

## **Constitutions on Ice:**

# **Iceland's Stalled Reform Effort and Bosnia and Herzegovina's Nonexistent One**

**DPC Policy Note  
New Series #14**

**by Hannah Fillmore-Patrick**

**Budapest,  
July 2016**

A report from  
Democratization Policy Council (DPC)

Guest author: Hannah Fillmore-Patrick \*

Editing: DPC Editorial Board

Budapest,  
July 2016

\* **Hannah Fillmore-Patrick** has a B.A. in English from Colby College in Waterville, Maine, USA, and an L.L.M. in International Law from the American University in Bosnia and Herzegovina. Originally tackling issues of governance and authority in literary classics like Gulliver's Travels and The Tempest, she is now interested in examining alternative means of governing, particularly in Bosnia and Herzegovina.

hansefp@gmail.com

**TABLE OF CONTENTS**

INTRODUCTION..... 1

I. DISRUPTION IS AN OPPORTUNITY FOR REFORM..... 1

II. THE PEOPLE ARE REFORM’S STRONGEST ADVOCATES..... 2

III. SUCCESSFUL REFORM NEEDS ELITE POLITICAL CONSENSUS ..... 4

CONCLUSION..... 6

## CONSTITUTIONS ON ICE: ICELAND'S STALLED REFORM EFFORT AND BOSNIA AND HERZEGOVINA'S NONEXISTENT ONE

### Introduction

As angry Icelandic citizens prepare for early parliamentary elections this autumn, a bill to adopt the world's first crowdsourced constitution sits on ice in Reykjavik. The bill, already approved by national referendum, has lain dormant since parliamentary elections ousted its sponsor parties back in 2013.

The six-year history of Iceland's constitutional bill, with all its twists and turns, is a practical case study for Bosnia and Herzegovina (hereafter BiH). Not only does Iceland provide workable models for the drafting phase, it, realistically, confronts the political setbacks inevitable in any constitutional reform effort.

Both Iceland and BiH adopted their existing constitutions in wartime (World War II and the Bosnian War, respectively). While these wars and the constitutions of Iceland and BiH differ vastly, the political environment in which Icelandic lawmakers adopted their constitution, the constitution's durability thereafter, and the country's bottom-up reform process hold valuable lessons for BiH.

### I. Disruption is an Opportunity for Reform

International Rewriting a constitution is a lengthy, taxing undertaking. Only a large economic or political disruption can sustain public interest in reform long enough to produce a draft constitution. In a participatory approach – e.g. a crowdsourced constitution approved by referendums – the disruption must affect at least enough people to achieve whatever the system calls a quorum.

In 2008, the Icelandic banking collapse decimated the country's economy overnight. Unable to shoulder the burden of their reckless bankers, the Icelandic people sought accountability from their politicians who, first, had failed to regulate the banks and, now, were paying for their own mistakes with taxpayer money.

The Icelandic people found that it was difficult to prosecute politicians under the existing constitution, since it did not clearly define executive roles. As the Panama Papers did last month, the legal and moral crises caused by the banking collapse ignited public interest in a new constitution that would hold politicians accountable for future negligence.

Yet, if an economic or political crisis can be resolved with less comprehensive legislation, it will be. Such are the politics of least resistance, and such was ultimately the case in Iceland. Once

the government prosecuted the country's bankers and adopted more financial regulation, the people stopped pursuing a new constitution.

In 2013, four years after work started on the new constitution, it was not a major part of any party's election platform. The election that year actually saw major losses for the constitution's sponsors – the Social Democratic Party and the Left-Green Movement – and gains for the party opposing it – the Independence Party.

Until the Panama Papers reignited civil society earlier this month, Iceland saw a marked return to political normalcy in mid-2013. Despite the fact that the government's new financial regulations were far from comprehensive, and despite the fact that the leaders who had led Iceland into the banking collapse were back at the helm, citizens settled comfortably into the old political status quo.

## II. The People are Reform's Strongest Advocates

Those in power have little incentive to change the existing power structure, since it already benefits them. The demand for constitutional reform, then, must come from outside the government, ideally from the people themselves.

