

ICELAND'S NEW CONSTITUTION IS NOT SOLELY A LOCAL CONCERN

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Abstract

This paper analyzes the constitutional impasse in Iceland where, after the financial collapse of 2008, Parliament convened a National Assembly with 950 citizens randomly drawn from the national register to launch a long overdue revision of the 1944 constitution. The National Assembly concluded that a new constitution was needed and ought to contain certain key provisions. On this basis, a Constitutional Council of ordinary citizens was elected by the nation to draft a new constitution that was accepted by 2/3 of the voters in a national referendum held by Parliament in 2012. Parliament has yet to ratify the new constitution.

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Democracy is under stress around the world. Apart from the United States, democracy was practically nonexistent until 1850 when Europe was swept by revolutions that were struck down, yes, but delivered remarkable results later on. The number of democracies rose to around 25 in the interwar period, then fell to fewer than ten during WWII (Figure 1). In 1943, there were only five democracies in Europe: the United Kingdom, Ireland, Iceland, Sweden, and Switzerland. From 1945 to 1960 the number of democracies rose rapidly to about 35, then stagnated during 1960-1980, and then jumped to 90, almost a half of all countries, from 1980 to 2000 after the collapse of communism around 1990. Then the spread of democracy stagnated again. There has been no increase in the number of democracies over the past ten years.¹ A number of countries have scaled down or turned their back on democracy in recent years, including Russia and Turkey and also Thailand and Bangladesh. Autocracies are backsliding, true, but anocracies (a technical term for halfway houses between autocracy and democracy, like Russia) are increasing in number. Even Hungary and Poland, fully fledged European Union members, show new signs of dwindling respect for democracy and human rights. Even the United States has been downgraded by Freedom House in its most recent report on democracy and freedom.²

Against this background, the Icelandic Parliament's failure to ratify the new constitution supported by 2/3 of the voters in the 2012 national referendum called by Parliament is a matter of concern. We should not view the challenges faced by democracy around the world at present as an excuse for disrespecting democracy in Iceland. On the contrary, we should be especially alert that now is an exceptionally

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inopportune time to digress from the path of democracy. When democracy is under stress as it is now even within Europe and the United States, it is of paramount importance that Parliament do the right thing, that it show the rest of the world that when, after the financial collapse of 2008, the people of Iceland produced perhaps the most democratic, most inclusive constitution ever made anywhere, they really meant what they did.³ Iceland is now in a unique position to send the rest of the world an uplifting signal about the beauty and utility of popular democracy, a signal that would be welcomed by advocates of democracy and human rights all over the world. Parliament has neglected to send that message for almost four years now, thus inviting the rest of the world to wonder why.

The 1944 Constitution

As Gudni Th. Jóhannesson, President of Iceland, has described in more detail than others, the 1944 constitution was intended only as a provisional constitution.⁴ The King of Denmark had brought Iceland its first constitution in 1874, derived from Denmark's own constitution from 1849. The 1874 constitution needed revision when Iceland declared full independence from Nazi-occupied Denmark in 1944. The word "King" in the text was replaced by "President" who, importantly, would be elected directly by the nation rather than by Parliament and who would be granted certain powers, including the right to refer legislation from Parliament to national referenda. Supported by Iceland's first scientific opinion poll, Iceland's governor, Mr. Sveinn Björnsson, was able

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to arrange matters such that politicians would not be granted the right to select the President. This was possible because the state of play in Icelandic politics at the time had led the governor, soon to become the country's first president, to appoint an extra-parliamentary government, in office 1942-1944. In his 1949 New Year's address to the nation, President Björnsson reminded Parliament of its failure to keep its promise of a new constitution: "... we still have a mended garment, originally made for another country, with other concerns, a hundred years ago."⁵ He was right.

