable part of the being of every modern democratic society.

This enables the basic principles of democracy, including the principles of publicity and transparency - which are in the function of the principles of legal certainty as well as the consecutive realization and protection of public interest. It is about the principles of constitutional importance whose proper application essentially ensuring public interest in the exercise of public functions - in this case the legislative function. Legal principles, including the mentioned principles, are rules of principled nature. They are the principles of higher order which are a source of law in itself in all democratic legal systems, and can be considered as “law for the legislator”. The coherence and democracy of the system depends on their respect and consequent implementation in the legal system, and in this specific case, the legal certainty of participants in the field of social relations, as a value *per se*. Therefore, it is about principles that have a constitutional significance, and thus, *eo ipso*, supra-legal force.

Nevertheless, a significant number of Acts of Law at the entity level in the post-Dayton period were passed by suspending a regular legislative procedure and / or direct violation of the procedures prescribed by the Rules of Procedure of the representative bodies. Some of these Acts of Law are key acts in vital areas - such as the Labor Law, the Act on Company Law, the Act of Law on Amendments to the Act of Law on Foreign Investments, Acts of Law related to the budget and execution of the budget, and even the very budgets as the most important financial instruments, etc. In some cases, even the Constitutional Court had to intervene at the request of the authorized proposers for violating the legislative procedure.



At the level of the cantonal legislative bodies, this practice of unconstitutionally suspending the ordinary/regular legislative procedure is also present. It is well-known the case of passing Acts of Law on the Higher Education at the cantonal level in some cantons by using urgent procedure for the only purpose to control of the ruling political parties over the Universities and for the establishment of politically eligible academic personnel (Deans, Rectors etc.), which, besides violating the regular legislative procedure, severely violated the autonomy of the universities. Thus, for example, the Assembly of Tuzla Canton passed the Law on Amendments to the Law on Higher Education of the Tuzla Canton (Official Gazette of the TC, No. 5/17). This controversial Acts of Law was passed outside the ordinary legislative procedure, that is, by urgent procedure, and its main purpose was exclusively in the early dismissal / removal of the newly elected management of the University (Rector and Vice-Rector in the first place), and appointment other politically suitable persons for this positions. However, there is no adequate protection of constitutionality in BH of such acts adopted at the level of cantonal legislative bodies, due to the narrow circle of proposers who can initiate the procedure of constitutional review before the federal Constitutional Court, as well as because of the rejection of jurisdiction and, in our opinion, unconstitutional self-limitation of State Constitutional Court when it comes to proceedings of the reviewing constitutionality of cantonal Acts of Law.

Certainly, by suspending a regular legislative procedure, without meeting the conditions prescribed by the Rules of Procedure, the provisions of the BH Constitution, the entities Constitutions, the Constitutions of the cantons, and international instruments for the protection of human rights and freedoms, to which these constitutional acts are invoked are directly violated. This directly violates the provisions of Article 25 of the International Covenant on Civil and Political Rights, which stipulates: „Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives... (c) To have access, on general terms of equality, to public service in his country.” Article 2 of this Covenant, in doing so, establishes the prohibition of any arbitrariness in terms of bringing it into a more unfavorable position, inter alia, of any kind of status, including political opinion and/or affiliation, in this case regarding the rights and opportunities to participate in the conduct of public affairs, and to have equal access to the public institutions and services of their country - where undoubtedly belongs (and in the first place!) legislative procedure and function as well. In this regard, the provision of paragraph 1 of Article 21 of the Universal Declaration of Human Rights of the UN, also states: „Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.” In this sense, is also third line of the Preamble to the BH Constitution, which stipulates: „Convinced that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society...” It also should be noted the fifth line of the Preamble to the BH Constitution referring to the obligation to apply the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights of the UN, but also to the application of the International Covenant on Economic, Social and Cultural Rights. Annex I of the BH Constitution also refers to these international acts regarding the obligation of their application and stipulates that these international instruments shall directly apply in BH. In the sense of the foregoing, the provision of Article I/2 of the BH Constitution stipulates, as follows: „Democratic Principles - Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law...”

In this regard, it can be reliably concluded that an institution that functions outside regular procedures, contrary to acts of constitutional importance, and on principles that presuppose limiting the rights and duties of elected representatives/MPs (but also citizens themselves) cannot be considered as a democratic body / institution. By introducing urgent and shortened procedures for passing Acts of Law where they do not supposed to be provided, legislative bodies at all levels of the BH authorities, including the legislature of cantons and both entities the RS and Federation of BH, do not act as democratic institutions, but on the contrary.

Approach to the exercise of a legislative function, which often includes procedural violations of the legislative procedure, as well as non-compliance with the Constitution and rights and freedoms of citizens guaranteed by the Constitution, also decisively affects the content of the adopted laws and - thus rule of law. Many Acts of Law in the key areas of life, as will be seen from the text that follows, at first glance directly violate the constitutional norms and rights and freedoms of citizens. After many years of application and the consequences these Acts of Law caused - some of them have been declared unconstitutional, others have been brought before the Constitutional Court, and some are still implemented in proceedings conducted by public authorities, including courts without any obstacles. The fact that legislations that are at first glance unconstitutional in their content are passed during the exercise of legislative function, and that they are then conducted producing harmful consequences for the citizens for years, speaks about the low level of the rule of law and constitutional justice in BH. Additionally, besides the other reasons, this is also the consequence of the inconsistent combining of the US normative model of constitutional regulation - which, due to imprecise and framework regulation, leaves much

more possibilities for the lawmaker to go beyond the boundaries of the Constitution, with the European-continental centralized model of protection of the constitutionality, where ordinary courts have no jurisdiction to control constitutionality but only implement Acts of Law regardless of their content and where is only Constitutional Court who have this jurisdiction. True, as mentioned before, the ordinary courts in BH have the possibility to stop the procedure before them and request the opinion of the Constitutional Court in an individual case, but this possibility proved to be insufficient to ensure full protection of constitutionality and strengthening of the rule of law.

