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From Collapse to Constitution: The Case of Iceland

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Abstract

Most of the time, crises precede constitutions. Following a brief review of relevant historical background, this article aims to show why Iceland, after its financial collapse in 2008, is now at last on the road to adopting a new constitution to replace the provisional constitution from 1944. The aim is also to show how the constitutional bill of 2011 came into being with significant help from the general public. Further, the article outlines some of the key provisions of the bill as well as why and how it differs from the current constitution. The article concludes by offering a brief discussion of some potential obstacles to the adoption of the bill in parliament, the role of the public, and some lessons from, and for, other countries.

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I. Introduction

When countries crash, a natural thing for their inhabitants to do, *inter alia*, is inspect their legal and constitutional foundation to look for latent flaws and to fix them. This was, in fact, one of the demands of the 'Pots-and-pans revolution' that shook Iceland after the country's spectacular financial crash in October 2008 when three banks comprising 85 percent of the country's banking system collapsed within a week and the domestic equity market was virtually wiped out overnight. The rest of the banking system crashed in quick succession. The 'Pots-and-pans revolution' owes its name to the boisterous banging of kitchen utensils by ordinary people from all walks of life who took to the streets and thus helped seal the fate of the government, forcing it to resign in early 2009 and to declare a new parliamentary election that the leading party of the pre-crash government – a grand coalition of the two largest political parties, the Independence Party and the Social Democratic Alliance – lost decisively, paving the way for the formation of a new government of the Social Democratic Alliance and the Left-Green Movement. These events went hand in hand with an initially unenthusiastic public investigation into what went wrong. A special prosecutor's office was set up and the position of special prosecutor was advertized, but there were no takers. After some delays, the minister of justice appointed a special prosecutor to whom the Financial Supervisory Authority, under new post-crash management, had by early 2012 referred about 80 cases of suspected fraud before and surrounding the crash. Meanwhile, parliament appointed a Special Investigation Committee (SIC) which delivered a devastating report in April 2010, exposing criminal wrongdoing by the banks and serious negligence by several politicians and public officials (see Gylfason, 2010). In response to the SIC report, parliament passed, in September 2010, a unanimous resolution, with 63 votes against zero, stating, among other things, that "Parliament resolves that criticism of Iceland's political culture must be taken seriously, and emphasizes that lessons must be learned from it. Parliament resolves that the SIC report is a damning verdict of the government, of politicians, and of public administration ..." (my translation).

When airplanes crash we do not turn the page. No, we insist on a full-scale investigation. The same must apply when banks crash, especially when they all crash at the same time. We owe it to ourselves as well as to others, including those who were hurt and also those who bailed us out. The National Transport Safety Board investigates every civil-aviation crash in the United States. In Europe, national Civil Aviation Accidents Commissions perform this vital role. Their principal concern is public safety as well as respect for the truth. In this regard, there is a case for viewing banking and finance the same way as civil aviation. This is

why, when things go wrong, there needs to be a trustworthy mechanism in place to secure full disclosure. If national governments hesitate, the international community may want to consider mutually acceptable ways to fill the gap. Credible crash analysis is indispensable, lest history repeat itself.

After the collapse of communism in 1989-91, the countries of East and Central Europe, all except Hungary which waited until 2012, adopted about 25 new constitutions (Elster, 1995). South Africa adopted a new constitution 1994-96 following the defeat of apartheid. After the recent regime changes in North Africa, several countries of the region are now about to revise their constitutions. Most constitutions are written or revised following economic or political upheaval of some kind because crises often trigger demands for a fresh start or expose flaws that need to be fixed. In quiet times, people and politicians most often feel they have other things to think about. There are exceptions, however, such as the constitutions of Sweden (1974) and Canada (1982) that were rewritten out of the blue without being triggered by crises.

II. From seven waves to economics

Elster (1995) identifies seven waves of constitution making following the Declaration of Independence of the United States in 1776. First, during 1780-91 the United States, Poland, and France adopted new constitutions, as did Sweden in 1809 and Norway in 1814. Second, following revolutions in Europe in 1848 several countries adopted new constitutions some of which did not last long, however, because the revolutions producing them were suppressed. The third wave swept Europe after World War I (1914-18) when Poland, Czechoslovakia, and defeated Germany passed new constitutions. The fourth wave followed World War II (1939-45) when Italy, Germany, and Japan had new constitutions more or less dictated to them by the victors. The fifth wave rose around the same time as the sun set on the colonial empires of the United Kingdom, France, and others in Asia and Africa after 1945. Those constitutions were most often derived from those of the former colonial powers. The sixth wave went up when authoritarian regimes in Southern Europe were driven from power in 1974-78 and Greece, Portugal, and Spain adopted new democratic constitutions. The seventh and last wave swept East and Central Europe after the collapse of communism around 1990. In recent years, several Latin American nations have revised their constitutions, introducing novel provisions on environmental protection, among other things. Ackerman (1997) covers a similar ground, referring to the past sixty years as a “wave of constitutionalism.”

On the whole, the connection between constitution making and crises or other types of emergencies seems fairly clear. Elster (2012) points out that, because constitutions tend to be written in periods of social unrest, they tend to induce strong emotions and, frequently, violence. Elster (1995) distinguishes several types of crises or emergencies and how they gave rise to new constitutions. The upheaval caused by the revolutionary war in the United States 1775-83 gave rise to the making of a new constitution in 1787. The French constitution of 1791 and the revolution of 1789 sprang in part from a common cause, namely, grotesque disparities of power and wealth that showed, among other things, in an average height difference between the aristocracy and the working class of two to three inches (Komlos, 2003). Likewise, the constitutions of France and Germany in 1848 can be traced to the revolutionary situation in Europe at the time. Iceland's constituent assembly of 1851 sprang from the same source, but failed to achieve constitutional reform even if it did succeed in engineering the abolition of the last vestiges of the Danish King's trade monopoly in Iceland. The French constitution of 1958, again according to Elster (1995), arose from the fears of Charles de Gaulle, later president, of the political outfall from the Algerian uprising against French rule. Defeat in war is another source of new constitutions as in Germany after both world wars and also in Poland after World War I and in Italy and Japan after World War II. Newly won independence is yet another source as in the United States in 1776 and in several countries in Asia and Africa after 1945. Notice the absence of financial crises from this list. The Great Crash of 1929 did not trigger constitutional amendments on either side of the Atlantic because changes to the general act of law – the Glass-Steagall Act of 1933, in particular – were considered sufficient.

In retrospect, one may wonder whether, in the United States, the Glass-Steagall Act separating commercial banking from investment banking activities to increase the safety of depositors and to reduce the likelihood and scope of future financial crises should, perhaps in conjunction with the establishment of the Securities and Exchange Commission in 1934, have taken the form of a constitutional amendment. The aim of Glass-Steagall was to protect ordinary bank customers from exposure to unnecessary and unwanted risk (Gylfason *et al.*, 2010, Ch. 4). Had this protection been inserted into the constitution, the deliberate, some would say reckless, deregulation of banking and finance in the United States after 1980 would have been more difficult to bring about. Perhaps, the demise of Lehman Brothers in September 2008 and the ensuing international financial crisis could then have been averted. Admittedly, this trail of thought is complicated by the fact that, north of the border, only a few small banks failed in the 1930s. Canada's financial system has remained strong, even during

the current global crisis. Yet, unlike US banks under Glass-Steagall, Canadian banks have always been universal, offering commercial banking services and investment banking services side by side without incident. For this reason, the separation of commercial banking and investment banking along the lines of Glass-Steagall has not been thought necessary in Canada, and not in Europe either. In view of Europe's recent banking problems, however, perhaps Europe needed Glass-Steagall all along. But Canada is clean. The erection of legal firewalls to separate commercial banking from investment banking cannot, therefore, be viewed as a necessary universal remedy against recurrent financial crises. Even so, the fact that Canada has never felt the need for such firewalls in its laws does not, by itself, undermine the argument for building such firewalls into the constitutions of countries such as the United States with a history of recurrent and contagious financial crises. To date, presumably in the interest of efficiency and flexibility in financial markets and on the grounds that laws and regulations are enough, no country has, to my knowledge, built such firewalls into its constitution – except Ecuador, to be discussed when we return to finance in Section XVII.

Recent literature on the economics of constitutions makes several useful points that are meant to illuminate the discussion to follow. Congleton and Swedenborg (2006, pp. 2-3) define constitutions "as the fundamental and durable procedures and constraints through which laws and public policies are adopted," including "a nation's legal and regulatory setting, which might be considered a nation's 'economic constitution.'" Persson and Tabellini (2005) develop and test various hypotheses about economic outcomes – e.g., the size of the public sector – under different types of constitutions, contrasting presidential and parliamentary systems of government. Like Hirschl (2010), Ticchi and Vindigni (2010) stress the economic origins of constitutions, following Beard (1913) who argued that the US constitution was designed to reflect the interests of the economic elite at the time, including those of the members of the Constitutional Convention in Philadelphia, securing individual property rights as well as the best possible institutional framework for private enterprise. They compare 'majoritarian' constitutions (containing, e.g., 'first-past-the-post' or 'winner-takes-all' election systems rather than proportional representation) such as the constitutions of the UK, Canada, Australia, and New Zealand and also, to some extent, the US with 'consensual' constitutions characteristic of Northern Europe, showing how unequal societies tend to prefer 'majoritarian' constitutions. Acemoglu, Robinson, and Torvik (2011) analyze the pros and cons of constitutional checks and balances, pointing out, *inter alia*, that effective checks and balances are less likely to emerge when the political elite is well organized and able to influence or bribe politicians, especially in unequal societies. Acemoglu, Egorov, and Sonin

(2012) discuss intertemporal aspects of constitution making, showing how the current rewards from adopting a specific constitution need to be viewed in the context of its likely implications for the future.

III. Constitutions differ, countries differ

Constitutions resemble exchange rate regimes in that, due to multiple objectives, one size does not fit all. Some countries abandon flexible exchange rates and adopt fixed rates or join currency unions looking for greater price stability. Other countries prefer floating rates to fixed ones in the pursuit of flexibility. This is why some countries fix their exchange rates while others allow them to float and others still go back and forth between fixed and floating rates. This is the way it should be. Different exchange rate regimes across countries reflect different assessments of the relative merits of flexibility and stability.