The 1944 constitution is deeply flawed as is hardly surprising given that it dates in essence back to 1849. It was perhaps fit for a 19th century king, but not for a modern republic. For example, the 1944 constitution would have allowed a new President to be elected with only 12% of the popular vote in June 2016 had each of the eight unsuccessful candidates received 11% of the vote. Luckily, that did not happen, but it could have happened. It could not, however, have happened under the new constitution that Parliament continues to refuse to ratify. The new constitution stipulates that the President must have majority support, ascertained through the ranking of candidates in one round of voting if desired. For another example, the unequal voting rights allowed by the 1944 constitution produced two extra seats in Parliament for the Progressives, the party of the Prime Minister, after the 2013 election, and one extra seat for the Independence Party, thus giving the two parties a 60% majority in Parliament even if their share of the popular vote was only 51% . This pattern was repeated in the 2016 parliamentary election in which those two parties' 40% share of the vote gave them a 46% share of the seats in Parliament, though not enough to keep them in office. Both

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elections were held in violation of the principle of “one person, one vote,” a principle supported by 2/3 of the voters in the 2012 national referendum on the new constitution.⁶

Political Dysfunction

Parliament has failed to listen to its own voice. In September 2012, Parliament resolved unanimously, with 63 votes to zero and no abstentions, that “criticism of its political culture must be taken seriously.” Political culture is, in fact, quantifiable (Figure 2). In April 2016, it came to light that the names of about 600 Icelanders, including three cabinet ministers and the First Lady, were among those found in the Panama Papers.⁷ Of the 332 cabinet ministers in all of Western Europe, four showed up in the Panama papers and three of those four are Icelandic and two of them, the leader and deputy leader of the Independence Party, are still in office as if nothing happened and ran for reelection in October 2016, as did the former Prime Minister who resigned from office under public pressure after the scandal broke. All three were reelected. For comparison with the 600 Icelanders, there are 51 Danish names in the Panama Papers. This is not because Iceland has 12 times as many inhabitants as Denmark; as you know, it is the other way round – Denmark’s population is 15 times that of Iceland.

It would take 100,000 Ukrainian names for the Ukraine to have a similar per capita presence as Iceland in the Panama Papers but actually there are not nearly that many names listed from around the world in the leaked documents. As far as is known, it appears that about 20 Ukrainian names appear the Panama Papers.⁸ I mention the

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Ukraine here for a reason. According to opinion polls, only 20% of Ukrainians say they trust the Parliament in Kiev.⁹ In Iceland, since the crash of 2008, polls show that an average of 15% of respondents have said they trust the Icelandic Parliament, compared with 41% on average from 1995 until the crash.¹⁰ In early 2016, 17% expressed trust. The Icelandic people's trust in our Parliament has collapsed below even the Ukrainians' trust in their Parliament in Kiev.

These numbers appear to convey an important message. Iceland accepted economic advice and assistance from the International Monetary Fund, the Nordic countries, and Poland to resuscitate the country's economy after the crash in 2008. In many respects, the economic rescue operation orchestrated by the IMF went remarkably well. Gross national product fell by about 10% during 2009-2010 while unemployment stayed below 10% of the labor force. Thereafter, the Icelandic economy picked up steam again as a greatly depreciated domestic currency attracted foreign tourists to the country in unprecedented numbers. Thus, under the IMF's tutelage, the economic recovery from the crash was by and large successful. The IMF was perhaps fortunate in that the Finance Minister who served as the IMF team's host in Iceland was the leader of the Left Green Party which had previously, on ideological grounds, expressed hostility toward the IMF. Like Nixon in China, the Left Greens opened Iceland's door to the IMF. But economic recovery is not enough when a country's financial system collapses mainly due to corrupt ties between bankers and politicians who had privatized the country's banks by placing them in the hands of their cronies who took little time to bankrupt them.¹¹ Despite being encouraged to do so, the Icelandic government did not

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receive, nor did it ask for, external assistance with amending its political and business culture. This may help to explain why Iceland is still struggling with business as usual on the political front.

The failure of Parliament to ratify the new constitution needs to be viewed in this light. It is a sign of a failed political system, a failed political class that has permitted itself to stage a frontal assault on Iceland's age-old democracy. The reason for the current constitutional impasse can be found in Iceland's deficient political culture rather than in possible design flaws illuminated by constitutional theory and international experience. The current impasse constitutes yet another confirmation that politicians as a rule are not fit for constitution making.