It is well-known the case of the Act of Law on Bankruptcy Proceedings of the Federation of BH, whose provisions stipulated that workers in bankruptcy proceedings have the right to declare only eight minimum wages in a higher pay line, regardless of the number of earned and unpaid salaries and other employee claims to the employer, and regardless of which labor claims were incurred earlier in relation to other claims giving priority to payment. As a rule, this number of earned, but unpaid salaries was multiple higher, with claims settled from the assets of the bankruptcy debtor - a company in bankruptcy in the order of settlement which does not follow the timing of the obligation, and whose assets were alienated in a suspicious way for years before the initiation of the bankruptcy proceedings. For the obligations incurred, the owner and management of the company are not liable with their private assets, which, as a rule, were constantly increasing during the time when the company in their possession consistently recorded losses.

After a many years of application of the provisions of the Act of Law on Bankruptcy Proceedings that limited the right of employees even to report claims in the higher payroll in bankruptcy proceedings to only eight minimum wages, regardless of the actual total amount of claims, the Federation Constitutional Court declared these provisions as unconstitutional. The Constitutional Court of the Federation of BH noted that these provisions violated the right to the property of the employees, and emphasized to the binding application of the principle *prior tempore, potior iure* (earlier in the time, stronger in right) as well, in terms of the order of payment of the creditor of the bankruptcy estate, who, regarding the order of payment of the workers' claims in the bankruptcy procedure was not respected (see: Judgment of the Constitutional Court of the Federation of BH no. U-27/15).

It is one of the key Act of Law that has been the basis for violating workers' rights and the forming of post-transition financial power centers that have strong political influence. Otherwise, the exclusion of liability for settlement of the debts of owners and management of companies, which came to the hands of private owners through a very suspicious process of privatization in the post-war period, the financial transitional elites are protected, while the prescribed priority in the order of settling in the bankruptcy procedure allowed the minimal functioning of public health funds and the pension insurance fund - all at the expense of labor rights and earned and unpaid wages. Namely, just as the owners of the company did not pay the salaries and other claims to the workers, they also did not pay taxes and contributions for pension and health insurance, which had catastrophic effects on these funds. The paradox of the whole situation is best seen from the fact that, in accordance with the provisions of the Act of Law on Bankruptcy Proceedings, priority is given to payments (from the assets of the bankruptcy debtor) for health insurance of employees that workers never used, and could not use it because of the fact that the employer did not pay the same. If workers were forced to seek health care services in that period, they would have to pay for them from their own funds.

Despite the fact that some of the provisions of the Acts of Law on Bankruptcy Proceedings of the Federation of BH being declared as unconstitutional and having ceased to apply, the remaining consequences were produced by the application of unconstitutional provisions in the period of 11 years of their application in the tenths, perhaps hundreds of thousands of individual cases of unpaid earnings and unpaid work claims in proceedings that have already been completed. However, the rule of law in BH may best be explained by the fact that even after the Constitutional Court ruling in this case, the ordinary courts, before which bankruptcy proceedings are conducted, refuse to apply the new provisions of the Act of Law on Bankruptcy Proceedings that were passed after the ruling on the unconstitutionality of the old provisions - with unacceptable quasi-argument that bankruptcy proceedings already initiated in accordance with the old (unconstitutional!) provisions should be completed according to the provisions in force at the time of their initiation. Thus, the ordinary courts in most cases, further applied the provisions declared as unconstitutional by the Constitutional Court and amended by the Parliament of the Federation of BH by enforcing the judgment of the Constitutional Court, actually maintain the state of unconstitutionality and continue to apply the provisions of the Act of Law on Bankruptcy Proceedings that ceased to be valid for their unconstitutionality.

This practice of ordinary courts regarding the application of unconstitutional provisions and toleration of illegal consequences arising from their application in various cases, which led to judgment of the Constitutional Court on their unconstitutionality, went so far that the Constitutional Court of the Federation of BH, in judgment no. U-20/22, had to take the following position: "The Constitutional Court of the Federation of Bosnia and Herzegovina,

ruling on the constitutional question submitted by the Supreme Court of the Federation of Bosnia and Herzegovina on the legal effect of the decisions of the Constitutional Court of the Federation of Bosnia and Herzegovina on ongoing court proceedings, based on Article IV.C.3.10.(4) of the Constitution of the Federation of Bosnia and Herzegovina, at the session without public discussion held on 27. June 2022., brought – Judgment – in relation to the presented constitutional question, the effect of the decisions of the Constitutional Court of the Federation of Bosnia and Herzegovina, which determined that a law or regulation or an individual provision of a law or regulation is contrary to, i.e. inconsistent with, the Constitution of the Federation of Bosnia and Herzegovina, is such that in relation to the procedures that are pending before ordinary courts in any phase of court proceedings, from the date of publication, must be applied in such a way that such a regulation, law or individual provision is not applied in regular/ordinary court proceedings, i.e. the decision of the Constitutional Court of the Federation of Bosnia and Herzegovina has retroactive effect on ordinary court proceedings which are ongoing."