By the same token, constitutions differ because they aim to accommodate multiple and sometimes conflicting objectives. One such conflict concerns the establishment of clear and firm yet flexible rules. Constitutions need to be clear and firm to avoid legal ambiguity and they need to be flexible to stand the test of time. A constitution that will not bend will break (Posner, 2007). Different constitutions reflect, in part, different assessments of the relative merits of clarity, firmness, and flexibility. Recent literature on rights protection in times of emergency illuminates one such conflict (Goderis and Versteeg, 2012). Should countries always stick firmly to their commitments to human rights? Or should they be flexible? – that is, ready to sacrifice liberty for security. If, in times of emergency, majorities panic and fail to protect minority interests, there is a case to be made for sticking to prior commitments. Against this view, Posner (2007) points out that a constitution is not a suicide pact and that governments may have to compromise rights today to save lives tomorrow.

Besides, constitutions need to reflect local circumstances, customs, and history (Jacobsohn, 2010). Against this point of view, other researchers claim that constitutions are, in fact, fairly standardized documents and rather similar across countries. Goderis and Versteeg (2011) show that constitutional provisions are often borrowed from other nations. Both sides have a point. If history shows some nations – Denmark, say – to be fairly disciplined, they may need relatively few basic rules or restrictions to regulate their behavior. If history suggests that some other nations – meet the Icelanders! – lack Danish discipline, they may for that reason need more detailed and less flexible laws and constitutions. Discipline or lack thereof need not reflect national character, if such exists, but may be the result of other circumstances such as, for example, institutions and age; Iceland is a young republic (est. 1944). Since 1939, the

Icelandic króna has lost 99.95 percent of its value vis-à-vis the Danish krone, for you to get my drift on discipline, political as well as pecuniary. So, if deep-seated lack of discipline or norms calls for more detailed rules to regulate behavior, perhaps we may have here part of the reason why Denmark's relatively brief constitution from which Iceland's constitution is derived seems to have served Denmark better than Iceland. Unlike Iceland, the Danes have on a few occasions made significant changes to their constitution from 1849, most recently in 1953 to prepare for their accession to the European Union. If so, perhaps countries with a history of high inflation – Iceland and Turkey, for instance – need more comprehensive constitutions than low-inflation countries, a testable proposition in principle. Further, the assessment of the relative merits of the aims of constitutions may change over time. For example, some observers have suggested that the checks and balances built so carefully into the US constitution in 1787 may have contributed to recent gridlock in Washington, DC.

Be that as it may, it seems clear that the absence of effective checks and balances in the provisional constitution of Iceland from 1944 made it possible for the undisciplined executive branch of government to assume too much power at the expense of both parliament and the courts. Three examples will suffice. First, virtually on their own, two cabinet ministers decided to enlist Iceland in the "Coalition of the willing" invading Iraq in 2003 without any consultation with, or even possible recourse for, the parliament. Second, after the Supreme Court of Iceland ruled in 1998 that the Icelandic system of fisheries management is discriminatory and thereby unconstitutional, the Court reversed its opinion in 2000 under visible pressure from the same two ministers. In 2007, the United Nations Committee on Human Rights expressed agreement with the earlier verdict by issuing a binding opinion declaring the inequitable nature of the fisheries management system to constitute a violation of human rights and instructing the Icelandic government to rectify the situation (see International covenant on civil and political rights, CCPR/C/91/D/1306/2004, 14 December 2007).[1] Third, politically motivated judicial appointments and even nepotism have shaken public confidence in the courts. From 1926 to 2008, the Independence Party and the Progressive Party managed, through their exclusive control of the Ministry of Justice, to

[1] In March 2012 the UNHRC "decided, in light of the measures taken so far by the State party to give effect to the Committee's Views, not to examine the case any further under the follow-up procedure, with a note of partly satisfactory implementation of its recommendation." By "partly satisfactory implementation" was meant, according to an announcement from Iceland's Ministry of Foreign Affairs in June 2012, that in February 2009 the "Minister of Fisheries … reiterated on behalf of the government that it had been decided to strengthen the human rights provisions of the constitution and to consolidate that resources of the sea are a common property of the nation …" (my translation).

monopolize the appointment of all judges except for five years (1944-47, 1958-59, 1979-80, and 1987-88). Those are the parties that privatized the two state banks 1998-2003 in a manner that paved the way for them to be run to the ground in record time as laid out in the SIC report and other public documents (more on this in Sections VI, VII, and XIX).

Those were not isolated occurrences. On the contrary, they were part of a broad pattern. The supremacy of the executive branch over the legislative and judicial branches made Iceland's government in practice resemble a presidential system of government more than a semi-presidential or parliamentary one. This interpretation accords with the findings of Andersen and Aslaksen (2008) that, in democratic countries, (i) heavy dependence on natural resources tends to slow down long-run economic growth (the so-called 'resource curse') under a presidential system of government but not under a parliamentary system and (ii) the distinction between a parliamentary versus a presidential system matters more for the effects of natural resources on economic growth than the distinction between a democratic versus an autocratic form of government.

The unchecked supremacy of the executive branch made it easy for the Icelandic government first to allocate valuable common-property catch quotas to vessel owners from the mid-1980s onward and then, in like fashion, join hands – some would say jump into bed – with the bankers, first selling the state banks to their political cronies at modest prices, Russian style, and then making sure that the banks would not be bothered too much by reserve requirements or inquisitive financial supervision. In return, the banks treated the political parties and individual politicians generously as detailed in the nine-volume, 2,300-page report by the Special Investigation Committee appointed by the parliament (SIC, 2010, vol. 2, pp. 200-201, and vol. 8, pp. 164-170, available only in Icelandic except for a brief executive summary that leaves out the financial relations between the banks and politicians, but see also Árnason, 2010). When the banks crashed, ten out of 63 members of parliament owed the banks more than one million euro each at the pre-crash exchange rate of the króna; their personal debts to the failed banks ranged from €1 million to €40 million. The average debt of the ten MPs was €9 million. How many MPs owed the banks, say, half a million euro or more was not reported by the SIC nor is it known whether the loans of the failed banks to politicians will be repaid or written off. Bill Moyers, interviewing Simon Johnson, the economist, on PBS, told their viewers that the US financial industry donated $180 million to political campaigns in 2008, or 60 cents per person. The roughly comparable Icelandic figure, according to the SIC report, not including the above loans, was $8 per person in 2006, or 14 times as much.

IV. Historical background

But let's begin at the beginning. Iceland was granted home rule by Denmark in 1904. The Icelandic constitution of 1944, having been approved by 98 percent of the voting public and adopted at Thingvellir, the ancient site of the parliament (the Althing, est. 930), was adapted from the Danish constitution following thorough debate that led to the substitution of a popularly elected president with potentially significant powers for hereditary king. The new constitution replaced the one handed down by Christian IX, King of Denmark, on the 1,000th anniversary of the settlement of Iceland in 1874, revised in 1920. The new constitution of 1944 was part of Iceland's unilateral but somewhat controversial decision two years earlier to separate as soon as possible from German-occupied Denmark. The separation was permitted by the union treaty between the two countries from 1918 when Iceland was granted sovereignty slightly short of full independence, the main difference being that, in the monarchial union of the two countries, Denmark continued to handle Iceland's foreign affairs even after 1918. The close connection between the adoption of a new constitution and the separation from Denmark explains the 98 percent support for the constitution. Voting Yes was generally regarded as a national duty on the understanding that the constitution was meant to be only provisional and thus did not generate much public debate. Yet, with remarkable foresight, the governor of Iceland, Sveinn Björnsson, elected Iceland's first president in 1944, insisted on a popularly elected president, among the first such in Europe, rather than one chosen by the parliament as the politicians wanted. It helped the governor that dissension among the political parties made them dysfunctional to the point that they were unable to form a government. For that reason, in 1942, with the grudging consent of the parliament, the governor had appointed an extra-parliamentary cabinet. Meanwhile, the first scientifically conducted opinion poll in Iceland showed that 70 percent of the electorate preferred a popularly elected president to one chosen by parliament.

According to the 1944 constitution, the president's powers were mainly twofold. First, he or she had a catalyzing role to play in the formation of governments following parliamentary elections. Second, the president could refer laws adopted by parliament to a national referendum. The latter instrument lay dormant for 60 years, however, not being brought into use until 2004 when the parliament passed a law that would have broken up and effectively closed down the second largest television station and the second largest newspaper, concentrating control of the media in the hands of the government parties. The president exercised his constitutional veto right – that is, the right to refer legislation approved by parliament to a national referendum for acceptance or rejection – but the referendum to be

held on the law in accordance with the constitution did not take place. Rather, the parliament, without explicit authorization in the constitution, withdrew the legislation.

This, in short, is how it came about that Iceland adopted Europe's first semi-presidential parliamentary government, that is, one where the president is directly elected by the people, and has significant powers *de facto* as well as *de jure*, and where the prime minister must enjoy the confidence of a popularly elected parliament (Duverger, 1980). Today, Austria, Bulgaria, Finland, France, Iceland, Ireland, Poland, Portugal, and Romania all have semi-presidential governments, even if some constitutions grant more power to the president than others.

The parliament promised at once to quickly revise the provisional constitution adopted in 1944. First it promised to finish the job no later than 1946. This promise was not kept. Despite repeated attempts, the parliament never managed to agree upon a comprehensive revision of the constitution even if some revisions were undertaken on seven different occasions over the years mainly to adjust the article on parliamentary elections to demographic changes and migration, to transit from a bicameral parliament to a unicameral one, and to append, in 1995, new articles on human rights following the enactment of the European Convention on Human Rights in Iceland the year before. The enactment of the European Convention followed in the wake of a couple of legal cases that the Icelandic government lost in the European Court of Human Rights. It was against this background of broken promises that the pots and pans demanded a new constitution after the crash of 2008. Up against the wall or out of conviction, in uncertain proportions, the post-crash government elected in April 2009 acceded to this demand, setting the revision process in motion.

V. The process

In effect, the parliament admitted its 65-years-old failure to produce a new constitution by resolving to have a popularly elected constituent assembly do the job rather than the parliament itself. There were two good reasons for the adoption of this approach. One was clearly the parliament's long-standing failure to deliver. The other was that, among other things, the constitution is meant to circumscribe the powers of parliament and to lay out the method by which MPs are elected, tasks that would create a conflict of interest if undertaken by the parliament itself. The problem is at least as old as the US constitution, the oldest written constitution still in force. In the Federalist Papers, Madison (1788) wrote: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it

to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." Popper (1966, p. 128) put the question thus: "How can we organize political institutions so that bad or incompetent rulers can be prevented from doing too much damage?"[2]

Goderis and Versteeg (2011) document the growing willingness of governments since World War II to constrain themselves by constitutional means, asking: "... Why would self-interested elites willingly constrain themselves by constitutional means? Because they fear revolution, is one answer (Acemoglu & Robinson (2000); Elster (1995)). Because they fear electoral competition is another (Ginsburg (2003); Hirschl (2004); Finkel (2004)). Other accounts are more ideological and suggest that constitutionalism is spurred by the traumatic experience of war and dictatorship and a belief that unconstrained politics can be dangerous (Zakaria (2003); Weinrib (2007)). What all these explanations have in common is that they focus on the domestic determinants of constitution-making. Whether through the electoral market or through changing beliefs, the constitution is perceived as a national product."