Icelandic Democracy in Retrospect

Iceland has one of the oldest parliaments of the world, established almost 1100 years ago. Icelandic democracy has made impressive progress over time. In 1874 when the King of Denmark unilaterally dictated the current constitution to Iceland, 8% of the people were eligible to vote. Today, 74% of the Icelandic population have the right to vote compared with 71% in the United States. Voter turnout in parliamentary elections in Iceland peaked at 92% in 1956 and has since gradually declined to 79% in 2016 compared with 36% in the United States in 2014.¹² A people with an unblemished long-standing record of liberal democracy cannot permit its Parliament to deprive it of a new constitution that 2/3 of the voters have said they want. It is futile to argue as some do

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that the opponents of the new constitution won the parliamentary election of 2013, with 51% of the vote but 60% of the seats in Parliament, because such an argument implies that politicians in Parliament can repeat elections as often as they please until they get the results they want.

Why did voters who in October 2012 expressed overwhelming support for a new constitution turn round in April 2013 and return to power the two parties fervently against the new constitution? There appear to be two main reasons for this.

First, the parliamentary election in April 2013 revolved mainly around the Progressive Party leader's promise of immediate debt relief to distressed households to be financed by squeezing foreign vulture funds that had acquired impaired assets at low prices shortly after the collapse of the banks. With three foreclosures a day on average from the crash until the election, this empty promise was believed by voters who increased the Progressives' share of the vote from 15% in 2009 to 24% in 2013, and then cut it down to 12% in 2016. Further, in 2016, the IMF-orchestrated economic recovery since the crash may help to explain why a parliamentary election held six months ahead of schedule due to public outrage at the appearance of three of Iceland's most senior politicians in the Panama Papers nonetheless gave the Independence Party a win of two new seats in Parliament.

Second, the literature on collective intelligence suggests that voters behave differently in different types of elections.¹³ In parliamentary elections where political parties spend large sums of money to bring their supporters to the polls, the average voter tends to enter the voting booth with the mindset of a group member or party

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member and to cast his or her vote accordingly. In national assemblies or referenda where political parties are more distant (they were literally absent from the 2012 constitutional referendum in Iceland), the average voter is free from political party influence, casting his or her vote as a member of the community, not of a special group or party.

A fundamental rule of democracy is that election results cannot be revised after the fact. Election results are final, they must stand – always, without exception. Thinking and behaving otherwise amounts to an affront against democracy. The British understand this. That is why the results of the advisory referendum on Brexit will stand, however misguided some of us may think the outcome was. The UK will leave the EU unless perhaps Scotland mounts a successful legal challenge authorizing it to exercise its veto. I will never forget a lesson I learned from Lord George Brown, Britain’s Foreign Secretary, on his visit to Iceland almost 50 years ago. He said: “Democracy means that there shall be no one to stop us from being stupid if stupid we want to be.”

This is why the only correct course of action for Iceland’s Parliament was to ratify the new constitution after the advisory referendum called by Parliament in 2012 where an overwhelming majority of the voters declared their support for the new crowd-sourced constitution as the basis for Iceland’s legislation and where also an overwhelming majority declared their support for certain key individual provisions of the new constitution. Among those provisions are the one stipulating “one person, one vote” through equal apportionment of seats in Parliament and the one stipulating

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national ownership of natural resources. What sets those two provisions apart from the others that Parliament put on the ballot is that they concern human rights.

Human Rights

Unequal voting rights have marred every parliamentary election in Iceland since 1845, creating controversy. In 1931, for instance, the Progressives won 55% of seats in Parliament with only 35% of the votes. Even in 2013, despite modest electoral reform in stages over the years, the Progressives won 30% of the seats in Parliament with 24% of the popular vote and the Independence Party also won 30% of the seats in Parliament with 27% of the popular vote. Similarly, in 2016, as described before, those two parties benefited significantly from the bias built into the electoral system through Iceland's special form of gerrymandering.¹⁴ The difference is that the 2013 and 2016 elections took place after 2/3 of the voters had declared their support for equal voting rights. Many Icelanders, recently supported by foreign election monitors from the Organization for Security and Co-operation in Europe (OSCE), view unequal voting rights on the scale observed in Iceland as a violation of human rights.¹⁵

