

**Drawing the Curtain on Civic Kabuki:
Principles for Citizen Election Law and
Constitutional Reform Deliberation Processes**

DPC Policy Note

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Introduction

For a variety of reasons, election law reform and constitutional reform in Bosnia and Herzegovina (BiH) returned to the agenda in 2021.

This policy note briefly outlines some key principles and recommendations related to the process that would increase the chances that resulting options and proposals would enable a future electoral and political infrastructure that could allow BiH's citizens to finally play a meaningful role in transcending the morass of the past 15+ years. Avoiding compounding the damage through the essentialist entrenchment of ethno-national gerrymandering, labeling, and othering is crucial for real progress. The following issues are briefly described:

- The need to disentangle election integrity efforts and power allocation/constitutional reform efforts – however purportedly “minor” – with the former being the immediate priority;
- The need to initiate a genuine, interest-based, citizen-driven, bottom-up process of defining the social contract *they* would like to see.

The Disentangling

The first step towards a meaningful and meaningfully participatory political and civic discussion on these issues must be the disentangling of two related yet fully distinct elements: the portion of the effort that is related to “election integrity,” and the portion of the effort that is related to the political allocation of structural and regulatory power.

Since early 2021, these have been fused together.

Head of the EU Delegation Johann Sattler, US Ambassador Eric Nelson and Head of the OSCE Mission Kathleen Kavalec outlined the parameters of ensuring free and fair elections in a joint op-ed on February 17, 2021.¹ They called for “common sense changes,” noting the need to improve the way polling station commissions are formed and function, how technologies can assist in vote tabulation to ensure a timely announcement of results or to reduce fraud, and to sanction hate speech or offensive dialogue in the course of campaign seasons. These are indeed relevant and necessary steps, and efforts have been underway throughout the post-war period to continually improve these aspects of election administration, spearheaded by the OSCE and ODIHR, but supported through a multitude of projects by organizations from the US (e.g., IFES, NDI, IRI) as well as through other efforts at the grassroots and higher levels.

Few would argue against common sense steps to improve elections in BiH. A number of studies have pointed out weaknesses. For example, the coalition of NGOs Pod Lupom has published its findings from

¹ “Joint Op-ed by EU Ambassador in BiH Johann Sattler, US Ambassador in BiH Eric Nelson and Head of OSCE Mission to BiH Kathleen Kavalec on electoral reform.” *EU Ambassador's Blog*. February 17, 2021. Available at <http://europa.ba/?p=71574>.

independent election monitoring, as well as a list of extensive reform to the Election Law.² Transparency International presented its own recommendations at a conference in May.³

However, at almost the same time, and building from the US/EU talks with the HDZ and SDA on election reforms in Mostar (which is viewed by supporters of a top-down process as a model that can be “upscaled” to inspire election reform in BiH as a whole)⁴ these same ambassadors announced and have supported an Inter-Agency Working Group (IAWG) with a remit that would go well beyond the technical:

“The IAWG process must be inclusive and transparent to credibly implement the three pillars of reform: limited constitutional change to address ECHR rulings, election law changes to implement BiH Constitutional Court rulings, and technical reform to improve election integrity.”⁵

These first two points are fundamental. The first point is shorthand for addressing the Sejdić-Finci and other European Court of Human Rights (ECHR) rulings, which go to the heart of the nature of citizenship and citizenship rights. (There is a conspicuous absence of reference to the Zorić case in particular, the nature of which most directly challenges the dominant role of ethnic preferences and discrimination, and which, if properly addressed would in turn resolve *all* of the outstanding cases.)⁶ The second bundles in the Ljubić case, despite the fact that this case is itself fundamentally different.⁷ However, its inclusion and erroneous linkage to Sejdić-Finci is aimed at preparing the ground for fundamental – not minor – reform that would be a final step toward the further internal partition of the country into three *de facto* ethno-territorial political units.⁸ To date, the words “common sense” are difficult to find in discussions of these two elements.

Weaving the third priority – technical reform – into the substantially more controversial issue of

² Several years of independent monitoring reports are available at <https://podlupom.org/v2/en/article/konacni-izvjestaj-2014/124>; see also “Recommendations of the Coalition ‘Pod lupom’ for improvement of the electoral legislation.” *Pod Lupom Web Site*. Available at <http://podlupom.org/v2/en/article/recommendations-of-the-coalition-pod-lupom-for-improvement-of-the-electoral-legislation/255>.