The Icelandic parliament decided in 2009 to proceed in three steps by (a) convening a National Assembly, (b) appointing a Constitutional Committee to gather information, provide analysis, and propose ideas, and (c) holding an election of Constitutional Assembly representatives. Thus, the parliament's aim was to have a people's constitution prepared rather than one written by the politicians themselves or their lawyers.

First, the National Assembly comprised about 1,000 individuals selected at random through stratified sampling from the national registry subject to certain constraints intended to secure equal representation of men and women of different age groups as well as of different parts of the country.[3] Held in October 2010, if only for a day, the National Assembly produced a brief document highlighting the things it wanted to see in a new constitution, including, for example, equal voting rights and public ownership of the country's natural resources. By law, the Constitutional Assembly was expected to consider the conclusions of the National Assembly.

The notion that the people should be involved in drafting their constitutions is gaining ground as the new 'gold standard' in constitutional design whereas, in the past, constitutions have been written mainly by alleged experts, sometimes even foreigners. For example, the

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[2] In this spirit, Brennan and Buchanan (1977) argue that farsighted, principled politicians should write tax laws aimed at restricting the expansion of the public sector rather than try to maximize their following in keeping with the teachings of the public choice school (Buchanan and Tullock, 1962). See also Mueller (2000).

[3] The National Assembly followed the example of a privately organized assembly convened in 2009 by a group of citizens experimenting with collective intelligence.

post-apartheid South African constitutional assembly invited popular petitions and received many. The aim was, in part, to help build a sense of nationhood. It remains to be seen whether constitution-making processes with direct popular involvement actually produce different outcomes – constitutions that are more 'indigenous,' better tailored to local circumstances, or more effective. Ginsburg *et al*. (2009) review the theoretical and empirical relationships between the process of constitutional design and constitutional outcomes.

Second, the parliament appointed a seven-member Constitutional Committee comprising professionals from different directions, including law, literature, and science. The committee produced a 700-page report with detailed ideas concerning the composition of the new constitution, including suggestive examples of the text of individual articles as well as a thorough, clause-by-clause analysis of the constitution from 1944 and of specific issues, including the electoral system used in parliamentary elections and the management and ownership of natural resources. The committee also used its website to facilitate access to foreign constitutions and related literature.

Third, a national election of representatives of the Constitutional Assembly was held in November 2010. There were 522 candidates competing for 25 seats if competition is the right word. Most candidates let it suffice to put their names forward, without advertising their candidacy beyond posting a few articles on the internet and chatting with their friends on Facebook. The electoral method used was STV (single-transferable-vote), a system designed to ensure that if your preferred candidate has no chance of being elected or has enough votes already, your vote is transferred to another candidate according to your instructions, thus ensuring that few votes go to waste (see Balinski and Laraki, 2010, p. 37). The STV system is used, for example, in Ireland (except in elections for the presidency and by-elections) and Australia as well as in local elections in Scotland. Some observers attributed the 37 percent turnout in the Constitutional Assembly election to the STV system, claiming that choosing one to 25 candidates out of 522 was more off-putting than choosing one party slate out of, say, eight, the usual method. For comparison, voter turnout in the last three parliamentary elections was 83-87 percent and in the last two municipal elections, 73-78 percent. Others made the point that special elections generally attract fewer voters than general elections. For comparison, voter turnout in Iceland's previous Constitutional Assembly election in 1850 was around 30 percent. In the national referendum on the union treaty with Denmark in 1918, voter turnout was less than 44 percent. Some have expressed concern that the election of 25 representatives on an individual basis from hundreds of scattered candidates may scatter the vote and weaken the bond between voters and representatives. Others argue that other voting

methods, including proportional representation based on party slates with numerous safe seats, do not necessarily secure a stronger bond between the voters and their representatives.

The election campaign was exceptionally civilized, and quite different from parliamentary election campaigns. The political parties did not field candidates, partly perhaps because the two main opposition parties (the Independence Party and, though not quite as consistently, the Progressive Party) were against the constitutional project from the start. One reason appears to be that the two parties that from 1930 until the crash of 2008 could rely on the support of about 50-70 percent of the electorate between them have a vested interest in preserving the *status quo* that served them so well. To be sure, the Progressive Party advocated a new constitution before the 2009 election, making it the centerpiece of its platform only to reverse its position afterward. It does not help that the revision of the constitution is widely viewed as part of the necessary cleanup after the crash for which those two parties continue steadfastly to refuse to admit any responsibility even if they, together in government from 1995 to 2007, privatized the banks with disastrous consequences and their MPs, all of them, voted for the parliament's unanimous resolution of September 2010 accepting collective responsibility for "Iceland's political culture" (recall Section I). Interest organizations did not field or openly support any candidates in the Constitutional Assembly election. The Independence Party office mailed a list of favored candidates to party members, but only two of them were elected.

The media, including state television and radio, did little to inform the electorate about the issues or the candidates who seemed to view one another as fellow advocates of a common cause rather than as competitors or opponents. No opinion polls were conducted to gauge the support for individual candidates, so no one knew which among them were most likely to be elected.

The elected representatives comprised a diverse group of people of all ages with broad experience from almost every nook and cranny of national life: doctors, lawyers, priests, and professors, yes, but also company board members, a farmer, a champion for the rights of handicapped persons, mathematicians, media people, erstwhile members of parliament, a nurse, a philosopher, poets and artists, political scientists, a theatre director, and a labor union leader, a good cross section of society. Some expressed concern that too few of the elected representatives came from the countryside, partly because voter turnout there was somewhat lower than in the Reykjavík area. Others considered this immaterial on the grounds that where you happen to live matters less than a good understanding of the needs of the country as a whole.

VI. The Supreme Court's intervention

The aftermath of the election proved less civilized. One unsuccessful candidate and two other individuals, all with connections to the Independence Party, filed a technical complaint about the design of the voting booths and such, claiming, among other things, that the ballot was not, in fact, secret even if the design of the voting booths was the same as in similar STV elections in Ireland and Scotland. The party connection matters because, of the seven politicians and public officials identified by the SIC as having neglected their duties as laid down by law, four were from the Independence Party whose former chairman and prime minister, suspected of criminal negligence before the crash, was indicted by parliament and, in April 2012, found guilty without punishment by a Court of Impeachment of violating the constitution and the law on ministerial responsibility.[4] Further, the party's chief executive officer for 25 years and board member of one of the three failed banks (Landsbanki, the bank favored by the Independence Party) has been sued by the winding-up committee of the bank for his part of the responsibility for the bank's demise, including the disbursement of huge sums of money to favored clients of the bank just before the collapse.

A bit of local banking history will help here. The privatization of the Icelandic banks 1998-2003 was deeply flawed. In a celebratory essay on the prime minister in 2004, presumably published with the subject's prior approval, the then editor of *Morgunbladid*, the unofficial Independence Party organ, wrote that, given that the Progressive Party had secured its claim to the second largest state bank, Búnadarbanki, the prime minister "considered it necessary that Landsbanki would land in the hands of persons within at least shouting distance of the Independence Party" (Gunnarsson, 2004, p. 467; my translation). After the crash, the prime minister's office disclosed that the erstwhile St. Petersburg, Russia-based father-and-son team that 'bought' Landsbanki borrowed from Búnadarbanki a significant part of the sum they paid the state for the bank. In turn, the buyers of Búnadarbanki borrowed a significant part of their purchase price from Landsbanki and apparently presented a fake foreign partner to make their offer look more impressive. The debt from the Landsbanki purchase remains unsettled and, through compound interest, has more than doubled since 2003. Some politicians and their friends became very rich. Four years after the crash, the parliament has not yet decided to order an investigation into the privatization of the banks. But we digress.

After reviewing the complaints, the Supreme Court declared the Constitutional Assembly

[4] The former prime minister was found guilty on one count – not convening cabinet meetings on the banking crisis before the banks collapsed – but he was acquitted, though severely criticized by the Court, on three other counts. Two further counts had earlier been dismissed from the original six-count indictment by parliament.

election null and void in what must be the first instance of a national election being invalidated *in toto* in a democracy, on flimsy grounds to boot as outlined by dr. Reynir Axelsson, a mathematician at the University of Iceland. Both the Supreme Court decision and Axelsson's analysis of it are available in English. Axelsson (2011) concludes his analysis as follows:

> *The only real and only significant deficiency in the election was that the Supreme Court spoiled it by a Decision which is demonstrably based on false reasoning and dubious sources of law. … The Decision of the Supreme Court is not a judgment. It would therefore doubtless be theoretically possible to refer it to the courts of law; if the case then returns to the Supreme Court, all the judges of the Court would be disqualified and new judges would need to be appointed ad hoc. It is very unlikely that this route will be taken. As a result, the Decision of the Supreme Court will no doubt be allowed to stand as an extremely dangerous precedent in the history of the Icelandic judiciary.*

The decision by the Supreme Court was widely seen as an attempt by vested interests to thwart the democratic process by killing the constituent assembly in its infancy. The strong opposition of the Independence Party to the constitution's being revised or redrafted outside parliament was clear. Furthermore, the Supreme Court's decision to invalidate the election may have been illegal. Icelandic law stipulates that, to invalidate the election of a specific representative, it must be proved either that the representative was ineligible by law to stand for election or that a fraudulent attempt was made to improve the representative's chance of being elected. The law does not permit the invalidation of the election of a representative on any other grounds (such as technical ones concerning voting booths, etc.). Accordingly, the Supreme Court did not have legal authority to invalidate the election *in toto*. No one bothered, however, to appeal the Supreme Court's decision to the European Court of Human Rights even if the European Court has overruled the Supreme Court of Iceland on several occasions in the past.

This kind of thing is not something you would ordinarily expect to happen in a Nordic country – Italy, perhaps, before Berlusconi, or Japan or Russia, but not Scandinavia. But then you would not either expect to see several high-ranking members of what throughout the history of the republic from 1944 onward was the largest political party in such deep trouble with the law, including the permanent secretary of the Ministry of Finance who is serving an unconditional two-year prison sentence for insider trading in Landsbanki stocks, a verdict confirmed by the Supreme Court in 2012.