Fisheries management has been another hotly contested issue in Icelandic politics for almost 50 years. The access to Iceland's fishing grounds was granted free of charge to selected vessel owners from the mid-1980s until 2002 when a nominal charge was levied on quota allocations. To make a long story short, Parliament, with the stroke of a pen, created a class of wealthy oligarchs by granting them free or virtually free access to

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a common property resource which, by law, belongs to the people. The oligarchs, in turn – as no observer of, say, Russian politics will be surprised to hear – have used their wealth to flex their muscles in the political arena, media, and elsewhere. It did not have to be that way. Norway has no oligarchs. Iceland could have managed – and was, indeed, urged to manage – its marine resources the way that Norway manages its oil but Parliament chose not to. The new constitution aims to set this right by declaring, as the law has done for 25 years, that Iceland’s natural resources belong to the people – a polite way of stating that they do not belong to the oligarchs – and that there can be no discrimination among citizens in the allocation of the rights to exploit these resources. This is the thrust behind the opening salvo of the preamble to the new constitution: “We, the people of Iceland, wish to create a just society with equal opportunities for everyone.”¹⁶

The Supreme Court of Iceland ruled the discriminatory nature of Iceland’s fisheries policy regime unconstitutional in 1998. Under visible political pressure, the Supreme Court reversed course 18 months later, suddenly seeing no discrimination. In 2007, the United Nations Human Rights Committee confirmed the 1998 ruling by issuing a binding opinion stating that Iceland’s fisheries management system is discriminatory and hence unconstitutional.¹⁷ Accordingly, the UNHRC instructed Iceland in 2007 to remove the discriminatory element from the system and to award damages to the two fishermen whose rights had been violated and who had brought the case before the Committee. The government did not comply with this instruction but it promised in writing in 2009 a new constitution that was underway and would set the matter right, a

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promise that the Parliament has yet to keep. These events help to explain why the new constitution includes a provision that aims to strengthen judicial appointments.

If all the Parliament had done was refuse to ratify the new constitution in spite of the result of the 2012 referendum, the people of Iceland would have no recourse except through their flawed electoral process that still fails to respect the principle of “one person, one vote.” But the Parliament seemingly seeks to do more. If it persists in its failure to ratify the new constitution, it can be seen as trying to impede the advance of human rights by preventing the people from exercising their right to “one person, one vote” as well as their right to the full rent generated by their natural resources that belong to them by law. It seems inevitable that this aspect of Iceland’s current constitutional impasse will be brought to the attention of the UNHRC unless Parliament mends its ways.

The Current Impasse

As if to prolong the impasse the government in office 2013-2016 established yet another parliamentary constitutional committee comprising representatives of the political parties in Parliament, initially under the chairmanship of a steadfast opponent of constitutional reform. Over the years, several such committees have failed to produce but marginal amendments to the 1944 constitution. The mandate of the new committee was to forge a consensus across political parties by finding the lowest common denominator that all committee members could agree on as if no referendum had taken

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place. The committee initially chose four provisions of the 114 in the bill for a special speedy treatment, but after 53 meetings conducted in secrecy over a period of three years it came to light that those were the only four provisions considered by the committee.

One of the four provisions concerned the transfer of state powers to remove any perceived constitutional hindrance to Iceland's accession to the EU as well as to continued membership in the European Economic Area and NATO. Denmark did this in 1953 and Norway, in 1962. This provision was quickly taken off the table, however, suggesting that the majority of the committee members want Iceland to be the sole country in Europe where EU membership is implicitly forbidden by the constitution. This matters in Iceland which filed an application for EU membership in 2009, an application that has since been laid on ice. In Iceland, the majority of the Parliament's constitutional committee members seem to want the constitution to prevent the people of Iceland from being able to decide freely in a national referendum whether to join the EU or not. The other three provisions that the committee could agree on are watered-down versions of the corresponding provisions in the bill already approved in the 2012 referendum, including the one on national ownership of natural resources.¹⁸ In the end, the consensus of the committee broke down. One member declared: "The outcome [i.e., the constitutional committee's proposal] is what the reactionaries [i.e., opponents of constitutional reform] can accept." The comments from the public solicited by the Parliament and published on its website were overwhelmingly critical, and rightly so.

