We Have a New Constitution
How did it come about? Where is it?

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Beginnings: Norway and Denmark

Norway belonged to the Danish realm from 1380 to 1814 when the French lost a war to the English, a war where Denmark sided with France and Sweden sided with England. Denmark was then forced to surrender Norway to Sweden. The Norwegians were unhappy about being treated like small change in backroom deals among the big powers. They decided to convene a constitutional convention in 1814 at Eidsvoll, a short distance from Oslo, where they set themselves a constitution inspired by the United States declaration of independence of 1776 and constitution of 1787 as well as by the French revolution that had begun in 1789. The Norwegian constitution was among the first and most democratic constitutions that the world had seen. It enfranchised every other adult male, enhanced press freedoms, reduced the power of the King and prescribed that he should be selected by the constitutional convention, a significant novelty. Sweden was at the time unwilling to grant Norway independence, i.e., to dissolve the royal union between the two countries. It was not until 1905 that the Norwegians, encouraged by the nationalist awakening that had swept Europe from the mid-19th century onward, claimed independence by unilaterally severing the royal union of the two countries, supported by a national referendum that gave overwhelming backing to a declaration of independence. Poets and other artists buoyed up the groundswell of national awakening, among them the Nobel laureate Bjørnstjerne Bjørnson, author of Norway´s national anthem, and Edvard Grieg, the composer. Denmark had granted home rule to Iceland in 1904. Sweden´s decision to accept Norway´s declaration of independence in 1905 accorded with Denmark´s gracious handling of Iceland´s quest for increased self-rule the year before.

A groundswell of national awakening had swept Europe and triggered revolutions only to be crushed by the powers that be. Denmark held a constitutional convention during

1848-1849 to which Iceland sent five representatives out of a total of 158. The 1851 national assembly in Reykjavík was held in direct continuation of the Danish convention. The King´s representative at the assembly, Count Jørgen Ditlev Trampe, rejected the Icelandic representatives´ demands for self-rule and adjourned the assembly on the King´s behalf just as kings and emperors stifled the democratic aspirations of other European nations during this time almost everywhere except in Denmark itself. Following their constitutional convention in 1849, the Danes set themselves a constitution that abolished absolute monarchy and laid the foundation for a parliamentary democracy in which the King was to share his power with parliament in two chambers. The people would elect members of the lower chamber while the King would appoint his representatives to share the upper chamber with elected representatives of the property-owning class.

The Norwegian constitution from 1814 remains essentially unchanged to this day. The main changes that have been made include a clause added in 1962 to allow Norway to share its sovereignty with other nations and new human rights provisions added in 2015. The Danish constitution from 1849 has likewise remained essentially unchanged. The main changes include a clause added in 1953 to allow Denmark to share its sovereignty with other nations (nine years before Norway) to prepare Denmark for membership in the European Union if necessary. New human rights provisions were also added to the constitution besides the abolition of the upper house of parliament to underscore the inviolability of parliamentary democracy by removing the last vestiges from earlier times when royal representatives and wealthy property owners sat side by side in the upper house. The 1953 provision on the sharing of sovereignty has been a source of controversy and led to litigation, for example two legal cases brought against Denmark´s prime minister in 1996 and 2011. The provision survived both challenges as the prime minister was acquitted in the first case and the second case was dismissed.

Denmark´s constitution shows signs of having been put together at a time of turmoil when the division of power between King and parliament was under radical revision. New constitutions are almost always written and ratified in times of turmoil, i.e., following external shocks or internal transition or upheaval as Jon Elster has described.[1] The idea that constitutions can be composed in consensual peace and quiet does not rhyme well with experience for the simple reason that constitutions are, in part, political declarations

of will They are social compacts that proscribe, among other things, the rights and obligations of citizens where the rights of some impose obligations on others, which, understandably, some like better than others. This is why, for example, the United States constitution was passed only by the narrowest of margins in the state-by-state votes taken during 1787-1788.[2] This was to be expected.