The parliament reacted to the Supreme Court decision by appointing the 25 elected representatives to a Constitutional Council, revising accordingly the law governing the Constitutional Assembly. Of the 25 elected representatives, ten women and 15 men, all but one accepted the parliamentary appointment. The abstainer was replaced by the person who came in 26th in the vote tally. Probably as intended, the opponents of the project have used the Supreme Court decision to question the legitimacy of the Council, referring to it as an irrelevant 'conference' that no one needs pay any particular attention to. Others have asked: if the parliament wanted to appoint 25 people to a Constitutional Council, which 25 individuals would have been better suited to the task than the 25 who were elected through a process that not even the Supreme Court claimed was affected by the alleged technical flaws in question? This is a key point: the Supreme Court invalidated the election without suggesting that the election results had been affected by the problems cited.[5]

VII. Constitutional bill: Preliminaries

It was clear from the outset that the people wanted change.

In keeping with the conclusions of the National Assembly convened the month before, the answers the Constitutional Assembly candidates gave the media before the November 2010 election reflected a broad consensus that substantial changes in the constitution are needed. Based on the answers given by 23 of the 25 candidates who were elected (two did not participate), 19 out of 23 said they were in favor of changing the constitution, 22 were in favor of equal voting rights everywhere in the country, 22 were in favor of public ownership of natural resources, 21 were in favor of more frequent national referenda, 20 favored strengthening the right of the public to information, 20 opposed the right of cabinet ministers to retain their seats in parliament, 18 were in favor of preserving the right of the president to refer laws to a national referendum, 18 were opposed to allowing ministers to appoint public officials on their own, and 16 were in favor of allowing voters to cast their vote for individual candidates and not just for party slates. Last but not least, all 23 were against allowing the minister of justice (now minister of the interior) to appoint judges on his or her own. To understand the 23 out of 23, it helps to know that throughout the history of the republic an overwhelming majority of judicial appointments has been made by ministers belonging to the two long-dominant political parties, the Independence Party and the Progressive Party.

[5] When the presidential election of 2012 was challenged by three handicapped voters claiming that because they were forced to accept help from election officials in the voting booth the ballot was not secret, the Supreme Court reversed course, dismissing the complaint on the grounds that the election results could not have been affected by the alleged lack of secrecy.

According to opinion polls, public confidence in the courts has long been almost as low as public confidence in the parliament. The problem persists. In 2011, according to Market and Media Research, a leading pollster, only one respondent in three expressed great confidence in the judicial system compared with one in ten who expressed great trust in parliament.[6] In sum, the elected representatives wanted more democracy, more respect for human rights, more checks and balances, more transparency, and less corruption.

Opinion polls suggested that the broad consensus among the elected representatives as well as among the 522 candidates reflected not only the sentiments of the National Assembly attended by about 1,000 randomly selected citizens, but reflected also public opinion. For example, the broad consensus among the representatives about the need to substantiate, or rather reclaim, the people's ownership rights to their natural resources accords with public opinion polls that have for many years consistently shown about 70 percent of the electorate to be opposed to the discriminatory nature of the fisheries management system that has turned a small group of boat owners into billionaires and major political power brokers. The National Assembly echoed this popular sentiment. The Constitutional Council considered itself obliged by law to take the resolutions of the National Assembly into consideration. Therefore, no one needed to be surprised when the Constitutional Council approved and delivered to parliament a constitutional bill that, if ratified in a national referendum and approved by two successive parliaments, will entail a major overhaul of Iceland's constitution.

Early on in the Constitutional Council's work it became clear that most of its members wanted to start with a clean slate, to write a new constitution from scratch rather than revise the existing one. Even so, the council reached a consensus, approving the bill after four months of work with 25 votes against zero, a remarkable feat, not least in view of the fact that the reforms proposed are quite far-reaching and radical in a number of ways. The bill stresses stronger checks and balances between the three branches of government as well as between power and accountability. It stresses transparency, fairness, protection of the environment, and efficient and fair exploitation plus national ownership of the country's natural resources. It aims to stamp out corruption and secrecy, yet leaves both words unspoken. At the same time, the bill promises continuity and stability by preserving and strengthening the semi-presidential form of parliamentary government laid out in the provisional constitution from 1944. In effect, while retaining a popularly elected president with potentially significant

[6] In view of Ackerman's (2004) hypothesis that, through popular involvement, people have a more positive view of their government and government institutions, it would be interesting to investigate empirically whether the delegates at the National Assembly remain as distrustful of parliament as the population at large.

powers, the bill aims to move the Icelandic governance model from 1944 in the direction of 'constrained parliamentarianism' along the lines of the constitutional practice of Canada, Germany, India, Italy, Japan, South Africa, and many other nations (Ackerman, 2000).

A short preamble in first-person plural sets the tone:

We, the people of Iceland, wish to create a just society with equal opportunities for everyone. Our different origins enrich the whole, and together we are responsible for the heritage of the generations, the land and history, nature, language and culture.

Iceland is a free and sovereign state, resting on the cornerstones of freedom, equality, democracy and human rights.

The government shall work for the welfare of the inhabitants of the country, strengthen their culture and respect the diversity of human life, the land and the biosphere.

We wish to promote peace, security, well-being and happiness among ourselves and future generations. We resolve to work with other nations in the interests of peace and respect for the Earth and all Mankind.

In this light we are adopting a new Constitution, the supreme law of the land, to be observed by all.

VIII. Some highlights and obstacles

Different Council representatives and different readers of the bill will no doubt produce different lists of their favorite provisions. Here I propose to present some of the highlights of the bill as I see it. I begin with the two articles that I find most important and that probably will engender the greatest resistance from the opponents of the bill. These two articles concern human rights in two dimensions, in the electoral system as well as in natural resource management. The emphasis on human rights in the bill reflects the evolution of international public opinion and the concomitant proliferation of constitutional rights round the world over the years. For example, in 2006, a third of the world's constitutions contained clauses protecting the right of the public to information about government, as the Iceland bill does (see Section XII), compared with only two percent in 1946. The right to life, protected by a third of the world's constitutions in 1946, most often without banning abortion, was protected in four of every five constitutions in 2006; the Iceland bill does, too. Goderis and Versteeg (2011, Table 1) document the evolution of 108 different types of constitutional rights from 1946 to 2006. Also, Goderis and Versteeg (2012) report that human rights deteriorated in the United States and elsewhere after 9/11 with increased violations against physical integrity

rights at home and abroad. In countries with independent judicial review, courts could prevent such rights violations.

So why would some Icelandic politicians object to the afore-mentioned articles on the electoral system and natural resource management intended to safeguard human rights? First, the constitutional protection of the principle of 'one person, one vote' plus the right of voters to cast their votes for individual candidates rather than or as well as for party slates will significantly hamper the reelection prospects of a number of sitting MPs. Put bluntly, this article will almost surely make some of them unelectable because they are the products of an electoral system that allows the political parties to allocate 'safe seats' to candidates with few accomplishments on record and hence with limited popular following. Asking some of those MPs to approve this article, therefore, is a bit like asking the turkey to vote for Thanksgiving. This is an important part of the reason for having constitutions written by representatives of the people, not by politicians. The main point is, however, that the one person, one vote part of the article is an essential aspect of human rights as foreign supervisors of Iceland's parliamentary elections have remarked repeatedly in their reports. Also, the National Assembly asked for electoral reform along these lines.

Second, in view of the generosity of the banks to political parties as well as to individual politicians tabulated in the SIC report, it appears likely if not almost certain (for authentication, see below) that some parties and politicians were also generously treated by the vessel owners to whom politicians granted free access to the fishing grounds through the allocation of freely transferable catch quotas. One example will suffice. In serious financial trouble, Iceland's main daily newspaper, *Morgunbladid*, has changed hands several times in recent years. For a short while, the paper was owned by the father of the Landsbanki father-and-son duo mentioned before (Section VI), but in 2009 he declared himself bankrupt in one of the largest personal bankruptcy filings on record anywhere ($750 million). Then the paper was taken over by one of the privileged boat owners made rich by the gratis allotment of fishing quotas. Under this new ownership, Iceland's discredited prime minister 1991-2004 who went on to have himself appointed Central Bank governor and was summarily removed from the governor's office after the crash was installed as editor of *Morgunbladid* – roughly the equivalent of making Richard Nixon editor of the *Washington Post* to ensure fair and balanced coverage of Watergate. *Morgunbladid* now fights tooth and nail against the constitutional bill. No public investigation of the suspected financial dealings between boat owners and politicians has taken place. The removal of the boat owners' privileges as stipulated by the bill will no doubt disappoint them as well as their friends and allies in the

political arena. For another example, a former editor of *Morgunbladid* describes the consequences of the fisheries management system after 1990 as follows: “Rural MPs sided with the quota holders virtually without exception. ... It meant political suicide to rise against the quota holders in rural areas.” (Gunnarsson, 2009, p. 206; my translation).

There is yet another, general reason why the Icelandic constitutional bill is likely to encounter resistance. The purpose of any constitution is, *inter alia*, to spell out the rights of the population *vis-à-vis* the state and other citizens. One person’s right is another person’s obligation. The stipulation of ‘one person, one vote’ aims to reduce the political influence of those whose votes have carried extra weight in past parliamentary elections. Rural voters are being asked to give way to others to promote equality. The declaration that natural resources belong to the people is intended to redistribute economic and political clout away from those who in the past were granted free, or, more recently, nearly free, access to fishing quotas, a common property resource by law since 1990. Privileged boat owners are being asked to give way to others for the sake of equality and justice. The clause on environmental protection aims to hold back those who want to be able to go on polluting the natural environment with impunity. Polluters are being asked to yield. The clause on the right to information aims to restrain the behavior of those who hitherto have benefited from unwarranted secrecy, and so on. Any constitutional referendum involves a contest between narrow special interests and the public interest.

Let me now review a few key provisions of the bill (Sections IX to XIV draw on Gylfason, 2011b).