Therefore, the Constitutional Court, after years of wrong practice by the ordinary courts, had to react in this way, explaining to the ordinary courts what should have been obvious, and after irreparable consequences and damage were caused in a large number of cases that were conducted before the ordinary courts.

A similar illegitimate assault on labor rights by the legislator was made by passing the Act on Amendments to the Act of Law on the Rate of Default Interest of the Federation of BH, which was adopted in 2016. This Act prescribes that the rate of default interest on employment related claims of employee is 0.2% which is 60 times less than the rate of default interest on all other claims (12%), and even the ones that the employer can have towards the employee (e.g. compensation for damage caused etc.). In doing so, the legislature completely neglected the fact that the default interest - as such - is a measure of sanctioning the market subjects that do not comply with their obligations, thus endangering the stability of the entire economic system and jeopardizing the existence of companies - their creditors who, in the event of a delay in the payment of their own claims, they must make the necessary funds to meet the basic needs by mostly borrowing, in which case they would pay multiple default interests on those debts. All this leads to the further cyclical bringing of a wide group of citizens to an unequal / discriminatory position, thereby directly violating the constitutionally guaranteed right to property of workers /employees by its potential reduction in the above mentioned and other possible ways.

The possibility of charging default interest at a certain and necessary level should be used as a means of prevention from the employer's fraudulent behavior, as well as an adequate remuneration to the disadvantaged party in a particular relation that has timely carried out their obligations and without fault of their own did not achieve the contracted fee or salary. In contrast, the controversial provisions of this Act of Law stimulated employers to fraudulent behavior, and created an environment for the emergence of very unfavorable situations, generally having in mind the lack of functioning of the institutions and the weakness of the rule of law in BH. Thus, in potential future cases, an employer who does not fulfill his obligations to employees could be rewarded in the form of a difference between the amount of interest on savings or other investments and the rate of default interest on the debt (0.2% ) if it decided, for example, that instead of paying the salaries, place the same amount of money on the bank in the form of savings or make some other investments, and for the period as long as the court proceedings for claims for unpaid salaries would last. This possibility should not have been ruled out by the legislator nor can these allegations be considered unrealistic, pretentious or unapproachable for at least two reasons. The first reason concerns the fact that, basically, legal norms create a potential or a certain future within one society in terms of concrete relationships, which is one of the primary functions of legislative regulation. Bearing in mind the situation in the area of work processes and realization of labor rights, the scenario appeared to be very realistic (more importantly, certain!). Another reason, in direct connection with the first one, concerns the ubiquitous practice (which has become the rule!) of non-payment of wages/salaries and other claims arising from the employment relation, i.e. the constant delay in payment, with the tolerant attitude of competent authorities in the field of exercising rights from employment, and without any effective sanction against employers even though the violation of the Labor Law is a misdemeanor, i.e. a criminal offense against positive criminal legislation in BH, which also speaks about the weakness of the rule of law in BH. This indicated a logical conclusion regarding possible future misuse of the disputed provisions of the aforementioned Act of Law, and this very wide scope in terms of the population that might be affected. However, in the case no. U-30/17, by its judgment of 25 September 2018, the Constitutional Court of the Federation of BH declared provisions of this Act of Law as unconstitutional. So, the unacceptable scenario regarding possible abusing of this Act of Law is prevented by the proper reaction of the Constitutional Court of the Federation of BH.

In addition to the above, there are a large number of cases in vitally important areas that are or were the subject of unconstitutional regulation by the legislator at first glance, on the occasion of which procedures for the protection of constitutionality were conducted before the Constitutional Court. Unconstitutional provisions and provisions of

dubious constitutionality as well as judiciary practice affected the rights of workers as it could be seen from previous text, then pregnant women and children from 6 to 15 years of age to mandatory health insurance, the rights of victims of war crimes, crimes against humanity and genocide to compensation of damage, the rights of workers in the health sector to effective trade union organization, etc. The elaboration of each of these cases goes beyond the capacity of this paper, so they are only given as examples.

It seems that the transition political elites have completely misunderstood the capitalism that is being achieved in a democratic society. Thus, workers, trade unions and the most vulnerable categories of population, such as pregnant women, mothers with newborns, ill, abused and neglected children aged 6 to 15, came to the strike of ruling political elites, but also some of international subjects, in the post-war period. Namely, it is a well-known fact in BH that the process of privatization, reform of the banking sector, payment transactions, and even the adoption of specific Acts of Law that introduced restrictions regarding the aforementioned and other rights of citizens of existential importance, was often influenced by international credit and other centers of powers that had their own interests and used the influence of OHR and certain foreign embassies in BH.