³ “Transparency International in BiH Presented recommendations for Improving the Election Legislation.” *Transparency International web page*. May 21, 2021. Available at <https://ti-bih.org/transparency-international-u-bih-predstavio-preporuke-za-unapredjenje-izbornog-zakonodavstva/?lang=en>.

⁴ Bodo Weber. “The West’s Dirty Mostar Deal: Deliverables in the Absence of a BiH Policy.” *Democratization Policy Council Policy Note 16*. December 18, 2020. Available at <http://www.democratizationpolicy.org/the-west-s-dirty-mostar-deal-deliverables-in-the-absence-of-a-bih-policy/>.

⁵ “New talks on electoral reform, ambassadors call for ‘transparent’ process.” *N1*. March 16, 2021. Available at <https://ba.n1info.com/english/news/new-talks-on-electoral-reform-ambassadors-call-for-transparent-process/>.

⁶ Elvira Jukić. “Strasbourg Court Piles Rights Pressure on Bosnia.” *Balkan Insight*. July 15, 2014. Available at <https://balkaninsight.com/2014/07/15/another-human-rights-ruling-pressure-bosnia/>

⁷ For an explanation on how this ruling must be understood in a fundamentally different way from the ECHR cases, see Bodo Weber’s, “Bosnian Croat Leadership on Course to through Bosnia and Herzegovina into Electoral Chaos.” *Heinrich Boell Stiftung Sarajevo*. September 30, 2018. Available at <https://ba.boell.org/en/2018/09/30/bosnian-croat-leadership-course-throw-bosnia-and-herzegovina-electoral-chaos>

⁸ Kurt Bassuener and Valery Perry. “Is the US Doubling Down on Division in Bosnia and Herzegovina?” *Just Security*. March 15, 2021. Available at <https://www.justsecurity.org/75299/is-the-us-doubling-down-on-division-in-bosnia-and-herzegovina/>.

substantial structural political changes is clever, as anyone speaking out against efforts related to the first two points could be accused of being against the nearly universally accepted interest in reducing voter fraud and polling station malfeasance. It creates space to pressure opposition parties opposed to the process, and opposed to the intent of the process.

However, the sequencing itself raises some core questions: If the integrity of the current rules and procedures is so questionable that it requires this level of attention, then why wouldn't one wait until this integrity is restored/confirmed to then wholeheartedly support a discussion of on electoral/constitutional reforms and power allocation?

Disentangling these two very different elements should therefore be a priority.

Prioritizing Election Integrity

Addressing election integrity should be the main focus of attention, starting now. The following elements could strengthen the work already being done by Pod Lupom, Transparency International, and others:

- A high profile explanation announcing the detangling and setting the stage for a new way forward. Media appearances and joint op-eds can explain to the citizens of the country why it has become clear that this issue should be disaggregated from the more politicized elements of reform initiated through the Mostar deal and the work of the IAWG.
- This can be followed by a concerted effort to identify, highlight, and push back against any efforts that are *against* election integrity happening in the absence of a coterminous power allocation process.
- Support CSOs and researchers to assess how to counter “simple” fraud (ballot box stuffing, etc.), as well as more sophisticated systemic and structural fraud (e.g., patronage, voting under duress, etc.). This can include a review of existing proposals, other ideas such as compulsory voting, white ballots/protest vote options, etc., all to be distilled into easy-to-understand citizen resources, which could feed into...
- ...support for hyper-local (e.g., sub-municipal/neighborhood) discussions on the issue and on how to clean up elections, moving beyond the large population centers to visit places like Glamoč, Maglaj, Čitluk, Bosanski Petrovac, Orašje, or Mrkonjić Grad; this will generate ideas, but also send a clear signal from citizens who are interested in actively working to create the system and country that they would like to see. How would certain changes affect life these places? How would small or medium-sized communities be affected? This process would also point-out potential members of a real constituency for positive change.
- Proactively prepare to respond to pushback by parties against election integrity efforts and threatening to boycott elections if they cannot consolidate the power allocation they would like to see under the current political constellation. This should include messaging to citizens reiterating the common sense reasons for finally decoupling these issues: first and foremost, giving *them* the agency to decide their leaders, rather than party leaders the power to determine their voters.