Because it was written at a time of social unrest as is almost invariably the case, the Danish constitution contains wording that does not accord well with the constitutional order that the Danes chose for themselves: unfettered parliamentary democracy. For example, the constitution states explicitly that the King can dismiss the prime minister and veto legislation as he did occasionally before the "change of system" in 1901 when the liberals defeated the conservatives who had held power since 1865. The King´s vetoes included several concerning Icelandic affairs, but the King did no such thing after 1901 in keeping with the general consensus among Danes that a hereditary monarch — unlike an elected president — no longer has the right to royal dissent. In fact, the Danish prime minister a few years ago suggested that the constitution was ripe for revision but this was not to be. After all, the Danish people face the risk that a new monarch would suddenly decide to take the constitution at its word and do some of the things that the constitution explicitly says the king (or queen, not mentioned) can do such as vetoing legislation or dismissing the prime minister. Such an event would trigger a constitutional crisis.

A revision of the Danish constitution would also be timely in view of the fact that the average life expectancy of constitutions around the world is 19 years as Zachary Elkins, Tom Ginsburg, and James Melton have shown.[3] This numerical average, 19 years, is remarkable in view of history. Thomas Jefferson wrote James Madison a famous letter in 1789 when further work on the bill of rights was underway, and said:

> "No society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, & what proceeds from it, as they please, during their usufruct. They are masters too of their own persons, & consequently may govern them as they please. ... Every constitution then, & every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, & not of right. It may be said that the succeeding generation exercising in fact the power of repeal, this leaves them as free as if the constitution or law had been expressly limited to 19 years only."[4]

Lives were shorter in those days. Jefferson is simply saying that each generation should set its own laws and constitutions rather than subject itself to the laws and constitutions of departed generations. Many modern constitutional scholars in the United States share this view.[5]

Iceland 1874-2009

Throughout the second half of the 19th century Icelanders dreamed of reclaiming the independence they had surrendered to Norway in 1262, exhausted by violent strife and lawlessness during the age of the Sturlungs. Even so, parliament (Althingi, est. 930) could not agree on the path to take, so King Christian IX took the opportunity when visiting Iceland on the occasion of the 1000th anniversary of Iceland´s settlement in 1874 to produce a constitution that was little more than a translation of Denmark´s 1849 constitution, with some special provisions for Iceland. Parliament was granted legislative powers in areas concerning Icelanders alone but would still be subject to the King´s power of veto. The statue of the stern-faced King with the constitution in his outstretched hand in front of Government House in Reykjavík remains in place as a reminder of the royal visit in 1874 as well as of parliament´s sedentariness on the constitutional front ever since.

For fifty years following the National Assembly of 1851 opinion was divided in parliament as to how extensive demands should be made for increased self-rule for Iceland. Every other year demands were issued by parliament, only to be summarily rejected by the King. When a compromise drawn up by Valtýr Guðmundsson MP (a philologist at the University of Copenhagen) was accepted by parliament shortly after the turn of the century, the “change of system” in Denmark led the Danish government to offer home rule to the Icelanders in 1904, a better deal than the Icelandic parliament had recently settled on. The beginning of home rule can be viewed as the most significant milestone in Iceland´s political history together with the aforementioned surrender of Iceland´s independence in 1262. All this occurred while Iceland’s 1874 constitution remained operative, unchanged. Denmark would still take care of judicial affairs as far as was needed until the Supreme Court of Iceland was founded in 1920 and would also take care of foreign affairs until the appointment of Iceland´s first foreign minister in 1941.

The 1874 constitution was amended for the first time when the Supreme Court was established in 1920 and the opportunity was then used to increase the number of seats in parliament from 26 to 42 to keep up with population growth. The next amendment was made in 1934 to increase the number of parliamentary seats further to 49, again to keep up with the population. The next change was made in 1942 to reduce further the rural bias of the electoral provision, increasing the number of seats in parliament to 52, one for every 2,400 Icelanders. This brought the number of MPs to twice their number in 1874 (as well as in 1845 when Althingi reconvened after a 45-year hiatus).