IX. One person, one vote

Article 39 on elections to parliament states that “The votes of voters everywhere in the country shall have equal weight.” This is important because MPs from rural areas currently have much fewer votes behind them than their fellow MPs from the Reykjavík area, with far-reaching political and economic consequences. The same article states: “A voter selects individual candidates from slates in his electoral district or from nationwide slates or both. A voter is also permitted instead to mark a single district slate or a single nationwide slate, in which case the voter will be understood to have selected all the candidates on the slate equally.” Voters will thus be free to cast their votes for parties as now or for individual candidates on different slates. This matters because, among other things, corruption is more prevalent in countries with small electoral districts and party slates than in countries with large electoral districts where voters have an opportunity to elect individual candidates

(Persson and Tabellini, 2005, Ch. 7). In essence, article 39 stipulates that voters can vote for persons as well as parties, even across party lists, while also guaranteeing minimal representation of regions as well as one person, one vote. Also, the article states: "The means of promoting as equal a proportion of men and women in the Althing shall be provided for in legislation on elections."[7]

The continuing need for detailed constitutional provisions concerning the parliamentary election system stems from the fact that earlier changes of the electoral clause were colored by the insistence of the prevailing political parties on preserving their privileges through unequal voting rights. Throughout most of the 20th century, the number of votes needed to elect an MP for the Reykjavík area was two, three, and up to four times as large as the number of votes needed in the rural electoral districts, in effect giving each farmer the ability to cast the equivalent of two to four votes in parliamentary elections. Until 2003, the provinces kept their majority in parliament even if nearly two thirds of the people now live in Reykjavík. The deliberate bias built into the electoral law resulted, among other things, in a neglect of education in the provinces. Provincial politicians are often more interested in roads and bridges rather than education. Besides, too much education can sometimes feel threatening to the authorities, a well known phenomenon; think of Haiti under Papa Doc or Congo under Belgium: '*Pas d'élites, pas d'ennemis*' ('No elites, no enemies'). For another example, Italian colonial governors in Eritrea long followed a policy of restricted education to ensure Eritrean acquiescence (Wrong, 2006, p. 67). Be that as it may, the electoral bias in Iceland, a *de facto* instrument of regional policy, slowed down the migration to Reykjavík as well as the lopsided transition from a rigid, quasi-planned economy toward a more flexible, mixed market economy, and resulted in a similarly reluctant and slow depolitization of economic life, including the banks that were privatized as late as in 1998-2003, as said before, several years after the privatization of commercial banks in East and Central Europe and the Baltic countries was completed. In the parliamentary election of 1927, an extreme case, the Progressive Party obtained the majority of seats in parliament with one third of the votes behind it, setting Iceland on a course of protectionist, inward-looking economic policies that lasted a generation or longer.

[7] Gender equality through affirmative action might also be helpful in banking and finance in view of empirical evidence that women are more averse to risk than men (Barber and Odean, 2001). Lehman Sisters might still be standing.

X. Natural resources

Article 34 is as follows:

> *Iceland's natural resources which are not in private ownership are the common and perpetual property of the nation. No one may acquire the natural resources or their attached rights for ownership or permanent use, and they may never be sold or mortgaged. Resources under national ownership include resources such as harvestable fish stocks, other resources of the sea and sea bed within Icelandic jurisdiction and sources of water rights and power development rights, geothermal energy and mining rights. National ownership of resources below a certain depth from the surface of the earth may be provided for by law. The utilization of the resources shall be guided by sustainable development and the public interest. Government authorities, together with those who utilize the resources, are responsible for their protection. On the basis of law, government authorities may grant permits for the use or utilization of resources or other limited public goods against full consideration and for a reasonable period of time. Such permits shall be granted on a non-discriminatory basis and shall never entail ownership or irrevocable control of the resources.*

By "full consideration" is meant full market price – that is, the highest price that anyone is willing to pay, e.g., in a market, at auction, or in an agreement with the state as agent for the resource's rightful owner, the nation – for the right to exploit the resource in question. This marks a clear departure from current practice where vessel owners have been granted access to valuable common-property fishing quotas, first free of charge and then against nominal fees, a discriminatory and thereby also unconstitutional practice according to the United Nations Committee on Human Rights (2007). The Constitutional Council discussed the possibility of replacing "full consideration" by "fair consideration," but the idea was rejected on the grounds that "fair consideration" might be perceived as a constitutionally protected offer of a discount to those granted permits for the use or utilization of resources. Further, the wording "fair consideration" would have introduced an element of discrimination into the bill in violation of the equality clause (article 6) because the clause on the right of ownership (article 13) states:

> *The right of private ownership shall be inviolate. No one may be obliged to surrender his property unless required by the public interest. Such a measure requires permission by law, and full compensation shall be paid. Ownership rights entail obligations as well as restrictions in accordance with law.*

Like the constitution from 1944, the constitutional bill prescribes "full compensation" for private owners, and must treat all owners the same way.

The article on natural resources together with the articles on environmental protection is located in a chapter entitled "Human Rights and Nature." This is done to underline the human rights aspect of natural resource management.

Notice also the reference to "the common and perpetual property of the nation." Several constitutions (Chile, China, Ghana, Iraq, Kuwait, and Russia, to name a few) declare natural resources to be the property of the state. Some other constitutions are rather ambivalent or even silent on the subject of natural resources. For instance, the constitution of Nigeria lets it suffice to say that "the material resources of the nation are harnessed and distributed as best as possible to serve the common good."

The Iceland bill takes a different route based on an explicit conceptual distinction between the 'property of the nation' and 'property of the state.' State property – office buildings, for example – can be sold or pledged at will by the state. The property of the nation is different in that it "may never be sold or mortgaged." The wording "perpetual property of the nation" accords with the wording of the 1928 law about the national park at Thingvellir that states: "The protected land shall be under the protection of parliament and the perpetual property of the nation. It may never be sold or mortgaged." This means that the present generation shares Thingvellir as well as the natural resources belonging to the nation with future generations, and does not have the right to dispose of the resources for its own benefit. These restrictions are meant to refer to the natural resources themselves as well as to the rights attached to the resources.

In part to clarify the meaning of the nation's, as opposed to the state's, ownership rights to its natural resources, the article on natural resources is preceded by a corresponding article on cultural assets (article 32):

> *Valuable national possessions pertaining to the Icelandic cultural heritage, such as national relics and ancient manuscripts, may neither be destroyed nor surrendered for permanent possession or use, sold or pledged.*

National ownership of cultural assets as well as of (renewable) natural resources is intended to impose on the current generation a duty to preserve the assets in question for unborn generations. State ownership involves no such duty.

XI. Iceland's nature and environment

Article 33 is as follows:

Iceland's nature is the foundation of life in the country. Everyone is under obligation to respect it and protect it. Everyone shall by law be ensured the right to a healthy environment, fresh water, clean air and unspoiled nature. This means maintenance of life and land and protection of sites of natural interest, unpopulated wilderness, vegetation and soil. Previous damage shall be repaired to the extent possible. The use of natural resources shall be managed so as to minimize their depletion in the long term with respect for the rights of nature and future generations.

The article reflects increased public awareness of the need for environmental protection mirrored by an increasing propensity to adopt such provisions in constitutions around the world. Addressing the need to balance the rights of the present generation and future generations, and of man and nature, such constitutional provisions have become more detailed and specific in recent years, reflecting keener public interest in the importance of nature for the health and happiness of mankind. To underline their importance and the kinship involved, such provisions are included among the human rights provisions in, for example, the constitution of Finland. The Iceland bill takes the same approach, following also the example of France as well as some South American constitutions (e.g., Bolivia and Ecuador). In line with recent developments of legal thought about nature and the environment (reflected, e.g., in *La Charte de l'environnement* adopted by parliament as part of the French constitution in 2005), the traditional rights of man to exploit nature are balanced against the independent rights and protection of nature against excessive exploitation in the spirit of sustainable development. This has an important implication. Ordinary people can now seek legal recourse in matters relating to environmental damage and their rights to enjoy nature. The provision "Previous damage shall be repaired to the extent possible" refers, *inter alia*, to grazing on other people's or public lands, a major source of environmental erosion in Iceland over the centuries and to this day. Grazing was a source of conflict and of preventive legislation in medieval times as recorded in *Jónsbók*, Iceland's basic law from 1281 to 1662. In 1662, the Icelanders relinquished their autonomy to the monarchy of Denmark and Norway, an arrangement lasting until 1874. That was the year when the king of Denmark granted Iceland the first rudiments of home rule plus a constitution, a precursor of the provisional constitution of 1944.

This discussion suggests another way to view the afore-mentioned provision on cultural assets. If Iceland‘s nature and environment deserve constitutional protection, the cultural heritage of the country is bound to merit comparable protection. The Greek constitution takes the same parallel view of the protection of nature and culture, stating that "The protection of

the natural and cultural environment constitutes a duty of the State." Going a step further, the Portuguese constitution grants "Everyone, either personally or through associations that purport to defend the interests at stake, … the right to *actio popularis* in the cases and under the conditions provided by law, notably the right to promote the prevention, the suppression, and the prosecution of offences against public health, the environment, the quality of life, and the cultural heritage, as well as to claim the corresponding damages for the aggrieved party or parties." This Portuguese provision accords with environmental and cultural protection provisions in the Iceland bill which, however, does not extend those provisions to public health or the quality of life.

Article 35 on "Information on the environment and legitimate interests" states, *inter alia*, that "Public access to preparations for decisions which will impact the environment and nature, as well as permission to seek the intervention of impartial administrative agencies, shall be ensured by law."

Articles 32-35 on cultural assets, natural resources, and nature and the environment mark a clear departure from the 1944 constitution which does not deal with those subjects at all. These articles stipulate 'new' rights present in many modern constitutions but hardly in any constitution written before the 1980s. Other novelties include the bill's provisions about the right to information, freedom of the media, the appointment of public officials, independent state agencies, and national referenda to which we now turn.

XII. Right to information and freedom of the media

Article 15 contains the following provision: "Information and documents in the possession of the government shall be available without evasion and the law shall ensure public access to all documents collected or procured by public entities." Article 16 states:

> *… The freedom of the media, their independence and transparency of ownership shall be ensured by law. The protection of journalists, their sources of information and whistle-blowers shall be ensured by law. It is not permitted to breach confidentiality without the consent of the person providing the information except in the process of criminal proceedings and pursuant to a court order.*

The precedent illuminating the provision on the right to information is the Swedish constitution which already in 1766 provided for the freedom of the press and right to information ('tryckfrihetsförordningen' in Swedish), including the right of the public to access to official documents. The Swedish constitution, with these provisions, preceded the French Bill of Rights of 1789 and the first amendment of the constitution of the United States

in 1791. The right to information is an integral part of human rights and must be accorded similar protection as other human rights. The guiding principle is transparency which means that the legislature is not authorized to restrict the publication of information except subject to strict conditions. This general rule ('offentlighetsprincipen' in Swedish, also referred to as 'sunshine laws') means that everyone is guaranteed access to official documents, court proceedings, and open meetings where political decisions are made. Finland has similar provisions in its constitution.

The right of journalists to protect their sources of information differs fundamentally from the confidentiality of doctors and lawyers who have a professional duty not to share with others, even in court, confidential information they have acquired about their clients. By contrast, it is the professional duty of journalists to share their information with the public. The constitutional protection accorded to journalists does not apply to the information they have gathered, but only to the sources of the information. This is a key distinction underlying the constitutional protection of sources and whistle-blowers. Freedom of the media is an important pillar of democracy and, therefore, merits constitutional protection.