Otherwise, it is about the categories of population that were specially protected during socialism, which - especially when it comes to workers and workers' class - are obviously understood as a political or class opponent in the new social order. Thus, a system of wild capitalism has been established which takes into account the immoral interests of newly-formed financial elites and international centers of power with undue political influence even in the exercise of legislative function - which is evident from the above-mentioned examples of law-making that obviously violates constitutional provisions on a *prima facie* basis - at a first glance. It seems completely neglected in BH that private financial interests in a modern democratic society must be exercised within the norms of the constitutional order, respecting the rights and freedoms of others, and not by suspending the rights and freedoms of workers and citizens. All this adversely affects the implementation of the principles of constitutional rule and the rule of law, in a situation in which key Acts of Law are adopted in an urgent and shortened procedure and by violations of the prescribed procedures of the regular/ordinary legislative procedure, with the exclusion of citizens, the democratic public and stakeholders, and with the content which is already, at first glance, in direct conflict with constitutional provisions and on the line of pursuing the interests of internal and international political and financial elites. In addition to the above, as is already known, the entire constitutional system is based on ethnic discrimination and pronounced inequality of votes in elections, about which there are already judgments of the European Court of Human Rights in Strasbourg, which makes the status of rule of law and entire environment as very difficult and unacceptable for proper development of democratic society.

In this regard, the frequent practice of passing laws by using urgent procedures, which is often misused to stipulate solutions that are of dubious constitutionality or that are at the first glance contrary to the Constitution, has an extremely negative effect on the rule of law in the conditions of a framework and imprecise constitutional regulation which leaves much more possibilities for the legislator to violate the boundaries that are vaguely set by the Constitution.

#### **4. American Model of Constitutional Regulation Vs. European Model of Organization of Political Parties in Bosnia and Herzegovina: An Impact on Legislation**

In addition to the American model of constitutional normative regulation inconsequently combined with European-continental centralized system of protection of constitutionality in BH, this model of constitutional regulations is realized in terms of strictly centralized hierarchical structure of political parties with strong party leadership, which is mainly characteristic of European party organizations. Party leadership is constantly present in the political life of European countries. In most European countries party leadership and strictly centralized political party organs at different levels of organization are an inevitable factor in managing all major political processes. They represent a kind of non-institutional, often decisive, informal power center where decisions are actually made, which are then formally proclaimed through representatives of ruling political parties in the legislative and executive bodies of public authority.

Bearing in mind the general phenomenon, especially in transition countries with underdeveloped democratic institutions, that executive power takes the initiative in regulating significant social relations by its own decisions, where there is no possibility of involving a broad democratic public in the adoption of such acts, and the proposals of the majority of the Acts of Law come from the executive branch - this opens the possibility of concrete political influencing of "anonymous gray power zones" concentrated in the political parties' leadership to regulate key processes in society. If added to that the impractical and framework constitutional regulation that exists in BH as a result of the US influence, which does not set clear boundaries to the legislator rather than leaving it and gives the freedom to adapt certain general constitutional standards and principles to social processes, then it requires a

strong decentralized model of constitutional protection - precisely as it is in the United States. However, if such a model of the framework and imprecise constitutional regulation is combined with a strictly centralized model of protection of the constitutionality that is characteristic for the countries of the European-continental legal circle where there is only a Constitutional Court that protects constitutionality and which in most cases is limited, then such a model does not provide adequate support for the exercise the principle of the rule of law and providing constitutional justice, which is the case in BH.

Thus, instead of having Acts of Law and other rules to reflect the general will and democratic processes, these rules can become a means of realizing individual interests - financial and other, assembled around narrow party leaderships that have a crucial influence on the functions of the legislative and executive authorities. A particular problem arises when these rules are applied for years even in cases of their unconstitutionality which is noticed at first glance, without effective judicial protection in a system where ordinary courts apply Acts of Law as long as they are in force. The limitation of access to Constitutional Court and, thus, to constitutional justice is an additional problem, whereby only the highest officials - those who are appointed by the ruling political parties in most cases can initiate procedures for the reviewing of constitutionality - as is the case with the Constitutional Court of BH and the Constitutional Court of the Federation of BH. In addition, the political influence on the appointment of judges of the Constitutional Courts, which takes place in the cooperation of executive and legislative authorities, is of great importance. In transition countries - such as BH, where democratic consciousness and democratic institutions of society are not developed, such a state has a very negative effect on the principle of the rule of law and constitutional justice, manifested by rigid violations of human rights and freedoms and by the illegitimate realization of narrow interests of the individuals gathered around ruling party leaderships.

In BH, the role of the leadership of political parties is particularly emphasized. Thus, candidate lists are signed by political party presidents, which give them special power to make decisions because without their signature there is no candidacy. In addition, in BH, the electoral lists/ballots of the semi-open type are really nominal, and of a really closed type. Namely, voters have the option of voting for candidates from the list of a political party and a lower ranked candidate may be winner within candidates from the same list by the number of votes, but it stil may not be enough, because of obligation to cross the established threshold, i.e. must receive at least 20% of the total number of votes it has received entire list plus one vote on general elections, so it is rare that it actually happens.