Non-governmental organizations (many sponsored by foreign stakeholders), the United States government (particularly), and other foreign governments have all called for constitutional reform in BiH. Aside from a lone amendment to allow Brčko District access to the Constitutional Court, however, no effort has been successful. Public dissatisfaction with the current system is high,<sup>1</sup> but so is public apathy towards reform (or, at least, resignation to the lack of reform).

In Iceland, public protests in 2009 resulted in early elections, mass resignations of those government officials tasked with financial regulation, and an amendment to the country's central banking act. Empowered by the success of the protests, the public undertook constitutional reform with an unprecedented level of civic engagement.<sup>2</sup>

In the period of unrest and reform following the banking collapse, the Icelandic people directly affected change through, primarily, national referendum. The 2010 and 2011 Icesave referendums, which rejected repayment plans on debts incurred by Icelandic bankers, were the first in Iceland since it adopted its constitution in 1944.

Iceland's participatory approach to constitutional reform also involved crowdsourcing ideas via

---

<sup>1</sup> Public Opinion Poll, BiH and Herzegovina (BiH), National Democratic Institute, August 2010. Available at: [https://www.ndi.org/files/NDI\\_Bosnia\\_Poll\\_Report\\_August\\_2010.pdf](https://www.ndi.org/files/NDI_Bosnia_Poll_Report_August_2010.pdf).

<sup>2</sup> Hannah Fillmore-Patrick, The Iceland Experiment (2009-2013): A Participatory Approach to Constitutional Reform, DPC Policy Note, Sarajevo August 2013. Available at: [http://dpc.djic.com/uimages/pdf/dpc\\_policy\\_note\\_2\\_the\\_iceland\\_experiment.pdf](http://dpc.djic.com/uimages/pdf/dpc_policy_note_2_the_iceland_experiment.pdf).

an official online forum, holding a national gathering of citizens, and vesting authority in a small constitutional council of representatives. In 2012, voters approved the constitutional bill in a nonbinding referendum with 73% in favor.<sup>3</sup>

The constitutional bill does not dramatically change the structure of the Icelandic government. It does, however, include a preamble that sets a progressive moral tone for the document, expands legislative oversight of the executive branch, and broadens referendum power.

In BiH, constitutional reform efforts, most significantly the 2006 April Package negotiated with the strong backing of the United States, usually look to clarify the country's unwieldy bureaucracy. Bureaucracy – exemplified by the country's three member rotating presidency and over 100 ministers at several levels of government– absorbs, by World Bank numbers, 40% of BiH's GDP annually,<sup>4</sup> yet is painfully ineffective.

There is not, however, a consensus on exactly what needs to change in the constitution. Kurt Bassuener, Senior Associate at the Democratization Policy Council, thinks the basic objectives of constitutional reform in BiH should be incentivizing internal integration, ensuring political and legal accountability, and rationalizing governance and public services to promote better and more equal service to citizens.<sup>5</sup>

The non-governmental organization Koalicija 143 has proposed a comprehensive municipalization model<sup>6</sup> that balances direct democracy and group rights in a more efficient, more effective government system. The model trades the existing entity and canton system for a less convoluted local system that includes stronger and more democratic ethnic protections.

In the proposal put forward by Koalicija 143, citizens vote for or against their representatives directly. Direct democracy makes individual politicians accountable in a way the current party-centric system does not. Above the municipal level, there is currently no direct relationship between elected officials and their constituents.

Icelander Smari McCarthy is a prominent information freedom activist who helped to word three of the Icelandic draft constitution's articles. He believes that, despite the country's divisive nationalism, a participatory approach could work in BiH.

"If people were to start a process here, in BiH, that identifies a few things everyone agrees on, it could work," he says. "Bring up a lot of topics and then eliminate whatever two-thirds of the

---

<sup>3</sup> "Iceland Constitutional Referendum: Reactions to Results," Iceland Review, 22 October 2012. Available at: [http://www.icelandreview.com/icelandreview/daily\\_news/Iceland\\_Constitutional\\_Referendum\\_Reactions\\_to\\_Results\\_0\\_394587.news.aspx](http://www.icelandreview.com/icelandreview/daily_news/Iceland_Constitutional_Referendum_Reactions_to_Results_0_394587.news.aspx).

