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REPORT

“THE ICELANDIC CONSTITUTIONAL EXPERIMENT”

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Iceland is known to men as a land of volcanoes, geysers and glaciers. But it ought to be no less interesting to the student of history as the birthplace of a brilliant literature in poetry and prose, and as the home of a people who have maintained for many centuries a high level of intellectual cultivation. It is an almost unique instance of a community whose culture and creative power flourished independently of any favouring material conditions and indeed under conditions in the highest degree unfavourable. Nor ought it to be less interesting to the student of politics and laws as having produced a Constitution unlike any other whereof records remain and a body of law so elaborate and complex, that it is hard to believe that it existed among men whose chief occupation was to kill one another.

- James Bryce, *Studies in History and Jurisprudence* (1901)¹

Historical background: the Social Contract of the Old Icelandic Commonwealth

1. Iceland became a member of the Council of Europe in 1950 and can consequently not be classified as one of the world's new and emerging democracies. Iceland has arguably the world's oldest national assembly (*Althingi*) dating back to the Old Icelandic Commonwealth (930-1262). It was established in 930 when the ruling chiefs (*goðar*) together with their advisers constituted the legislature (*Lögrétta*) of the new Althingi. The chiefs administered justice in their own districts, and matters not settled there were referred to the Althingi. In this way they held both the legislative and judicial power. There was no executive power, but to chiefs fell the duty of seeing that such men as accepted their leadership received their rights, and to this extent they held the executive power. The system as a whole had no coercive power or law-enforcement agency and rested on a **social contract**. The laws of the commonwealth that remain and are known collectively as the Grágás (*Grey Goose Code*) show the Icelanders' organizing ability, farsightedness and accuracy as well as skill in resolving legal difficulties.²

2. The principal weakness of the form of government during the Old Icelandic Commonwealth³ was analogous to present day market syndromes of monopolies and concentration of power where private enterprise lay at the root of the social structure. Chiefdoms (*goðorð*), the clans of the chiefs, were not fixed by territorial boundaries and those dissatisfied with their chief could attach themselves to another chief. The position of the chief could be bought and sold as well as inherited. The seats in the legislature (*Lögrétta*) were hence a marketable commodity,⁴ somewhat analogous to the harsh criticism of present day financing of political campaigns. The society was weaker than the weakest night watchman state as there was no executive branch of government.⁵ Killing was a civil offence resulting in a fine paid to the survivors of the victim. Enforcement of law was entirely a private affair.

3. Consequently with the passing of time the chiefdoms for large areas of the country became concentrated in the hands of fewer and wealthier chiefs. The rich and powerful could commit crimes with impunity as nobody was able to enforce judgment against them, which may provide another hypothetical analogy with the situation leading to the financial collapse in Iceland in 2008 – (Cf., *infra paras.* 9 and 10). The concentration of power and subsequent struggle was the main reason for ending of the commonwealth and for the country's submission to the king of Norway (1262), when it entered into a treaty establishing a union with the

¹ James Bryce, *Studies in History and Jurisprudence* (New York: Oxford University Press, 1901), p. 263 (2 vols).

² See: Andrew Dennis, Peter Foote and Richard Perkins (translators): *Laws of Early Iceland I*, University of Manitoba Press (2007). There was for instance legal protection regarding equality in the case of dissolution of marriage. Upon getting married, a man had to pay a "bride-price" to his bride, and if they divorced, she was entitled to keep this money. This was her money and not part of the community property.

³ The period is remembered as the Golden Age in Iceland.
http://www.newworldencyclopedia.org/entry/Icelandic_Commonwealth

⁴ <http://www.davidfriedman.com/Academic/Iceland/Iceland.html>

⁵ As pointed out by Richard A. Posner, *Overcoming Law*, Harvard University Press (1995), p. 313.

Norwegian monarchy. Iceland was then passed to Denmark in the late 14th century when Norway and Denmark were united under the Danish crown. In the early 19th century, national consciousness was revived in Iceland.