This additionally strengthens the position of the presidents of the political parties, since it also certifies the order of the candidates on the electoral list, thus crucially influencing future staffing. In addition, in BH a practice has been created for highly-positioned candidates in the electoral lists to sign contracts with a political party that contain specific property sanctions, which commit themselves to respect the instructions of the party leadership if elected to the representative bodies and even the pre-signed resignations which the party leadership may always use it in cases where the elected MP refuses to obey the instructions of the party leadership. Similar insurance policies are also used in cases of appointment of executive function holders. Thus, the case of Mr. Desnica Radivojević, the Deputy Prime Minister of the Federation of BH, who did not abide by party instructions when making the decisions of the Government, and the political party that nominated him to this position activated the blank resignation that Mr. Radivojević previously signed as a condition for appointment. This case was even considered by the Venice Commission, and it took the stand that the resignation of Mr. Desnica Radivojević, submitted to the FBH president Živko Budimir, is “a fictitious and dishonest procedure contrary to European principles”. The Venice Commission pointed out that the introduction of blank resignations, as a means of party control over elected and appointed officials, “is contrary to the best practices of democracy and the rule of law with negative consequences for the functioning of the political system”, after which the Constitutional Court of the Federation of BH issued a decision according to which such resignation cannot produce any legal effect. However, the practice of signing political party contracts with candidates on the electoral lists, as well as the practice of signing blank resignations as a prerequisite for appointment to the office, is still widely present in BH (see: Opinion of Venice Commission no. 691/2012 of 15 October 2012, CDL-AD (2012) 021).

Under such circumstances, representatives elected by citizens in public authority institutions are under real control of the narrow centers of power which are gathered around party leaderships. Bearing in mind the low level of intra-party democracy, this decisive influence on the decision-making process does not even have party bodies, but individuals within these bodies.

In contrast, the model of the organization of political parties in the United States is completely different. Two traditionally strongest political parties - the Republican and Democratic Party have no strictly centralized and hierarchically defined structure that would always be present in the background of officially elected public office holders, and do not even have party membership as it is understood in European countries. These are very loose structures in an organizational sense, whose basic purpose and focus is on election and election campaign. Even

then, party leaderships have no significant role, but the role of citizens and membership is dominant in the stage of candidacy.

Thus, the rules on candidate nomination, the organization of voting access, the participation of voters in basic and general elections, campaign financing and voting mode, vary from state to state in US. As Bowler, Donovan and van Heerde states, "the US Constitution, federal statutes and federal courts provide some general parameters that states must follow, but rules and regulations affecting the conduct of elections are largely left to states." (Bowler, Donovan and van Heerde, 2005: 188).

Citizens of the United States in the election process get included even in the stage of selection of party candidates. The difference in the candidacy procedure, which is one of the key stages of the entire electoral process between the United States and most other democratic states is that in the US selection of candidates to participate in elections is not on political parties and their leadership, this selection is made on the primary elections usually held in the middle of the election year, as Bowler, Donovan and van Heerde states (see more on that: Bowler, Donovan and van Heerde, 2005: 188). There are two variants of primary elections, as Vasović states, "one is closed primary, and the other is open primary. In closed primary, voters are, or become, party members" (Vasović, 2006: 206).

However, as with other issues pertaining to the electoral process, neither the primary elections in the United States have been uniformly regulated in all member states of the federation.

Some of the US member states prefer the closed model of primary elections, in which only those voters who are registered as party members may participate. This registration implies a link between a member and a party that is considerably weaker than the relationship between the party and its membership in Europe, since this link does not result in a payment obligation of affiliation fee or organizational meetings related to party membership. In states that prefer the closed model of primary elections, independent representatives, and members of the rival parties are excluded from the primary party elections. Some of the other US member states prefer the model of the closed system of primary elections, where apart from party membership, voting of independent voters is allowed. In other member states, there is a model of open primary elections, whereby every voter can choose any party ballot paper. In two member states, a blanket primary ballot is used, with a list of all functions and candidates for those functions from all parties. All voters, regardless of party affiliation, receive the same ballot paper and can choose different candidates from different parties for the different functions listed on the ballot, as Bowler, Donovan and van Heerde notes (see more on that: Bowler, Donovan and van Heerde, 2005: 189-190).

Such a system of party organization and action in which there are no strong, centralized and hierarchically firm party structures acting on institutions and individuals in institutions, with the strong decentralized support within the system of ordinary judiciary to protect the principle of constitutionality, promotes the individual responsibility of elected individuals in the institutions towards the citizens, rather than narrow party leaderships. On the contrary, in BH from a standpoint of the rule of law and respect for human rights and freedoms - a strong, centralized and strictly hierarchically structured political party structure - which is the quality of the European tradition and circle of countries, with the strong influence of the narrow party leadership under insufficient conditions of democratic society and informal influences of newly-formed financial as well as political elites and inconsistent influences of international subjects in BH, does not correspond to the US model of framework constitutional norms combined with a European-continental centralized protection model of the constitutionality. This is due to the fact that, as outlined above, the framework and undetailed model of constitutional regulation predominantly based on norms and principles of general nature leaves the legislator option that is often abused under the aforementioned conditions, whereby the legislator often goes out of bounds which the Constitution establishes in an unclear and undetailed way which is unusual for the European legal tradition and understanding of law. This is the reason for the passing of Acts of Law that are already at the first glance of suspicious constitutionality, where there is no effective protection of constitutionality under the circumstances in which, in the system of a centralized European-continental model of constitutional protection, only the Constitutional Court may exclude such Acts of Law from the legal order because of unconstitutionality, with very limited approach to the Constitutional Court.