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To repeat, the only correct course of action for Parliament after the referendum was to ratify the new constitution and then ratify it again after the 2013 election. Before the 2013 election a majority of Members of Parliament had declared in writing their support for ratification, but the Speaker of Parliament failed to bring the bill to a vote.

Conclusion

It helps to remember what the US Congress did in 1787. It decided that it had no right to change the bill drafted by the Constitutional Convention in Philadelphia, not even a single word. Members of Congress understood that all that they were supposed to do was to send the bill to the 13 states for ratification. After nine states had ratified the bill, some with narrow margins, it became the law of the land without the Congress in Washington having left any fingerprints on the bill. Even so, and this is important, the process of amending the bill started almost immediately.

This is what should also happen in Iceland. Parliament should demonstrate its respect for democracy to the Icelandic people and to the rest of the world by ratifying the bill, twice, and then set in motion the process of amending the new constitution along the lines laid out in the bill which simplifies the rules concerning constitutional change. The simplification consists in requiring a simple majority in Parliament plus a simple majority in a national referendum for a constitutional amendment to take effect rather than requiring simple majorities in two consecutive parliaments without a national referendum as stipulated in the 1944 constitution. If not, extraconstitutional means of ratification may have to be considered as was done in 1944.

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It is never too late to do the right thing. It is not too late for the Icelandic Parliament to ratify the new constitution. Should Parliament fail to do so, however, Iceland may stray farther toward the cluster of countries where democracy is now under the greatest stress. Iceland better not go there.

NOTES

¹ Larry Diamond (2015), "Facing Up to the Democratic Recession," *Journal of Democracy* 26 (7), 141-155.

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⁴ Guðni Th. Jóhannesson, (2012), "Tjaldað til einnar nætur. Uppruni bráðabirgðastjórnarskrárinnar" (The Origins and Provisional Nature of Iceland's 1944 Constitution), *Stjórnsmál og stjórnábyrdsla* (Icelandic Review of Politics and Administration), 7 (1), 61-72, <http://www.irpa.is/article/view/1116>, accessed 24 September 2016.

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⁸ Ukrainian Independent Information Agency of News, <http://www.unian.info/politics/1308200-twenty-ukrainians-exposed-in-panama-papers-leak.html>, accessed 25 September 2016.