4. The Althingi had been abolished in 1800 but was established in 1845 as a consultative assembly. In 1875 the Althingi received legislative powers again after Icelanders were given their first Constitution in 1874 when still part of the Danish kingdom. In 1903 the first important changes to the Constitution were made when Iceland was granted Home Rule, which went into effect in 1904. Considerable changes were made in 1915 when women got voting rights. A new Constitution went into effect in 1920 following the recognition of Iceland as independent of Denmark, though still in a personal union with the Danish king. The 1874 version of the Constitution remained in force virtually unchanged until 1944 when the Republic of Iceland was founded.

The Constitution of the Republic of Iceland (1944)

5. The present Constitution of the Republic of Iceland dates from 17 June 1944 and has been amended six times since. These amendments have especially concerned setting constituency boundaries and guaranteeing equal voting rights but the most important change was made in 1995 when the human rights section was reviewed to comply with the requirements of the European Convention on Human Rights, which had been incorporated into Icelandic law in 1994 and other treaty obligations under international law.

6. The main clauses in the Constitution deal with organization of the state and the position of its citizens. The principal clauses provide that Iceland is a republic; that state power is divided into three parts, with legislative authority grounded in the people as expressed in democratic elections, that executive authority is dependent on legislative authority through the organization of representative government, that judicial power is independent; that the municipalities shall enjoy independence and that basic human rights shall be guaranteed.

7. Despite what may appear long standing democratic traditions in Iceland the banking system collapsed in October 2008 as a consequence of ongoing corruptive political and economic practices. Relative to the size of its economy, Iceland's banking collapse is the largest suffered by any country in economic history. The *collapse* in everyday parlance does not only refer to the financial meltdown but also to the breakdown of trust towards authorities due to the lack of democratic accountability.

8. A report of the Special Investigation Commission (SIC) appointed by the parliament in December 2008 to investigate and analyze the processes leading to the collapse of the three main banks concluded in the spring of 2010 that ex prime minister was guilty of negligence alongside the former ministers of finance, commerce and foreign affairs for the 2008 collapse of the country's banking system.⁶ Furthermore, the SIC stated that the Director General of the Financial Supervisory Authority (FME) and the Governors of the Central Bank⁷ had shown negligence.⁸ The 2000-page report also cited evidence of possible insider trading by key Icelandic investors. It found that money had been withdrawn by "insiders" only days before the banks went bust. The matter had been referred to a special prosecutor.

⁶ <http://sic.althingi.is/>

⁷ Chairman of the Board of Governors of the Central Bank from 2005-2009 was former Prime Minister David Oddsson (1991-2005) and chairman of the Independence Party since 1991.

⁸ The Althingi decided on September 28, 2010 with 33 votes against 30 to indict the former Prime Minister only. The Althingi prosecutor pressed charges against the former Prime Minister who is now standing trial for serious misconduct before the High Court (Landsdomur), a special court which was established in 1905 with the mandate to handle cases where members of the cabinet are suspected of criminal behavior. This is the first time that the Court is assembled. The Landsdomur has 15 members, five Supreme Court Justices, a district court president, a constitutional law professor and eight people chosen by Parliament every six years.

9. A phrase from Thomas Jefferson's writings on an analogous situation may be used to describe the situation leading to the *collapse*: The power had been in the hands of a few corrupt men who sacrificed the public interest to their own.⁹ When the privatization process was started in the last decades of the 20th century the stated aim was to increase economic efficiency by eliminating the distortions inherent in state-ownership. The hands-off approach to the economy; the increased power of financial actors through political campaign financing and control of the media led to an ever more authoritarian system, with a blurred distinction between elected authorities and the financial power holders. The authors of the SIC-report stated that the Icelandic authorities lacked both the power and the courage to set reasonable limits to the financial system.¹⁰

10. There was very little public criticism of the ever growing banking system; the lack of transparency and the blurred line between elected authorities and the financial power holders. It has long been acknowledged that concentrating all the powers in the same hands, the legislative, executive and judiciary, is the definition of despotic government.¹¹ There were no strict rules on campaign financing and the close ties that had developed between the political sphere and the financial community set the stage for systemic corruption. After the collapse there was growing criticism of the administration for its ineffectiveness due to longstanding nepotism at the cost of meritocracy, the progeny of democracy.¹² It was also acknowledged that the media had not adhered to its public watchdog role as it was in the ownership of the main corporate actors and subject to various financial and political pressures. A critical public opinion could not grow out of such an environment where career and opportunities hinged on conforming to the establishment supported by the media.