The two articles on the right to information and freedom of the media aim to increase transparency and help uproot a pervasive official culture of secrecy and submissive journalism. In Iceland, until recently, even the travel expenses of cabinet ministers and other public officials were not accessible to journalists or the general public. The problem persists. In the course of its work, one of the committees of the Constitutional Council was denied access to information about pension payments from the Pension Fund of Public Employees to those retirees receiving the highest payments. The request for this information was predicated on the common knowledge that some politicians and public officials receive multiple pensions, but names with amounts attached are kept from public view, a state of affairs that the constitutional bill aims to change.

XIII. Appointment of public officials

Article 96 is as follows:

> *Qualifications and objective viewpoints shall decide appointments to offices. When a Cabinet Minister makes an appointment to the posts of judge and Director of Public Prosecutions, the appointment shall be submitted to the President of Iceland for confirmation. If the President withhold his confirmation, the Althing must approve the appointment by a two-thirds majority vote for the appointment to take effect. Ministers shall make appointments to other posts as defined by law following recommendation by an*

independent committee. If a Minister does not appoint to such an office one of the persons regarded as most qualified, the appointment shall be subject to the approval of the Althing by a two-thirds majority vote. The President of Iceland shall appoint the chairman of the committee.

The reference up front to "qualifications and objective viewpoints" as well as the establishment of a civil service commission is intended to put an end to ministerial appointments of incompetent or acquiescent people to high office. The ban in the equality provision (article 6) against discrimination with regard to 'political affiliation,' among other things, serves a similar purpose. Appointment corruption is a serious problem in Iceland as can be inferred, for example, from the criticism of several aspects of public administration presented in the SIC report of 2010 as well as from opinions issued by the parliament's ombudsman. Rather than have the minister of the interior appoint judges and the state prosecutor on his or her own, as was done until 2010 when the law was changed, the bill stipulates that either the president or a two-thirds majority in parliament must confirm the appointment. This provision is designed to make it unconstitutional for the politicians to revert to their old practice regarding judicial appointments. Likewise, rather than have ministers appoint other senior officials (e.g., cabinet secretaries and directors of key state agencies) on their own, the bill stipulates that such appointments must either follow the recommendations of an independent committee set up by the civil service commission whose chairman is appointed by the president or they must be confirmed by a two-thirds majority in parliament. The new, supervisory role conferred on the president plus the overlapping authority of ministers and parliament aim to disperse the power to make civil service appointments in an attempt to increase competence in public administration.

XIV. Independent state agencies

Article 97 is as follows:

Certain agencies of the State which carry out important regulatory functions or gather information which is necessary in a democratic society may be granted special independence by law. The activities of such agencies cannot be discontinued, significantly changed or entrusted to other agencies except by an act of law passed by a two-thirds majority in the Althing.

This article is intended to safeguard the activities and independence of state agencies that need to be able to operate independently without undue political interference, especially

agencies with important supervisory functions and information gathering responsibilities as necessary in a democratic society. In Council debates, some of the main agencies mentioned in this context were the Central Bank, the Financial Supervisory Authority, the Competition Authority, and Statistics Iceland in addition to the National Audit Office and the Ombudsman of the Althing for both of which the bill proposes constitutional protection. The article also aims to cover similar agencies charged with supervision and data collection concerning the environment. To be able to perform their duties, supervisory agencies need to be independent. Financial supervisory agencies, for example, need to be able to inspect bank operations without government interference or threats that parliament by a simple majority can dismantle them or disrupt their operations. The same applies to agencies charged with securing free and fair competition as well as to agencies gathering economic data or providing economic advice to the government and the public. The guiding principle behind this article is independence with accountability. Independent monetary policy must be guarded against the vicissitudes of political life. A central bank lacking independence will find it difficult to provide impartial economic counsel. The same applies to other institutions dispensing economic policy advice. Such institutions must stand ready to issue warnings about pending dangers on the economic front and to present inconvenient economic data and advice. This is why the bill stipulates that state agencies that have been placed in this category by law can only be dismantled by a two-thirds majority in parliament. Increased independence of state agencies needs to go hand in hand with external accountability as well as internal checks and balances.

The article on independent state agencies did not emerge from thin air. In 2002, the government decided to summarily abolish the National Economic Institute (est. 1974) on the grounds, among other things, that the economic analysis on offer from the commercial banks was enough. Subsequently, Statistics Iceland looked the other way while the distribution of disposable – that is, after-tax – income as measured by the Gini index became progressively less equal year after year due mostly to the government's deliberate shift of the tax burden from the most affluent groups in society to low-to-middle-income families. The government did this by tempting the rich to reclassify their labor incomes as capital incomes, taxed at ten percent, while essentially freezing the level of tax-free income with the result that inflation, through tax creep, made more and more low-income earners have to pay taxes. The ensuing increase in inequality brought Iceland's income distribution from approximate parity with the Nordic countries in the mid-1990s to near parity with the United States in 2007, a dramatic change denied by the government at the time (Gylfason *et al.*, 2010, pp. 155-6). Before the onset of the crisis, increased disparity of income and wealth was one of several signs that

Iceland was headed for trouble. Increased inequality also preceded the Great Depression in the United States 1929-39 (Galbraith, 1988, pp. 177-8).

XV. National referenda and role of the president

The bill seeks to preserve and strengthen one of the hallmarks of the 1944 constitution, namely, the semi-presidential model of parliamentary democracy, in two main ways.

First, the constitutional right to refer to a national referendum laws passed by parliament remains unchanged in the hands of the president, and is, secondly, granted also to ten percent of the electorate. This means that even in cases where the president sees no reason to refer a piece of legislation to a referendum, valid signatures by ten percent of the electorate can nonetheless do so. Experience from other countries seems to suggest that higher thresholds such as 15 percent are difficult to surpass (Direct Democracy, 2008, p. 198). Hence, with a threshold of ten percent, national referenda are intended to be more commonly used than before, directly or indirectly. The aim is to boost direct democracy. Iceland has held only seven referenda in the past, for example about prohibition in 1908 and its abolition in 1933 as well as, recently, about state guarantees in connection with the Icesave dispute involving the Icelandic, British, and Dutch governments. The parliament has scheduled a consultative referendum on the constitutional bill under review here on 20 October 2012 as well as another one on European Union membership following the completion of the accession agreement between the EU and Iceland under negotiation since 2009.

According to articles 65, 66, and 67,

> *Ten per cent of the electorate can petition for a referendum on legislation passed by the Althing. ... The legislation shall become void if rejected by the electorate, but shall otherwise remain in force. However, the Althing may decide to repeal the legislation before the referendum takes place. … Two per cent of the electorate may submit an item of business in the Althing. Ten per cent of the electorate may submit a legislative bill in the Althing. The Althing can submit a counterproposal in the form of another legislative bill. If a voters' bill has not been withdrawn, it shall be submitted to a referendum, as well as the bill of the Althing, if introduced. … A referendum cannot be requested on the basis of these Articles concerning the State Fiscal Budget, the Supplementary Fiscal Budget, legislation enacted for the purpose of implementing undertakings under international law, nor concerning tax matters or citizenship.*

The issues deemed unfit for referenda requested by ten percent of the electorate – the government budget, etc. – do not extend to the president's right to refer laws to a referendum. The president's right in this regard remains undiminished from current practice.

The guiding principle behind these three articles is the dispersion of power in order to bolster direct democracy through increased use of national referenda to absolve the parliament of particularly difficult and divisive decisions such as about EU membership or a new constitution. This article thus aims to encourage the outsourcing, or, better put, return, of some of the parliament's decision making to the people on the understanding that democracy means, in the words of Lord George-Brown, Britain's foreign secretary in the 1960s, in a public lecture in Reykjavík in 1971, that "There shall be no one to stop us from being stupid if stupid we want to be."

XVI. Anomalies

The constitution from 1944 contains several anomalies that remain in force because of the parliament's inability to keep its 65-years-old promise to revise the constitution. Two quick examples will suffice to suggest the extent of the problem.

Article 29 of the 1944 constitution states that "The President may decide that the prosecution for an offense be discontinued if there are strong reasons therefor."

Article 30 states that "The President, or other governmental authorities entrusted by the President, grants exemptions from laws in accordance with established practice."

These examples show what can happen when constitutional provisions considered fit for a 19th century king are left at the disposal of a 21st century president. In their defense, the constitution makers of 1944 could have argued that article 13, stating that "The President entrusts his authority to Ministers," means that the president cannot on his or her own grant "exemptions from laws in accordance with established practice." But even so, articles 30 and 13 together mean that the president with a minister in tow could grant such exemptions, clearly an untenable situation. The candidates running for president in 2012 expressed widely different views of the powers of the president, a clear sign of interpretive ambiguities that the constitutional bill is intended to prevent.

XVII. Absent: Financial and fiscal issues

We now return to something completely different, a topic introduced in Section II. Does financial regulation belong in constitutions? Or is it enough to confine such regulation to

laws? – which, to date, is near-universal practice.

This is a fair question, especially in a country that has recently gone through one of the worst financial crashes on record, with grave consequences for many households and firms at home and elsewhere. According to Eurostat, 13 percent of Icelandic households had great difficulties making ends meet in 2010 compared with 2-4 percent in Denmark, Finland, Norway, and Sweden. The corresponding percentages in 2004 were 9 percent in Iceland and 3-4 percent in the rest of the Nordic region. These figures suggest that Iceland was not primarily a victim of foreign events. If that were the case, Nordic households should find themselves in similar difficulties as Icelandic ones. The question is particularly pertinent in view of the fact that Iceland's Law on financial institutions from 2002, No. 161, article 52, states (I am not making this up): "Directors and managers must … have an unblemished reputation, and must not in the last five years have been declared bankrupt. They must not … have been convicted over the past 10 years of a criminal offense under the Penal Code, ... " (my translation). This article appears to have been tailor-made for the afore-mentioned person who a few short years later declared personal bankruptcy to the tune of $750 million, two thirds of which he owed to the bank he owned and operated as chairman of the board. He told the SIC that he believed that the bank "had been very happy to have [him] as a borrower." His vice chairman was the long-standing afore-mentioned CEO of the Independence Party, now in opposition.

In Iceland, as I see it, bankers were not solely responsible for the crash of 2008. They simply went as far as they could with the passive or active permission of politicians. The root cause of the crash was the incestuous relationship between politicians and the owners and managers of the banks and other big firms. Bankers everywhere usually go as far as they can within the limits imposed on them by politicians through laws and regulations, and sometimes farther. Likewise, politicians usually go as far as they can in the pursuit of their objectives by making laws and executing them subject to the restraints imposed by the constitution, and sometimes also by public opinion. This is why it is common practice around the world to put in the constitution general provisions laying out the division of responsibility and power among the three main branches of government, checks and balances, and to delegate to the law specific provisions concerning day-to-day government, including its regulation of banks and other financial institutions. The constitutional bill for Iceland is in this spirit. The bill aims to sharpen the division of power among the legislative, executive, and judicial branches of government to contain the ability of the authorities to harm the rights and interests of the public. The articles concerning the right to information, freedom of the media, appointments

to public office, the independence of key state agencies, and parliamentary investigation committees are, *inter alia*, intended to reduce the likelihood that the banks can again outgrow the government's ability to protect the people against the banks. Do these provisions suffice to prevent another crash? No. Probably no constitution can offer such a guarantee. All that a constitution can be expected to do – or the law, for that matter – is to lower the probability of yet another crash.