In fact, thanks to the mentioned mechanisms of party control over elected officials in the legislative and executive institutions in BH, the institutions of the system are transformed into a kind of "flow water boiler" where it is only necessary to raise hands for a decision whose content was agreed in advance – and not in the institutions of the system in a democratic and transparent manner, but within a narrow circle of party leaderships, and which are often under the strong influence of informal finance and other centers of power, inner and international. This is turning democracy into a partitocracy with elected officials in the institutions of the system responsible to the party leadership rather than the citizens who have only formally elected them. In addition, such a long-standing paradigm of political action in BH has completely led to the depersonalization of elected officials in the public, and their

decisions are seen only as decisions of political parties and less than the decisions of elected officials for which citizens voted and who have their own name and surname. All this leads to a complete blurring of the responsibility, where political parties as depersonalized entities, assumes responsibility instead of elected officials, generating a public opinion that no one is guilty of either bad or unconstitutional decisions or a generally bad conditions of life. Under the conditions of interethnic tensions that are constantly heated by ruling political parties, such bad decisions are assumed to be of higher national interests, the survival of peoples, the historical predisposition of the ruling ethnic political parties for the salvation of peoples, and the establishment of political campaigns in the atmosphere of individual irresponsibility for daily violation of human rights and freedoms at the individual level, and self-proclaimed and exclusive responsibility for the collective ethnic interests of the constituent peoples - Bosniacs, Serbs and Croats.

Thus, the issue of the legitimacy of government and contents of its decisions in BH has been replaced by the imposed discourse on the legitimacy of certain political parties for the representation of particular constituent peoples. The out of institutional way of acting goes so far as that the pro-Croat parties of the nationalistic orientation constituted the so-called Croatian People's Assembly in BH, which brings together almost all parties with a nationalistic Croat agenda. This body, which is some kind of body unrecognized by the Constitution, have tried to impose their standpoints as valid to the official institutions. Under such circumstances the imperative of the ruling political parties divided by ethnicity is contained in the intent and need to justify the separate decisions of their party bodies from the point of view of their content in order to provide the necessary level of subjective conviction of their followers on the sufficiency of those decisions from the point of view of the ethnic interests of the constituent people to which they belong. This practice has led to the systematic degrading of the citizen as an individual, with all the rights, obligations and responsibilities that should belong to him. Under these conditions, even when acting on an individual level, most citizens are subject to the dominant paradigm and their actions in political and social life are more like members of constituent peoples with very abstract expectations regarding the higher interest of the collectivity they belong to, instead as individuals with quite realistic needs. This may be most evident in the electoral process where citizens vote, not from the position of real existential interests, but from the point of view of the very abstract and unclear "higher interest" of the ethnic group/constituent people they belong to.

The absence of a realistically situated citizen, with all of his very specific needs and interests of primarily existential nature, implied the absence of the need to justify the decisions of ruling political elites from this aspect. This led to the neglect of any responsibility towards a realistically situated citizen, which as such does not exist in the perception of political elites, and to the legitimization of their decisions based on the very abstractive "highest" interest of the collectivities - the constituent peoples whose protectors have previously been proclaimed. In that sense, it is important to understand the many decisions that governed key relationships in society, which were undoubtedly not based on objective interests of citizens. Such decisions, which have determined the existential and every other position of citizens, have been made in the conditions of total disinterest of the public, which is mainly focused on decisions concerning collective rights and so called "national" interests of constituent peoples. Thanks to constitutional arrangement established by DPA which have introduced ethnic paradigm as dominant one.

Bearing in mind the aforementioned, in order to strengthen the rule of law in BH, it is necessary, first of all, to ensure the adoption of generally accepted international democratic standards through constitutional solutions. This implies the obligation to carry out a constitutional reform that would eliminate the existing discrimination on an ethnic basis, and that would ensure the real responsibility of the holders of public functions towards the citizens and their real needs. In the normative-technical sense, this would also mean clarification and detailed regulation regarding the definition of the most important constitutional principles and mechanisms for the protection of human rights and freedoms at the level of the constitutional act. It means also bringing the model of constitutional regulation closer to the European-continental tradition and understanding of law in general. The representatives of the international community in BH, OHR at the first place, should act in this direction, in order to implement the civil aspects of the DPA, but also to implement the legal obligations arising from ratified international agreements and the judgments of the European Court of Human Rights. In this way, the principle of the rule of law would be supported in a proper way, which would assure proper development of democracy and BH society as well.

## 5. Conclusion

The current constitutional arrangement of BH is the result of the influence of the US administration through the (*de facto*) imposition of the WPA and DPA. This directly influenced the model of constitutional normative regulation in BH that belongs to the Anglo-American legal tradition and understanding of law. This type of constitutional regulation leaves much more possibilities for the legislator (as well as other public authorities) to impermissibly cross the constitutionally set vague and unclear boundaries when enacting acts of law, other general legal acts and regulating key relationships. That is why such a framework and imprecise constitutional regulation at the level of norms and principles of a predominantly general nature requires strong support for the principle of constitutionality. In other words, the American model of constitutional normative regulation requires an American decentralized model of protection of constitutionality. However, in BH, which traditionally belongs to the European-continental legal tradition and understanding of law, the American model of constitutional normative regulation is combined with the European-continental centralized model of protection of constitutionality. At the same time, the American model of constitutional normative regulation in BH is combined with the European-continental model of the organization of political parties. Namely, in contrast to the American model of organization of political parties, the European-continental model implies a strong, hierarchically tightly organized structure, with a strong role of party leadership and strong membership connections with the political party to which they belong. Such party structures and party leaderships, under the circumstances prevailing in BH, are particularly present in the decision-making process together with other international and internal subjects as bearers of real power in BH. Such a state of affairs leads to the realization of the interests of informal centers of power through laws that often violate human rights and constitutional norms on a *prima facie* basis (at first glance) in conditions of an inadequate model of constitutional protection that does not correspond to the model of constitutional normative regulation, with the influence of informal centers of power concentrated in the leadership of political parties, financial and other international and internal power centers.