11. In the months following the *collapse* Icelanders rushed out on the streets and demanded change. The force of public anger was not least expressed in the new social media, diminishing the power of the corporate media to act as shield for their owners. Most notable with the demonstrations and discourse was the general intense dislike with the established political parties and increasing awareness of their affiliation with the powerful financial groups through the privatization process. Public anger was being heightened by the ongoing exposure of the financial elite along with growing distrust of public authorities and institutions as well as the media and academia.

12. The protestors demanded that the government of the Independence party and the Social Democrats would resign. A new government was formed in February 2009, although half of it, the social democrats were the other half of the previous government but with a new chairman and the left green party which had been in opposition since its founding.

Amending the Constitution

13. The Venice Commission is of the opinion that having stronger procedures for constitutional amendment than for ordinary legislation is an important principle of democratic constitutionalism, fostering political stability, legitimacy, efficiency and quality of decision-making and the protection of non-majority rights and interests.¹³

14. In the wake of the *collapse* the idea of reviewing the Constitution – to provide the basis for a more healthy political system to limit corruption – gained life. Demands had risen about the

⁹ Thomas Jefferson Writings, The Library of America (1984), p. 1566.

¹⁰ Executive summary, p. 17, <http://sic.althingi.is/pdf/RNAvefKafli2Enska.pdf> (accessed 11 July 2011)

¹¹ Thomas Jefferson Writings, The Library of America (1984), p. 245

¹² It is now proposed by the Constitutional Council that [positive] discrimination on the basis of political affiliation will be prohibited; i.e. that individuals are rewarded with posts and promotions within the administration due to their political affiliations.

¹³ [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)001-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)001-e.pdf)

need to review various ground rules of the Icelandic administrative infrastructure such as the organization of the legislative, executive and judicial powers and the separation between those three branches of government. Furthermore there was a call for direct democracy through referendums.

15. There had been previous attempts since 1945 to revise parts of the Constitution. The Prime Minister in 2005 appointed a committee of nine representatives of the political parties represented in Parliament along with an expert committee of four scholars to submit a draft to amend the Constitution no later than by the end of 2006. The political committee was to decide which parts of the Constitution needed revision.

16. In February 2007 the above political committee handed in an interim report summing up its work since its appointment in 2005, stating that it needed longer time to finish the complete revision. It submitted however a draft amendment regarding the amendment clause of the Constitution in Article 79 recommending that a referendum should take place about the draft amendments which in their view was a more democratic method than stipulated in the current provision.

17. The current amendment provision of the Constitution stipulates in Article 79 that if the Parliament (Althingi) adopts proposals to amend or supplement the Constitution, the parliament must be immediately dissolved and a general election held. If the parliament then passes the resolution unchanged, it shall be confirmed by the President of the Republic and come into force as constitutional law.

The Advisory Constitutional Assembly and the Constitutional Committee

18. Prime Minister Johanna Sigurdardottir submitted a bill to the Parliament about an advisory Constitutional Assembly to review the Constitution in November 2009, which became an Act in June 2010. The explanatory report to this Act refers to the objective of such a constitutional assembly to be in line with democratic governance where the constitutive power is with the people. An actual democratic discourse had never taken place in Iceland about how these topics should be handled by the Icelandic Parliament. Furthermore the bill showed that due to the fact that political parties had not succeeded in reaching an agreement about necessary amendments to the current Constitution, there was a proposal that a special Constitutional Assembly be formed with 25 - 31 elected representatives who would take on this important task.

19. The Act No. 90/2010 on stated that when the Constitutional Assembly had agreed on a bill about a Constitutional Law, it was to be submitted to the Parliament for processing.