Would it have been better to include in the bill an article aimed at tying the hands of the banks? This could have been done by, for example, stipulating quantitative limits on the ratio of foreign debt to gross domestic product or on the ratio of the foreign exchange reserves of the central bank to some appropriate base such as the short-term foreign liabilities of the banking system. The latter ratio, by the Giudotti-Greenspan rule, must never be allowed to fall below unity lest the currency be exposed to heads-I-win-tails-you-lose speculative attacks, a well-known proposition since the outbreak of the Southeast Asian financial crisis in 1997. Some countries have written such quantitative requirements into law. A rare exception, Bhutan's recent constitution features an article on the management of foreign exchange reserves as follows: "A minimum foreign currency reserve that is adequate to meet the cost of not less than one year's import must be maintained."

In US law, 'prompt corrective action' mandates progressive penalties against banks that exhibit progressively deteriorating capital ratios (Goodhart, 2009). In this vein, would an article protecting and extending 'prompt corrective action' by enabling the authorities to take over banks before their legal insolvency, thus infringing on property rights to safeguard society, have belonged in the Iceland bill? In the end, it was decided to let it suffice to extend the article on the right of ownership currently in force by adding the words "Ownership rights entail obligations as well as restrictions in accordance with law" without granting the state explicit constitutionally protected authority to take over troubled banks.

Quantitative economic provisions are uncommon in constitutions for three main reasons. First, the desire for durability through flexibility is inclined against constitutional clauses involving economic variables. Second, such rules are easy to circumvent by adjusting statistical definitions. This, by the way, is also why the Iceland bill does not contain provisions specifying limits on the government budget deficit or on public debt. Besides, unlike Greece, the Icelandic economy did not collapse under the weight public debt. What brought Iceland to its knees was the escalation of private bank debt. Germany, badly burnt by hyperinflation in the interwar period, was until recently the only European country with such a provision in its constitution from 1949. The Hungarian constitution of 2012 stipulates that

"Parliament may not adopt a State Budget Act which allows state debt to exceed half of the Gross Domestic Product." However, it goes on to add that "Any deviation ... shall only be possible during a special legal order, to the extent required for mitigating the consequences of the causes, and if there is a significant and enduring national economic recession, to the extent required for redressing the balance of the national economy." Third, quantitative constitutional provisions, or even only legal ones, related to, for example, gross domestic product (GDP) would need to be accompanied by special rules concerning adjustment to a contraction of GDP, tempting the government to keep GDP in money terms artificially high and thus imparting an inflationary bias to the economic system.

Ecuador is an exception to the rule. Ecuador's 1998 constitution included specific financial regulation clauses that specifically allowed the Central Bank to bail out private banks "for the next two years." Unsurprisingly, Ecuador's largest financial crisis, with huge bailouts that brought its national currency to an end, took place 1998-1999 (Reinhart and Rogoff, 2009, p. 361). In a complete turnaround, Ecuador's 2008 Constitution explicitly forbids bailouts and public takeovers of private debts. Specifically, Article 308 states: "The regulation and control of the private financial sector shall not transfer the responsibility of bank solvency, nor imply any guarantee by the State. Managers of financial institutions and those controlling the capital thereof shall be held liable for the solvency of said institutions." Further, Article 312 was recently reformed by referendum, now forbidding bankers to own shares in anything but banks by stating that "Financial entities or groups may not possess permanent holdings, whether total or partial, in companies that have nothing to do with financial business."

Had it been better to include such a provision on fiscal affairs in the Icelandic bill? The idea was discussed at length in the Council, but it was rejected. Again, consider aviation. Locking the steering wheel can be a good idea under good flying conditions. In extreme weather or other emergencies, however, every pilot wants to be able to overrule the aircraft's computer. The human mind must always have the last word. This fundamental principle applies to constitutional economics no less than to aviation. Besides, it is easy to bypass such regulations by moving selected public expenditure items outside the government budget or simply to break the rules. Even France and Germany have violated the Maastricht criteria with impunity. Easily breakable rules do not belong in constitutions.

Interestingly, Germany's constitution does not impose similar restraints on monetary policy as on fiscal policy. The constitution stipulates that the Bundesbank's "tasks and powers can, in the context of the European Union, be transferred to the European Central Bank which

is independent and primarily bound by the purpose of securing stability of prices." Here the German constitution is flexible as constitutions ought to be.

Justice Oliver Wendell Holmes (1841-1935) made the case for a 'living constitution':

A Constitution is not intended to embody a particular economic theory . . . It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. ... The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints.

XVIII. Icelandic law and lawyers

Legal studies in Europe rest, or should rest, on three main pillars. One pillar is the law itself. Another is human rights, especially the rights of men against the powers that be. The third pillar is the legitimacy of the law in the eyes of the people who, in democratic societies, are the sole source of power and the social rule of law. The three pillars reinforce one another. They constitute the basis of the rule of law in modern societies with just and lucid laws that the people choose to respect for their own benefit.

The teaching of law in Iceland rested for a long time on the first pillar alone. The legal profession was, and still is for the most part, preoccupied by law in a narrow sense of the term while human rights as well as the idea of the people, the nation, as the sole source and justification of the law ignited limited interest. It was not until 1995 that new articles on human rights were added to the 1944 constitution in accordance with the European Convention on Human Rights. The fact that the discriminatory nature of the Icelandic fisheries management system constitutes a violation of human rights (recall Section III) has generated limited interest among Icelandic lawyers except for a few who specialize in human rights. When the Supreme Court of Iceland came under attack from the government following the Court's 1998 ruling that the quota system is unconstitutional, 105 of 150 professors at the University of Iceland signed a public declaration in defense of the Court, encouraging the parliament to secure that the laws of the land accord with the constitution. No law professor (there were ca. ten of them at the time) was willing to sign the declaration. All judges and most of the senior lawyers went through the same five-year study program at the law department of the University of Iceland and few of them have chosen to supplement their education abroad. When, in 2012, the insider-trading case against the permanent secretary of

the Finance Ministry, a lawyer, came before the Supreme Court (recall Section VII), half of the judges recused themselves, a sign of progress of sorts.

The teaching of human rights and related subjects has made progress in recent years in the law departments at Icelandic universities. Even so, many lawyers appear unconcerned about human rights violations in the fisheries management system or in the election system, two of the main issues addressed by the constitutional bill. Few lawyers have come forward to welcome those features of the bill while several lawyers have offered criticism of the bill, either in general, nonspecific terms or detailed technical criticisms reflecting a narrow vision of the laws, a view that underrates justice as well as the right of the nation to make its own constitution. As an example of the attitude to the constitutional bill of at least part of the legal profession, The Icelandic Lawyers Association organized a public meeting in December 2011 under the heading "Worries and doubts about the proposal of the Constitutional Council" (my translation) featuring a single speaker, a lecturer in the department of law at the University of Iceland and a former chairman of The Youth Organization of the Independence Party whose leader declared from the outset that his party would pay no attention to the work of the Constitutional Council. In a nutshell, the apparently predetermined attitude among many lawyers to the bill seems to be attributable to the historically close connection of the department of law of the University of Iceland and large swaths of the legal profession to the Independence Party, to the lucrative services that academic lawyers have rendered as advisors to governments led by or including the Independence Party, and to the apparent sentiment among many lawyers that constitution making is their prerogative, and theirs alone. Many lawyers, like many politicians, seem to view the Constitutional Council as an intruder on their turf. They were against – even boycotted, some would say – the election to the National Assembly because they did not seem to accept the third pillar of the social rule of law, that is, the idea that the people, the nation, are the sole source of the parliament's legislative authority. The invalidation of the National Assembly election by the Supreme Court needs to be viewed in this light (recall Section VI).

XIX. From insourcing to crowdsourcing

Let me now turn from the substance of the Icelandic constitutional bill to the method that was used to produce it (this section draws on Gylfason, 2011c).

Iceland has never been particularly good at outsourcing. Insourcing, on the other hand – self-dealing, that is – has been something of a national sport. For example, a few years ago first the nephew and then a close friend (you met him in Section VI) of the prime minister were appointed judges on the Supreme Court, appointments that created some controversy,

and not only because of the personal ties. When a few years later the prime minister's son was appointed district judge, a more qualified applicant for the job sued the offending minister and was awarded financial compensation by the Supreme Court (much lower compensation, however, than a lower court had decided). (Both cabinet ministers mentioned in the preceding sentence were among the seven politicians and public officials referred to in Section VI). After the crash of 2008, to take another example, the government thought it better to appoint a domestic Special Investigation Committee, rejecting proposals for an international commission of enquiry that would have been beyond all suspicion of partiality. As it happened, the SIC did a good job, but that is another story (Gylfason, 2010).

Its philosophy resting on all three pillars of the social rule of law, the Constitutional Council decided to do things differently. The Council decided to invite the people of Iceland to participate in the drafting of the constitutional bill on the internet, an arrangement that has attracted considerable interest in foreign media (see, e.g., *The Guardian*, 9 June 2011). This decision proved advantageous and trouble-free. It was known that ordinary people from all walks of life were interested in seeing the constitution revised, and were even passionate about it. Otherwise, 522 people would hardly have run for the 25 seats in the Constitutional Assembly. Surprisingly, perhaps, constitutions and constitution making seem to appeal to many people without any particular interest in legislative work or politics. Even more striking, to me, was the lack of enthusiasm of several academics, not only lawyers, with well regarded expertise when asked to contribute to the work of the Council.

The job was done in three overlapping rounds. First, each week, the Constitutional Council posted on its website some new provisional articles for perusal by the public. In a second round, usually two to three weeks later, after receiving comments and suggestions from the public as well as from experts, the Council posted revised versions of those articles on the website. Then, in a final round, proposals for changes in the document as a whole were debated and voted upon article by article, and the final version of the bill was prepared. At the end of the last round, each article was approved by an overwhelming majority of votes. The passage of the articles on the parliamentary election system and on natural resources (recall Sections IX and X) was followed by spontaneous applause.