Prepare the Groundwork for Discussing a New Social Contract

Rather than suggesting that the power allocation elements of the initiative would represent only “minor” election/constitutional reform, with an eye towards an electoral system providing more agency and integrity, there is a need for support for genuine, meaningful and bottom-up discussions on the type of social contract individuals would like to see.

Against the backdrop of the “tangled” IAWG efforts of the past several months, we have seen some rising interest in such discussions. For example, the EU is supporting plans for citizen discussions⁹ that seems to be based on the random citizen selection process known as sortition.¹⁰ The Council of Europe is also supporting such citizens’ assemblies.¹¹ These efforts could, potentially, be constructive. However, the aims, approach, and facilitation of such efforts are critical if the aim is to generate truly broad thinking and new approaches toward BiH citizen-centric governance.

There are a number of principles that should ideally guide such discussions and deliberations. For example, the classic book *Getting to Yes: Negotiating Agreement without Giving In* is a fundamental review on how to move beyond the notion of negotiations as an exercise in which one side wins and one side loses.¹² Instead it provides a reminder that a zero-sum mindset is not only fatal, but futile.

Among other points, it reminds that the best way to reach a positive and lasting outcome is to focus on *interests*, not on *positions*.

Interests are the issues or concerns that have been defined at the heart of some dispute. *Positions* are decisions that have been made by a negotiating party in advance of beginning discussions. These are often divorced from the actual heart of the issue – the interests – at the core of a dispute.

Once an interest is understood and prioritized, there can be many ways to get to fulfilling that interest. Remaining wedded to some position can substantially limit creative thinking, and staking out a position without being willing to compromise contributes to polarization. Facilitators at citizen assemblies will have a greater chance at a win-win outcome if discussions are focused on interests, from which implementation options can then be generated.¹³ If the elites – international or domestic – define positions before citizens define their interests, this will all be a cynical kabuki, and civic engagement theater.

⁹ www.skupstinagradjana.ba.

¹⁰ In his powerful call for citizen action to address the climate crisis, Roger Hallam integrates sortition into his call for citizens’ assemblies, to ensure a diverse mix of voices, and to attempt to reach those who don’t normally engage (and thereby reduce the risk of sitting once again with only “the usual suspects”.) Roger Hallam. *Common Sense for the 21st Century*. 2019, p. 23. Available at www.rogerhallam.com.

¹¹ “Council of Europe Congress to co-organize the First Citizens’ Assembly in Mostar to promote deliberative democracy.” Council of Europe web site. July 8, 2021. Available at <https://www.coe.int/en/web/portal/-/council-of-europe-congress-to-co-organise-the-first-citizens-assembly-in-mostar-to-promote-deliberative-democracy>.

¹² Roger Fisher and William Ury. *Getting to Yes: Negotiating Agreement without Giving In*. Penguin Books, 1981.

¹³ Raluca Raduta considered the impact of interests and positions in a paper on effective citizen polling techniques and question formulation. See “Constitutional and Governance reforms in Bosnia and Herzegovina: Does Public Opinion Matter?” *Democratization Policy Council Policy Note*, January 2015. Available at <http://www.democratizationpolicy.org/pdf/DPC%20Policy%20Note%20New%20Series%208%20Does%20Public%20Opinion%20%20Matter.pdf>.

Second, it would be useful for organizers and facilitators to spend some time with John Rawls, and in particular his notion of making just social and political decisions based on the idea of a “veil of ignorance.”¹⁴ At its most basic level, Rawls posited that in any exercise in which a group of people is designing a system that will have an impact on society as a whole, the participants should develop the rules for that system without knowing what their position in that system might be. In other words, when drawing election unit borders, or developing an education system, or creating a tax policy, the individuals developing options should not know whether – in that system – they would be in the majority or minority; black or white; religious or atheist; male or female; Bosniak, Croat, Serb, or “Other.” Situated behind such a veil of ignorance, systems designers would then be incentivized to develop a just model that would neither excessively hurt nor excessively favor given social categories. This is the opposite of what we have seen in political negotiations (on both sides of the Atlantic). This is clearly idealistic, and even utopian. However, moving closer to this ideal should appeal to organizations that purport to support human rights and civic values, and to citizens who might want to live their lives without having to worry whether the side of the municipality, or town, or street they might live on will put them into a greater or lesser position of citizenship.