20. The Act on the Constitutional Assembly furthermore provided for the appointment *by Parliament of a Constitutional Committee*. This Committee's role was to present ideas on constitutional amendments to the members of the Assembly. The Constitutional Committee subsequently elected the chairman from its rows; an expert in cell biology at the department of nursing in the University of Iceland. Other members include a professor at the faculty of law at the University of Iceland; a registrar of the EFTA Court, a professor emeritus in Icelandic literature; a law student; a member of the administrative staff of the Akureyri University/ researcher in constitutional matters and a civil servant with a law degree. The Constitutional Committee was to process the viewpoints on the core values of the Constitution which were to be found out by assembling one thousand Icelanders randomly to express these values and hand over a report to the advisory Constitutional Assembly.

21. In an election on November 27, 2010, 25 delegates were elected out of more than 500 candidates to the advisory Constitutional Assembly. The deadline for announcing candidacy was 18 October 2010 and the elections took place on 27 November 2010. A brochure

published by the Ministry of the Interior, introducing the candidates and their agenda, was distributed into every household before the elections. A last minute attempt to meet criticism of the public's lack of time to get acquainted with the candidates' agenda – individuals from all spectrums of society – was to have marathon interviews on the public service radio where each candidate got 5 minutes to make known his/her intentions with regard to constitutional amendments.

22. The Venice Commission has not set forth any formula for a new European “best model” or standards for constitutional change.¹⁴ The main difference with the attempt with the Constitutional Assembly as an advisory body from previous bodies appointed to come up with drafts or recommendations to amend the Constitution is that the Council is elected by the general electorate and is given wider scope than previously appointed political and expert committees. Its recommendations, however, have no binding force and hence its election cannot be regarded as anything but an experiment as the final word lies with parliament itself according to the Constitution.

Supreme Court invalidation of elections to Constitutional Assembly

23. The Supreme Court of Iceland invalidated the elections to the Constitutional Assembly in January 2011 after receiving complaints about alleged faults on the conduction of the elections (potentially traceable ballot papers; construction of ballot boxes etc).

24. The representatives of all parties but the Independence Party (dominant political party until through the time of the republic dating back to 1944 to the financial collapse in 2008) in the committee which was appointed to decide how to react to the Supreme Court's invalidation of the elections decided to appoint the delegates that had been elected in the invalid elections to become members of a Constitutional Council or else the person next in line. On the basis of a parliamentary resolution the Constitutional Council was officially formed in April 2010 with only one of the elected members to the Assembly refusing to take a seat in the Council.

25. The appointment of the Constitutional Council was criticized for infringing the division of three branches of government with parliament invading the sphere of the judiciary. By appointing the invalidly elected delegates to a Constitutional Council the Parliament was in fact seen as undoing the decision of the Supreme Court to invalidate the elections. At the same time Parliament was also criticized for quashing its own legislation providing the Supreme Court with the final say in these matters. Such circumvention of constitutional principles was harshly criticized for not being appropriate given the aim to revise the constitution due to previous corrupt practices.¹⁵

26. The Venice Commission has not addressed the question of legitimacy of constitutional change, as long as it is done by constitutional (as opposed to irregular and “unconstitutional”) means. The Constitutional Council is merely an advisory body and as such it can hardly be deemed as going against the prescribed formal amendment procedures, which is meant to guarantee the constitutional legitimacy of constitutional change.¹⁶ The attempt might however be criticized as providing authorities with an alibi for responding to the public anger and demand for change – if there is not a serious intention to adopt its proposals. The current Constitution requires intervening elections with the consent from two different parliaments – the one before and the one after the following election for the proposed amendments to go through. In light of the financial crisis and shaky political environment it seems doubtful that the current meager majority in parliament will adopt the proposals to amend the Constitution as that requires that the parliament must be immediately dissolved and general elections held.

¹⁴ [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)001-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)001-e.pdf), para. 17.

¹⁵ Cf., Fréttablaðið 17. Mars 2011, article by prof. emeritus Sigurdur Lindal.

¹⁶ [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)001-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)001-e.pdf), para 22.

27. If the above would prove to be the case the Venice Commission has pointed to pitfalls linked to rules to constitutional change that are too rigid, i.e. if the procedural and/or substantial rules are too strict they may create a lock-in, cementing unsuitable procedures of governance, blocking necessary change.