Judging by the traffic on the Constitutional Council website, the people of Iceland welcomed the Council's invitation to them to participate in the project. The Council received 323 formal proposals that the three committees of the Council discussed and answered. More than 3,600 written comments were posted on the website by visitors; the Council representatives answered many if not most of them. Nearly all the proposals and comments

received proved useful in one way or another, not only what was said, but also the things left unsaid. If no one objected to the provisional articles posted on the website, then perhaps we were on the right track. Almost invariably, the proposals and comments were polite unlike some of the entries that some contributors permit themselves to post on political websites. Fears that an open Council website might be drowned in gibberish, or worse, proved groundless. Why did the low standard of public political debate in Iceland pass the Council by? Perhaps it helped that the discussions in Council meetings were characterized by courtesy and mutual respect as well as by respect for the task bestowed on the Council by the people and parliament. Direct broadcasts on the internet as well as on television from Council meetings were regularly watched by about 150-450 viewers. More than 50 interviews with Council members and others concerned were posted on YouTube and they had, by late 2011, been viewed 5,000 times. The website contains much information on the work of the Council and related material, including press coverage at home and abroad, though unfortunately all of it in Icelandic except for the foreign coverage. The phone numbers and email addresses of Council members were accessible to all. The Council meetings took place in Reykjavík, not in some remote corner of the country as sometimes has been considered necessary elsewhere in the past to shield the constitution makers from special interest groups. The US constitution was written in Philadelphia, true, but in secrecy.

Even if the Constitutional Council emphasized cooperation with the public, the Council also actively sought the advice of experts, starting with the Constitutional Committee's 700-page background report packed with good ideas. Many experts advised the Council every step of the way, lawyers and others, in meetings as well as in writing. The Council could not seek the advice of all available and eligible experts. However, like everyone else, those who had points to make were welcome to do so. Departing from standard operating procedure in parliamentary work, the Council did not invite representatives of interest organizations to special meetings, but these organizations had the same access as the general public to the Council, its open meetings, and to individual Council members. This was an important benefit of the crowdsourcing aspect of the operation: it created a framework for inviting everyone to have a seat at the same table, something that special interest organizations in Iceland are not used to.

XX. Lessons from, and for, other countries

It is too early to draw general lessons from the ongoing Icelandic experiment in constitution making because we do not yet know how the story will end. The national referendum that

parliament, after eight months of deliberations in committee, had resolved to hold concurrently with the presidential election on 30 June 2012 was derailed by filibuster by the minority opposing the bill on the grounds that they had not had enough time to consider the bill. Following further filibuster, parliament decided in late May 2012, with 36 votes against 16 with 11 abstentions, to hold an advisory referendum on the bill no later than 20 October 2012. It is impossible to know whether the government will be able to hold onto its slender majority in parliament long enough to finish the game.

The parliament decided on short notice to reconvene the Constitutional Council for four days in early March 2012 for the purpose of responding to questions and suggestions proposed by the parliament, and then decided to append five specific questions to the Yes or No question about the bill as a whole in the upcoming referendum. The additional questions proposed by parliament were framed strictly within the context of the bill. One of the five questions is whether the voters want natural resources to be declared the property of the nation, Yes or No. Another question is whether the electorate wants the votes of voters everywhere in the country to have equal weight, Yes or No. Thus it became clear that the parliament would not make any changes in the bill before putting it to a referendum. Even so, the parliament has said that some technical changes in wording, but not in substance, may be introduced before parliament votes on the bill after the referendum. The March 2012 meeting of the Constitutional Council offered alternative wording of a few provisions, including a shorter version of the provision on elections to parliament without any change in material content. The 1944 constitution requires a new or revised constitution to be passed by two parliaments with a parliamentary election in between.

In sum, the final outcome remains uncertain because the post-crash government that launched the project is weak and, apart from the prime minister, Ms. Jóhanna Sigurdardóttir, as well as a few other MPs, appears strangely unenthusiastic about its own offspring. There is also significant opposition to the bill from those who do not like to see their privileges reduced as is necessary for the sake of equal opportunity and human rights. The opponents, strongly opposed to equal voting rights and to national ownership rights to natural resources, among other things, happen to be the ones who most vehemently deny any responsibility for the 2008 crash, contrary to the clear evidence presented in the SIC report as well as to the parliament's unanimous resolution of September 2010 accepting the main findings of the report. In fact, on delivering its report in 2010, the SIC stated how struck it had been by the unwillingness of everyone interviewed by the committee to admit any blame for what went

wrong (see also SIC, 2010, vol. 1, p. 46). Collective admission of responsibility was all right for them, however, for if everyone is responsible, no one is.

Herein lies a serious challenge. Even in East and Central Europe that saw about 25 new constitutions come into being after 1990, the communists – clearly responsible for the collapse of their countries, and mostly admitting as much themselves, even to the point of apologizing for their mismanagement, or worse – contributed to the constitution-making efforts by their fellow citizens rather than try to sabotage them. Their successors wanted to include the communists in the process and, in most places, they accepted. A similar readiness to cooperate has not been forthcoming from the two political parties that governed Iceland from 1995 to 2007, privatizing the banks *à la russe* and thus laying the ground for their demise a few short years later. Instead, they declared from the outset that they wanted no part in the project, thereby turning their backs on the official position of earlier leaders of their parties who repeatedly promised revising the constitution, and failed to do so time and again.[8]

Understandably, with this lack of cooperation from two of the five political parties represented in parliament, the rest of us cannot be expected to grant them a right of veto. Instead, we have to say to them: Everyone was free to run for the Constitutional Assembly, you had the same opportunities as everyone else to offer your services every step of the way, and now the bill is ready, having been approved unanimously by the Constitutional Council, so there is only one more thing we have to do to finish the work and that is to allow the people to decide in a national referendum where every vote carries equal weight. The opponents need to remember how the American constitution was approved in 1787-88: by 89 to 79 votes in Virginia, 30 to 27 in New York, 187 to 168 in Massachusetts, and so on (Maier, 2010). In Rhode Island, the only state to hold a popular referendum, it was rejected. But the rules of the game stipulated that approval by a simple majority of elected representatives in at least nine states out of 13 would suffice, and that was to be.[9] Faced with such a prospect, the Icelandic opposition may still try to find a way to derail the promised referendum rather than risk losing it. If the people were to be denied the right to vote on the bill and the bill were to be shelved, against the odds, would they take to the streets, banging their pots and pans? They know how to. They have done it before. This is, indeed, an unusual situation for a Nordic country to be in.

Or is it? The recent history of the Faroe Islands, a self-governing dependency of Denmark

[8] To be fair, one or two parliament members of the Progressive Party, the smaller of the two opposition parties, have expressed support for the bill. Likewise, some members of the governing coalition oppose the bill.
[9] For a further comparison between Iceland in 2011-12 and the United States in 1787-88, see Gylfason (2012).

since 1948, may be illustrative. After ten years of preparation, a left-of-center coalition government readied the Faroe Islands' first constitutional bill, dated 2009, for a national referendum scheduled to take place in 2010. The government failed to finish its term and to deliver the bill to the promised referendum. A complicating factor was the Danish government's protestation that the bill is tantamount to a declaration of independence and thus is inconsistent with the Faroe Islands' status as a dependency of Denmark, a thorny issue that has bitterly divided the islanders since before 1948. A right-of-center government came to office following parliamentary elections in 2011, and shows no signs of intending to hold a referendum on the bill. Again, we do not know how the story will end. We do know, however, that there are strong private interests of boat owners and allied politicians in the new government aligned against the article on natural resources in the Faroese bill. Fully consistent with human rights, the article states that (a) the authorities are responsible for managing the country's natural resources (meaning fish), (b) the nation owns the resources and charges for their utilization or grants everyone equal access to them, and (c) the exploitation of the resources and the environment must be sustainable.

The full story is more nuanced. In fact, the Faroese constitutional bill can be traced to an economic crash in 1989-94 when GDP contracted by a third like in the Soviet Union around the same time, the deepest country-wide economic slump on record in democratic Europe in peace time. After a few difficult years of crisis and its aftermath, including controversial Danish involvement in the restitution of the collapsed economy and political structure, a coalition of three separatist parties – i.e., parties in favor of full independence from Denmark – took in 1998 the initiative to prepare a constitution. Apart from representatives from all political parties, the government appointed a number of specialists in law, social sciences, and history to the committee. With the political parties involved, however, astute observers felt that there never was any realistic chance of sailing the ship to harbor, partly because the same politicians that were responsible for the economic crisis of 1989-94 were heavily represented and partly because the divide between separatist and unionist parties was likely to block any agreement on the question of Faroese sovereignty. After a few false starts, the committee presented in 2006 a proposal for a new constitution to the government, its employer. Since then, the bill has been the subject of endless debates in parliament. Unlike its Icelandic counterpart, the Faroese project was not embedded in the people, but in the political structure. As in Iceland from 1944 to 2009, this setup was doomed. But, it is one thing for the Faroese parliament to kill a constitution bill drafted by a parliamentary committee as now seems possible or even likely and quite another for the Icelandic parliament to turn its back on a bill

composed by a popularly elected and then appointed constituent assembly by denying the people the right to decide for themselves, as promised, whether to accept the bill or reject it. For this reason, the distinction between an advisory referendum and a binding one should be immaterial in practice. By the 1944 constitution, true, it takes two successive parliaments for a new constitution to come into force with a parliamentary election in between, but parliament would hardly fail to ratify a constitution accepted in a national referendum. The new bill simplifies the process by stipulating that a constitutional bill passed by parliament must be referred to a referendum and, if accepted, enters into force.

Even if the opponents manage somehow to kill the bill in Iceland, the bill is there, featuring, it is hoped, some ideas and formulations that may be worth considering for adoption in other countries. Moreover, the method by which the bill was produced may offer a model to other countries preparing new constitutions – for example, Egypt, Tunisia, and Turkey, to name just three current cases. Despite the world's largest per capita number of internet users, or 95 percent in 2009, compared with 78 percent in the United States and 35 percent in Turkey (World Bank, 2011), Iceland's experiment with constitutional crowdsourcing may raise concerns about unequal access because the unconnected five percent are disproportionately old people. Even so, the democratic gains from granting easy access to a vast majority of the electorate seem likely to outweigh the losses from slightly unequal access, an apparently trivial disparity compared with the standard parliamentary practice of granting special interest organizations (farmers, vessel owners, bankers, etc.) privileged access to the legislative process. In fact, Constitutional Council members also answered letters and phone calls. Even so, in countries with limited access to the internet, such as in the Arab world, crowdsourcing new constitutions might be seen to give significantly disproportionate voice to those with ready internet access. But then perhaps the well-connected minority is in a good position to sway new constitutions in the making in the direction of increased respect for human rights and democracy.

The main lesson from Iceland's crowdsourcing experiment, however, may be universal: Treat people with respect and they will respond in kind. Do unto others as you would have them do unto you.

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