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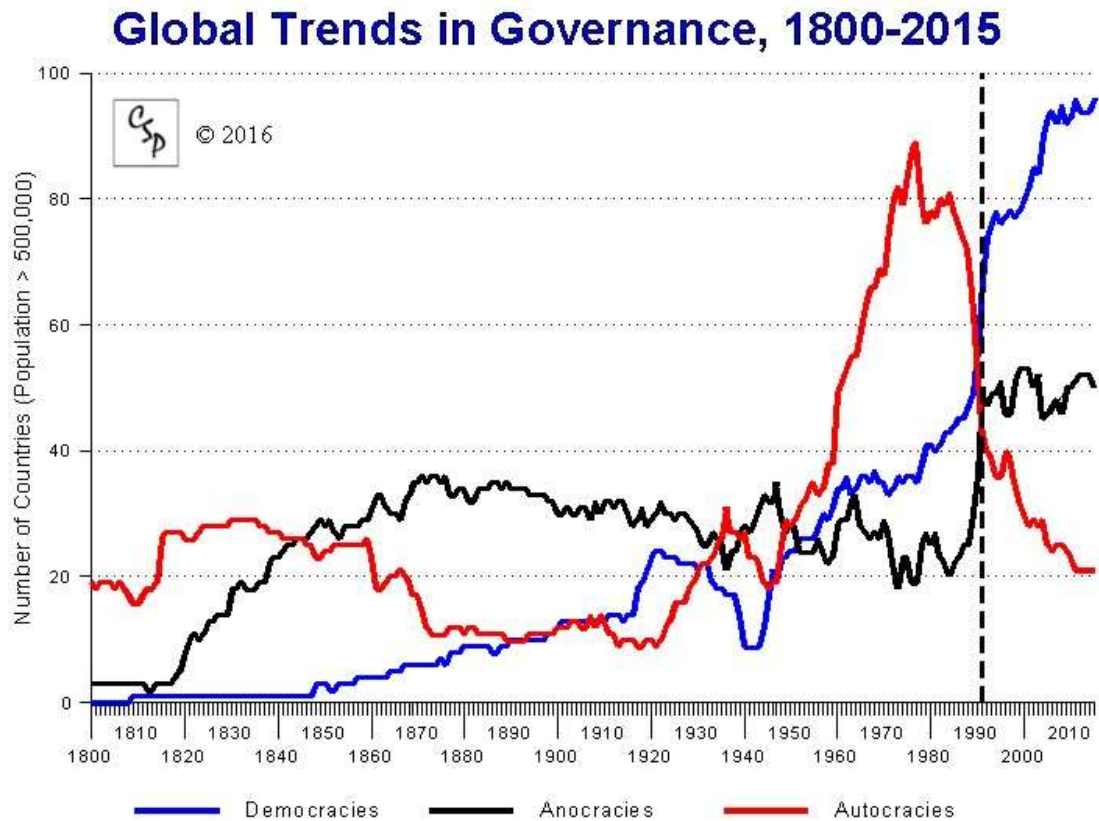
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- ¹⁴ Thorkell Helgason, (2014), "Umbætur á ákvæðum um úthlutun þingsæta" (Improvements in the Apportionment of Parliamentary Seats in Iceland), *Stjórnámál og stjórnsýsla* (Icelandic Review of Politics and Administration) 10 (2), 1-28.
- ¹⁵ Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, <http://www.osce.org/odihr/elections/100321?download=true>, accessed 25 September 2016.
- ¹⁶ For the full text of the new constitution in English translation, see http://stjornarskrarfelagid.is/?page_id=2619, accessed 25 September 2016.
- ¹⁷ United Nations Human Rights Committee, Communication No. 1306/2004, http://ccprcentre.org/wp-content/uploads/2012/12/1306_2004-Iceland.pdf, accessed 25 September 2016.

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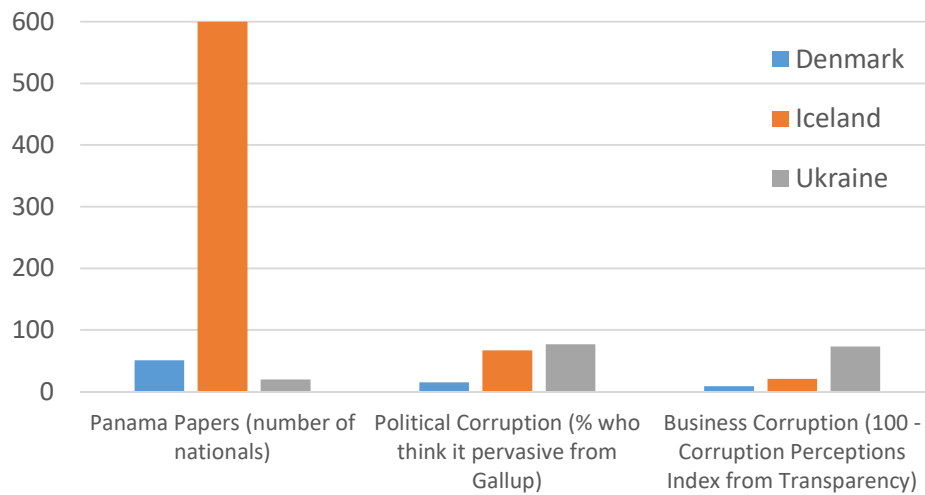
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Figure 2. Three Measures of Corruption



Source: Panama Papers, see note 7; Political corruption, see Gallup (2013), “Government Corruption Viewed as Pervasive Worldwide” by Jan Sonnenschein and Julie Ray, <http://www.gallup.com/poll/165476/government-corruption-viewed-pervasive-worldwide.aspx>, accessed 26 September 2016; Business corruption, see Transparency International, <http://www.transparency.org/country/>, accessed 26 September 2016.

Note: Higher columns mean more corruption in all three panels of the figure.