## References

- Ackerman, B. (2000). The new separation of powers. *Harvard Law Review*, 3, 633-729. <https://doi.org/10.2307/1342286>
- Albrecht, D., & Podolnjak, R. (2009). Razlike između američkog i europskog modela nadzora ustavnosti i zakonitosti (Differences between the US and European model of control of the constitutionality and legality). *Pravnik*, 43(87), 25-40.
- Aristotle. (1988). *Politika/Politics*. Zagreb: Globus/Sveučilišna naklada Liber.
- Barnes, H. S. (2001). The Contribution of democracy to rebuilding post-conflict societies. *The American Journal of International Law*, 1, 86-101. <https://doi.org/10.2307/2642039>
- Begić, Z. (2017). Position of ordinary courts in direct implementation of constitutional norms: New perspective in the case of legislative silence in Bosnia and Herzegovina. In A. Rainer, & Roth H. (Eds.), *Constitutional courts and ordinary courts: Cooperation or conflict?* (pp.59-87). Regensburg: Universitätsverlag Regensburg.
- Begić, Z. (2021). *O ustavu, legalitetu i legitimitetu: Od ZAVNOBiH-a do Dejtona i poslije (On the Constitution, Legality and Legitimacy: From ZAVNOBiH to Dayton and After)*. Sarajevo: Fakultet za upravu.
- Begić, Z. (2022). Legalitet kao pretpostavka demokratskog legitimiteta i kontinuiteta državnosti Bosne i Hercegovine: Pet ključnih perfidija (Legality as a presumption of democratic legitimacy and continuity of the statehood of Bosnia and Herzegovina: Five key perfidies). *Forum Bosnae*, 98, 34-67;
- Begić, Z., & Idrizović, K. (2015). Elements of Federalism in the Constitutional Organization of Bosnia and Herzegovina. In G. Marković (Ed.), *Public Law in Bosnia and Herzegovina: Trends and Challenges* (pp. 77-108). Athene: European Public Law Review and European Public Law Organization.
- Bieber, F. (2006). *Post-war Bosnia: Ethnicity, inequality and public sector governance*. New York: Palgrave Macmillan. <https://doi.org/10.1057/9780230501379>
- Bowler, S., Donovan T., & Van Heerde, J. (2005). The United States of America: Perpetual campaigning in the absence of competition. In M. Gallagher, & P. Mitchell (Eds.), *The Politics of electoral systems* (pp.185-205). New York: Oxford University Press. <https://doi.org/10.1093/0199257566.003.0009>
- Caspersen, N. (2004). Good fences make good neighbors? A comparison of conflict-regulation strategies in postwar Bosnia. *Journal of Peace Research*, 5, 569-588. <https://doi.org/10.1177/0022343304045973>
- Chandler, D. (2000). *Bosnia: Faking democracy after Dayton*. London: Pluto Press.