<sup>4</sup> Expense (% of GDP), The World Bank, 2012.

Available at: <http://data.worldbank.org/indicator/GC.XPN.TOTL.GD.ZS>.

<sup>5</sup> Kurt Bassuener, personal communication, 9 April 2016.

<sup>6</sup> <http://www.k143.org/en/municipalization.html>.

participants don't like. Round two would decide how each of the topics people agree on need to change specifically. Round three would choose the exact language. Round four would be a referendum."<sup>7</sup>

Such a process would likely need to be a combination of, first, direct democracy (to decide the broad terms and content of a new social contract) and, then, representative democracy (to fine-tune and codify these terms in legal language). Defining the terms of participation is also key; in Iceland it was by a combination of random national lottery-style selection with expert-driven working groups. As Icelanders discovered, while systems need to be inclusive, the average citizen's tolerance for politics is relatively low. Enthusiastic representatives, then, were essential to seeing Icelandic constitutional reform through.

Initially highly engaged, Icelandic voters turned out for referendums and elections in the period following the crash in increasingly smaller numbers. Election exhaustion caused less dedicated voters to slowly lose interest in reform, compromising the legitimacy of the process's participatory approach, particularly with regard to the election of the constitutional council.

### III. Successful Reform Needs Elite Political Consensus

Successful constitutional reform often takes decades. The pendulum of party politics slows down the process from election to election, as does a lack of elite political consensus when the legislature is in session.

For sixty years, constitutional reform routinely failed in Iceland. In the haste of war, Icelanders plagiarized heavily from the constitution of their former subjugator, the Danish monarchy. The constitution wasn't a bad one, but it didn't address issues critical to Iceland, such as ownership of natural resources.

After World War II, the government quickly abandoned attempts to write a peacetime constitution due to a lack of political consensus. Between 1950 and 2015, the state conducted periodic reviews of the constitution, amending it on seven occasions to, mostly, restructure constituencies and redefine voter eligibility. Again, however, the government lacked the political consensus for comprehensive revision.

Once the draft constitution passed national referendum in late 2012, it advanced to parliament for a vote. In parliament, party politics again halted reform; the Independence Party filibustered until the 2013 elections ousted the draft constitution's sponsor parties at which point lawmakers abandoned the bill.

After regaining power, the Independence Party also pushed through an amendment that makes

---

<sup>7</sup> Smari McCarthy, personal communication, 20 March 2016.

it more difficult to replace the existing constitution. Any constitutional changes now require the approval of two-thirds of parliament and 40% of eligible voters.

In BiH, unlike Iceland, there is no way to introduce constitutional amendments through national referendum. Elite political consensus, then, is imperative to actually adopting legislation. A constitutional bill drafted by the people must have the support of two-thirds of parliament, including at least one-third of the representatives from each entity (the so-called “entity vote”), to pass. Even if a bill has the support of parliament, political elites can veto it by citing “vital national interest.” The barriers to reform – of any kind – are substantial.

Bassuener calls the parliamentary process a “gauntlet.” Indeed, the only thing Bosnian politicians seem to agree on is that bureaucracy benefits them all, which doesn’t bode well for a bill aimed at clarifying accountability. Valery Perry, Senior Associate at the Democratization Policy Council, has supported and advocated for citizen-centered constitutional reform in BiH for years. She says that, since elites control the process, reform that aims at shrinking or rationalizing bureaucracy is dead on arrival.

“The Dayton constitution,” Perry says, “was never meant to have accountability as a central feature. It was a ‘good enough’ document aimed at ending a war by securing the buy-in of the representatives of three warring parties. Accountability and good governance were not first and foremost on the minds of these leaders, nor is it first in the minds of their successors today.”<sup>8</sup>

For constitutional reform to succeed in BiH, the country first needs an opposition movement strong enough to build elite consensus on the issue. Bosnians are universally disgusted with corruption, abuse of office, and impunity (excellent starting points for a civic consensus), but politicians not so much. Given the legal framework for adopting reform, a participatory approach needs allies in parliament to be successful.