Third, a read of some work by Sarah Chayes would be informative.¹⁵ In her book *On Corruption in America: And What is at Stake*, she outlines some proposed actions and processes that could be used in the US to reduce the systemic corruption and self-dealing she describes.¹⁶ She too suggests a local and bottom-up process, noting extensive consultations in Iceland¹⁷ for a new constitution and social contract (which failed, yet offered a cathartic and constructive process), and a process in the US state of West Virginia in which a candidate for governor developed his own platform following a thorough process of town meetings, consultations, and bottom up idea generation.

However, she also provides a warning. In her closing chapter she notes her frustrations borne from her experience with the US military in Afghanistan, providing analysis and recommendations and plans, only to repeatedly and belatedly be told that it was too late for *those* recommendations..... what should be done *now*? She notes, “I realized no one had any intention of carrying out any of these plans. What they wanted was a formula showing that some version of what they were already doing would solve the problem. And it wouldn’t.”¹⁸ Any consultative process that is aimed at seeking a rubber stamp for elite-negotiated agendas will not only fail to address the real interests held by citizens, but will further erode

¹⁴ Valery Perry. “A Different Kind of Veil of Ignorance.” *DPC Blog post*. June 22, 2020. Available at <http://www.democratizationpolicy.org/a-different-kind-of-veil-of-ignorance/>.

¹⁵ Her book *Thieves of State: Why Corruption Threatens Global Security* (W.W. Norton & Co. 2015) provided inspiration for the DPC/Eurothink research project that resulted in the book length study, *Sell Out, Tune Out, Get Out, or Freak Out? Understanding Corruption, State Capture, Radicalization, Pacification, Resilience, and Emigration in Bosnia and Herzegovina and North Macedonia*, published in 2021, available at <http://www.democratizationpolicy.org/wp-content/uploads/2021/04/Eurothink-DPC-Final-Report-to-Publish-March-2021.pdf>.

¹⁶ Sarah Chayes. *On Corruption in America: And What is at Stake*. Alfred A. Knopf, 2020.

¹⁷ See also Hannah Fillmore Patrick’s, “The Iceland Experiment (2009-2013): A Participatory Approach to Constitutional Reform.” *Democratization Policy Council Policy Note*, August 2013. Available at http://www.democratizationpolicy.org/pdf/dpc%20policy%20note%20_%20the%20iceland%20experiment.pdf.

¹⁸ Chayes, p. 298.

citizen trust in elites, *both domestic and international* – already at a low ebb.

With that in mind, moving forward a consultation process aimed at genuine idea generation for a new citizen centered social contract should include the following:

- A bottom-up citizen consultation process that emulates similar processes in Iceland and elsewhere, and that is focused on citizen interests rather than party power allocation positions. Interest based discussions should be centered on topics like health care/public health, the environment and green energy, agriculture, an independent judiciary, culture, youth opportunities, etc. These represent common sense interests, yet have been missing in the IAWG process to date.
- The widespread presentation of and deliberation on actual potential models for a new social contract is needed to move beyond inchoate yet valid statements of dissatisfaction, and to sketch out an achievable vision.
- Ensure that such consultations do not fall into the “projectitis” trap of so many civil society/community initiatives; support for development of a true citizen-centered social contract should be linked and coordinated with the tens of millions of Euros of funded projects that are now highly atomized and disconnected from any effort toward systemic change, let alone envisioning a new system. For example, quarterly meetings of all US, Swiss, UK and EU project managers should ensure that these disparate efforts are (re)calibrated and in line with the social contract outlines being developed by citizens; these donors should support a strategy, not a set of disjointed strategy-free projects.
- Following this process, popular positions can be aggregated into a systemic framework that is built around articulated popular interests – the *demand side* of governance. A process of *validating* that social contract can follow, then being codified into a constitutional/electoral framework, to formally enshrine articulated citizen interests into the country’s constitutional core.