The Constitutional Council and its task

27. The role of the Constitutional Council is to discuss the Constitutional Committee Report and prepare a bill about a revised constitution, taking into consideration the results of the National Forum 2010 (a randomly chosen 1000 representatives from the national register). The Constitutional Council decides which parts shall be revised and/or suggests new provisions or chapters be added to the current Constitution. The Constitutional Council was given four months to complete its role and it is comprised of the 25 delegates originally elected to the Constitutional Assembly which the Supreme Court invalidated.¹⁷

28. When the Council has come to an agreement about a bill about a revised constitution the bill will be sent to national parliament (*Althingi*) for processing. The revised constitution does not come into force unless the requirements of the current Constitution are fulfilled and these requirements state that the national parliament (*Althingi*) has the final word with voting between two discussions.

29. General meetings of the whole Constitutional Council are called Council Meetings. All members of the Council participate in those meetings. Council Meetings are open to the public and anyone can attend while there is enough room.

30. According to a parliamentary resolution about the Constitutional Council the Council shall discuss the following matters in particular:

- ✓ The foundation of the Icelandic Constitution and its basic concepts.
- ✓ The organization of the legislative- and executive powers and their limits.
- ✓ The role and position of the President of the Republic.
- ✓ The independence of the courts and their supervision of other holders of state authority.
- ✓ Provisions about elections and the constituency system.
- ✓ Democratic public participation e.g. in the timing and arrangement of referendum, including a bill about constitutional laws.
- ✓ Transfer of state authority to international organizations and handling of foreign affairs.
- ✓ Environmental affairs, such as regarding ownership and utilization of

Involvement of the public – the constitution is being drafted on the internet

31. The **Venice Commission** has emphasized that constitutional reform is a process which requires free and open public debate, and sufficient time for public opinion to consider the issues and influence the outcome.

¹⁷ Apart from the one candidate who refused to take a seat in the Constitutional Council and the next in line was hence appointed.

32. The Icelandic public has access to the work of the Constitutional Council on its webpage. Messages from the public are published on the website and there is a forum for discussion regarding the comments. The Council's work can also be seen on the major social media sites such as Facebook and Youtub. On Thursdays at 13.00 there is live broadcast from the meetings of the Council on the webpage. The webpage also has regular news from the Council's work as well as a weekly newsletter. Advertisements are published in the media encouraging the public to keep track of what is going on and to make comments.

33. The transparency of this process is to provide the opportunity for a genuine democratic discourse. The time is however limited as the Council when appointed was given four months to come up with a draft.

Shortcomings with regard to VC principles on constitutional amendments

34. The **Venice Commission** has emphasized that amending the constitution requires a certain time delay, which **ensures a period of debate and reflection**.¹⁸

35. The four months that the Council has to draft the proposals is not much time for reflection. It will however be the national parliament and not this Council that will finally debate and consider the issues proposed by the Council.

36. The **Venice Commission** has furthermore emphasized that when drafting provisions on constitutional amendment, there is need for awareness of the potential effects of such rules; this requires both general and comparative analysis as well as a good knowledge of the national constitutional and political context.

37. The purposes for comparative analysis are to look for possible solutions to the constitutional problems with which the polity is confronted. Knowing constitutional issues provides new frames at looking at constitutional law. Knowing the political and economic and legal context is furthermore crucial to be able to clarify the nature of guaranteed rights from various angles and on various levels.

38. The members of the Council are not experts in constitutional comparativism or human rights jurisprudence – the framework to construct new constitutional arrangements. The composition of the Constitutional Council is a break from the domination of the legal elite, which is part of the prevailing legal tradition. The Council members come from various disciplines and backgrounds. Among them are two professors, one in economy, the other in theology, the chairman of the institute of ethics at the University of Iceland, an associate professor in political science, two young lawyers, a psychiatrist, two general practitioners, a farmer, a pastor, a nurse, undergraduates, an individual active in lobbying for the disabled, a labour unionist, a spokesman for consumers and a theatrical director - to give an example of the professional variety of the members.¹⁹

39. When members of the Constitutional Council have considered it important they have invited experts on various issues to come and address the Council on specific topics.²⁰ From discussions in Council meetings it is evident that members furthermore seek advice from members of the Constitutional Committee.