- Chollet, D. (2005). *The road to the Dayton accords: A study of American statecraft*. New York: Palgrave Macmillan. <https://doi.org/10.1057/9781403978899>
- Collins, R. J. (2005). *The allegiance of Thomas Hobbes*. New York: Oxford University Press.
- Conces, J. R. (2005). A Sisyphean tale: The pathology of ethnic nationalism and the pedagogy of forging humane democracies in the Balkans. *Studies in East European Thought*, 2, 139-184. <https://doi.org/10.1007/s11212-005-2001-2>
- Cox, M. (1998). The right to return home: International intervention and ethnic cleansing in Bosnia and Herzegovina. *The International and Comparative Law Quarterly*, 3, 599-631. <https://doi.org/10.1017/S0020589300062199>
- Duignan, B. (2011). *The history of philosophy: Modern philosophy from 1500 to the present*. New York: Britannica Educational Publishing.
- Fekete, B. (2009). The unknown Montesquieu: An essay on Montesquieu's intellectual background. *Iustum Aequum Salutare*, 1, 151-159.
- Friedman, F. (2005). *Bosnia and Herzegovina: A polity on the brink*. New York: Taylor and Francis e-Library. <https://doi.org/10.4324/9780203495070>
- Graham, J. (1998). Black past, grey future? A post-Dayton view of Bosnia and Herzegovina. *International Journal*, 2, 204-220. <https://doi.org/10.1177/002070209805300202>
- Horowitz, S. (2003). War after communism: Effects on political and economic reform in the former Soviet Union and Yugoslavia. *Journal of Peace Research*, 1, 25-48. <https://doi.org/10.1177/0022343303040001204>
- Ibrahimagić, O. (2005). *Državno uređenje Bosne i Hercegovine (State organization of Bosnia and Herzegovina)*. Sarajevo: Autor.
- Kolpston, F. (1988). *Istorija filozofije (History of the philosophy)*. Beograd: BIGZ.
- Kožar, A. (2022). Odras dejtonskih ustavnih odredbi na obrazovne, naučne i kulturne tokove u Bosni i Hercegovini (*Reflection of the Dayton constitutional provisions on educational, scientific and cultural trends in Bosnia and Herzegovina*). In Hana Younis (Ed.), *Ustavnost Bosne i Hercegovine kroz historiju (Constitutionality of Bosnia and Herzegovina throughout history)* (pp. 255-307). Sarajevo: Univerzitet u Sarajevu – Institut za historiju.
- Lahtinen, M. (2009). *Politics and philosophy: Niccolo Machiavelli and Louis Althusser's aleatory materialism*. Leiden-Boston: Brill. <https://doi.org/10.1163/ej.9789004176508.i-328>
- Lloyd, S. A. (2009). *Morality in the philosophy of Thomas Hobbes: Cases in the law of nature*. New York: Cambridge University Press. <https://doi.org/10.1017/CBO9780511596759>
- Locke, J. (2002). *Dve rasprave o vladi (Two treatises of government)*. Beograd: Utopia.
- Luscombe, D. (1997). *A history of western philosophy, Part II: Medieval thought*. Oxford-New York: Oxford University Press.
- Lutz, S. D. (2000). Thinking about constitutionalism at the start of the twenty-first century. *Publius*, 4, 115-135. <https://doi.org/10.1093/oxfordjournals.pubjof.a030099>
- Manning, C. (2008). *The making of democrats: Elections and party development*. New York: Palgrave Macmillan. <https://doi.org/10.1057/9780230611160>
- Maurer, A. (1982). *Medieval philosophy* (2nd ed.). Toronto: Pontifical Institute of Mediaeval Studies.
- Mueller, C. D. (1996). *Constitutional democracy*. New York: Oxford University Press.
- Papayoanou, A. P. (1997). Intra-Alliance bargaining and U.S. Bosnia policy. *The Journal of Conflict Resolution*, 1, 91-116. <https://doi.org/10.1177/0022002797041001005>
- Pehar, A. (2022). Povijesni pregled primjenjivanih ustavnih rješenja u emancipiranju društvene jednakosti u Bosni i Hercegovini (Historical overview of applied constitutional solutions in the emancipation of social equality in Bosnia and Herzegovina). In Hana Younis (Ed.), *Ustavnost Bosne i Hercegovine kroz historiju (Constitutionality of Bosnia and Herzegovina throughout history)* (pp. 29-68). Sarajevo: Univerzitet u Sarajevu – Institut za historiju.
- Plato. (2002). *Država (Republic)*. Beograd: BIGZ.

- Reilly, B. (2001). *Democracy in divided societies: Electoral engineering for conflict management*. Cambridge: Cambridge University Press. <https://doi.org/10.1017/CBO9780511491108>
- Rousseau, J. J. (1993). *Društveni ugovor (Social contract)*. Beograd: Filip Višnjić.
- Saunders, J. J. (2002). *A history of medieval Islam*. London/New York: Routledge/Taylor & Francis e-Library. <https://doi.org/10.4324/9780203199763>
- Schneckener, U. (2002). Making power-sharing work: Lessons from successes and failures in ethnic conflict regulation. *Journal of Peace Research*, 2, 203-228. <https://doi.org/10.1177/0022343302039002004>
- Schulze, H. (2002). *Država i nacija u Evropskoj istoriji (State and nation in the European history)*. Beograd: Filip Višnjić.
- Šehić, Z. (2022). Dejtonski mirovni sporazum i problemi u izgradnji funkcionalne države Bosne i Hercegovine (The Dayton Peace Agreement and problems in building a functional state of Bosnia and Herzegovina). In Hana Younis (Ed.), *Ustavnost Bosne i Hercegovine kroz historiju (Constitutionality of Bosnia and Herzegovina throughout history)* (pp. 207-254). Sarajevo: Univerzitet u Sarajevu – Institut za historiju.
- Singer, W. P. (2000). Bosnia 2000: Phoenix or flames? *World Policy Journal*, 1, 31-37. <https://doi.org/10.1215/07402775-2000-2008>
- Snyder, R. C. (2004). Machiavelli and the citizenship of civic practices. In M. J. Falco (Ed.), *Feminist interpretations of Niccolo Machiavelli* (pp. 213-247). Pennsylvania: The Pennsylvania State University Press.
- Trnka, K. (2006). *Ustavno pravo (Constitutional law)*. Sarajevo: Fakultet za javnu upravu.
- Trnka, K. (2022). Etnički i građanski concept u ustavnom razvoju Bosne i Hercegovine (Ethnic and civil concept in the constitutional development of Bosnia and Herzegovina). In Hana Younis (Ed.), *Ustavnost Bosne i Hercegovine kroz historiju (Constitutionality of Bosnia and Herzegovina throughout history)* (pp. 9-28). Sarajevo: Univerzitet u Sarajevu – Institut za historiju.
- Vasović, V. (2006). *Savremene demokratije (Contemporary democracies)*, Part I. Beograd: JP Službeni glasnik.
- Weinert, S. M. (2007). *Democratic sovereignty: Authority, legitimacy and state in a globalizing age*. New York: UCL Press/Taylor & Francis Group. <https://doi.org/10.4324/9780203965689>

### Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).