Of course, with the right lawmakers, reform can pick up right where it left off. In 2012, McCarthy, Birgitta Jonsdottir (a founding member of the failed Movement party, which formed out of the 2009 protests), and others formed the Icelandic Pirate Party. Pro-direct democracy, the party’s platform includes support for the frozen constitutional bill.

“The Pirate Party has two priorities,” says McCarthy, “first, adopting the constitution the people agreed to and, second, holding a national referendum on European Union accession.” McCarthy, critical of the Independence Party’s recent attempts to redirect reform with less comprehensive amendments, insists that the Pirate Party stands behind the constitutional bill completely.

---

<sup>8</sup> Valery Perry, personal communication, 9 April 2016.



The Pirate Party had modest success in the 2013 elections, but now polls as the most popular party in the country. The Panama Papers,<sup>9</sup> which revealed that disgraced Prime Minister Sigmundur Gunnlaugsson hid his family's investments in Icelandic banks in an offshore holding, have only bolstered the opposition party's success. As of April 2016, it has the support of over 40% of Icelanders. In comparison, just over 30% of Icelanders support the two ruling parties combined.<sup>10</sup>

The Pirate Party proved itself an effective policymaker/policybreaker last year when its three members of parliament spearheaded the repeal of Iceland's blasphemy laws. If the Pirate Party fares well in the autumn elections, it should be able to bring the constitutional bill to a vote sooner than expected.

## Conclusion

The Dayton constitution has outlived its usefulness – two decades of political, economic, and social stagnation has proven that through and through. It's not realistic for stakeholders, now, to believe that the current system will ever hold the country's many politicians accountable for their corruption, abuse of power, and impunity. For Bosnians themselves, the current system gives plenty of patronage, but no real power.

BiH needs constitutional reform. Lawmakers cannot clarify excessive bureaucracy with less comprehensive legislation. The government structure that the existing constitution prescribes is simply too expensive and too ineffective to govern a country sustainably. Constitutional reform is an enormous undertaking, but it takes as much energy to keeping the broken Dayton system running day to day.

BiH's existing constitution also lacks democratic legitimacy. Not only were the people uninvolved in its composition, but, unlike Iceland's never approved the existing constitution by national referendum or parliamentary vote. A participatory approach to constitutional reform would confer much needed democratic legitimacy on the document.

Stakeholders should approach reform in BiH with realistic expectations. It's always the time for sourcing good, democratic ideas for reform, but not always the time for getting them passed. Successful constitutional reform may very well take decades in BiH. Stakeholders should be prepared, however, to act quickly when the timing is right.

Foreign governments, non-governmental organizations, and other stakeholders can jumpstart a participatory approach to constitutional reform by, first, committing to rule of law under the

---

<sup>9</sup> <https://www.occrp.org/en/panamapapers/>.

<sup>10</sup> Pirate Party Iceland Polling at 43%, Almost a Majority, Pirate Party News, 6 April 2016. Available at: <http://piratetimes.net/pirate-party-iceland-polling-at-43-almost-a-majority/>.

existing constitution and, second, supporting civil society projects that work directly with the Bosnian people to advance a constitutional reform effort.

Perry says that, “Rather than applaud the adoption of legislation through urgent procedures designed to block citizen input and consultation, the EU and other foreign actors should insist that required legislation and reforms envisioned within the Reform Agenda or other EU accession plans are genuinely consultative. Civic engagement at this legislative level could put wind in the sails of citizens to eventually turn to constitutional options.”

Further, the BiH government’s access to financial and other resources from foreign stakeholders should be conditional on the government’s commitment to the existing constitution including, says Perry, the implementation of Constitutional Court and European Court of Human Rights decisions (e.g. Sejdić-Finci). Respect for the existing constitution, from both foreign and domestic stakeholders, is key to establishing a precedent that will give constitutional reform weight once it’s been adopted.

In BiH, a participatory approach to constitutional reform can, and should, start now. The people do not need a cooperative government to create solid proposals for an alternative social contract. Proposals capable of drawing wide popular support are essential for that time, near or far, when political elites finally stop dragging their feet on a new constitution. Constitutional reform is never easy, not even for Iceland, but a participatory approach lets citizens sidestep obstructive officials on the way to a new constitution.