40. It is not within the scope of this presentation to assess quality of the Council's proposals (that has not finished its work at this stage) but according to discussions in the final stages there are no fundamental changes of the constitutional order.

¹⁸ [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)001-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)001-e.pdf)

¹⁹ <http://stjornlagarad.is/fulltruar/> accessed on 11 July 2011.

²⁰ Not apparent on website who these experts are.

41. Leaving aside any discussion on the competence of the Council in the area of constitutional science, the Icelandic experiment has evoked international attention. It is unlikely, however, that the Council's revision will put its mark on history like the American Constitution drafted in a closed and cramped room in Philadelphia by 39 brilliant minds in 1787 – described 50 years later by Alexis de Tocqueville as a tour de force that “ought to be familiar to the statesmen of all countries”.²¹ It was a bold experiment in political ideals that has influenced constitutional making to this day. Among the founders were highly educated men that understood the basic axioms of Newtonian physics as well as the world of human affairs – the Federalist papers provide an insight into the cognition, erudition and foresight of these relentless thinkers.²² These intellectual qualities provided the grounds for a breakthrough in the science of government.

Conclusion

42. This is the first time Icelanders are forming their own constitution.²³ The members of the Constitutional Council are new and inexperienced in the science of government – however the discussion is open and hence may work to the benefit of the drafting process as well as preventing errors. Time is though limited (4 months) and there has not been much feed back to the work of the Council or public debates on constitutional matters and required amendments in light of this experiment. The Council's 4 month time is coming to an end by mid July.

42. The initiative of revising the Constitution comes from the authorities as a response to growing public frustration in the wake of the financial collapse. The invalidation of the election of the Constitutional Assembly by the Supreme Court and the subsequent appointment by Parliament of the invalidly elected members to the Constitutional Council may have diminished its authority in the eyes of the public as a credible body to propose constitutional amendments.

43. The forthcoming proposals from the Constitutional Council do not carry any legal weight. They might prompt political pressure but in light of the aforementioned facts (cf., 41 and 42 *supra*) it is unlikely that there will be uproar if there is no reaction. Unlike what took place in France with the Declaration of the Rights of Man in 1789 and much more recently during the South African Bill of Rights debate²⁴ – there was in both cases agreement on the need for a Bill of Rights. At present in Iceland there is not an agreement for the need for a new constitution or furthermore whether the political and social ills leading to the crash can be blamed on constitutional deficiencies.

44. The current Constitution requires intervening elections with the consent from two different parliaments – the one before and the one after the following election for the proposed amendments to go through. In light of the financial crisis and shaky political environment it seems doubtful that the current meager majority in parliament will adopt the proposals to amend the Constitution since it requires that the parliament must be immediately dissolved and general elections held.

45. The historical opportunity to rewrite the Constitution may be lost due to the inherent rigid amendment requirements of the current Constitution and possibly lack of real political will to change it. How are the elected authorities expected to follow through at their own initiative with a procedure that may curb their own power or eliminate their political life? Even if there was scope to amend the Constitution without dissolving Parliament – like in Finland where a constitutional amendment may be adopted within the same legislative period provided that

²¹ <http://www.time.com/time/magazine/article/0,9171,964918-3,00.html>

²² <http://www.indiacause.com/blog/2011/03/05/america-creation-super-nation-superpower-economy/>

²³ Jefferson, p. 243

²⁴ Cf., Martin Chanock in Promoting Human Rights through Bills of Rights, ed. by P. Alston, Oxford University Press (1999), p. 393.

certain conditions are fulfilled, notably in urgent cases – such definition, i.e. of the urgent amendment is lacking in the Icelandic experiment if the Parliamentary Resolution list of matters is taken as a starting point (*Cf., Para 30 supra*).

46. Although it may be well justified that it is urgent to amend the Constitution – the clear and reasoned facts are not stated as to why changes are necessary and which amendments are absolutely crucial. If the members of the Constitutional Council are to come up with successful proposals – *a tour de force* – ensuring the *effective realization* of fundamental rights in the constitutional order - it seems they are faced with almost a heroic task like when Galileo pointed out that the earth was not flat.