The change of the constitution that was made in conjunction with the establishment of the Republic of Iceland in 1944, when Iceland unilaterally left the royal union with Nazi-occupied Denmark and declared full independence, was generally viewed as minor. The change involved mainly the replacement of the word King by president. Representatives of all parties in parliament promised a thorough overhaul of the constitution immediately after the establishment of the republic. This was clearly the right thing to do. Newly independent states do not as a rule adopt the constitutions of their old masters; rather, they make their own constitutions to seal their newfound freedom and independence. This particular 70-years old constitution had been drafted by a sleepy functionary in the Danish chancellery in 1874, as Jón Sigurðsson (the independence hero sometimes referred to as the father of the Icelandic nation) had remarked sarcastically at the time.

Guðni Th. Jóhannesson, historian and now President of Iceland, describes the situation well in his essay "The Origins and Provisional Nature of Iceland's 1944 Constitution" which he concludes thus:

> "Constitutions must be clear but that the provisional one from 1944 is not. After all, it has not set a precedent for any country nor has it had any influence elsewhere in the world. As the establishment of the republic approached, the leaders in parliament wished correctly to aim for national unity. They knew that unity would not be achieved if the political parties were to altercate about a new constitution. Thus it was decided to pass a slightly amended constitution provisionally and then revise it at the earliest opportunity. The republic established by the Icelanders was to last forever but the constitution was not meant to last, for after all, as could still be seen, it had for the most part been drafted in the Danish chancellery … Thus, it may be said – with the constitution in mind – that on June 17 1944 the Icelanders put up a tent for one night, an old Danish tent."[6] [My translation, TG.]

In his essay, President Jóhannesson recounts the speeches made by the representatives of all parties in parliament. All declared that the 1944 constitution was only meant to be a provisional one. When war broke out in Europe in 1939, the preparation of a new constitution for Iceland was begun in secret. Three Supreme Court justices as well as a law professor were instructed to propose only "such changes in the constitution as would necessarily follow from the expiration of the Act of Union from 1918 and from the fact that a president would replace the king." Parliament decided that it would be impermissible to make "any changes in the constitution other than those that followed directly from the dissolution of the royal union and the fact that with the establishment of a republic the Icelanders would assume full responsibility for the affairs of state." In 1943, the parliament´s constitutional committee submitted a constitution bill virtually unchanged from the one that the three justices and the professor had prepared three years earlier.

Political leaders considered it essential during the war that the nation would demonstrate its unanimous support for the establishment of the republic and, therefore, considered it vital not to endanger such unity by having a fight about a new constitution. This is why it was decided to make only such changes as were absolutely necessary. The parliament´s constitutional committee was not only tasked with drafting a bill with necessary changes but also to prepare "other changes to the constitutional order" that would enter into force later. The committee proposed that parliament would select the president of the republic. However, the people did not like that as was made clear in the first scientific opinion poll conducted in Iceland, published in 1943, where a majority of the respondents (70%) declared their wish to elect the president as the socialists had advocated in parliament. With the support of Governor Sveinn Björnsson, soon to be elected Iceland´s first president in 1944, the people carried the day against the politicians. This is how Iceland got one of Europe´s first popularly elected heads of state, following France in 1848, Germany in 1919, and Ireland in 1938. This meant that the popularly elected president´s right of veto, i.e., the president´s constitutionally protected right to refer legislation to a national referendum, must be considered active contrary to the demonstrably dead letter of the royal right of veto in the Danish constitution. This was the most important substantive change in the 1944 constitution, and laid the foundation for Iceland´s semi-presidential-cum-parliamentary constitutional order.

In the fall of 1944 a new government came to office, comprising the right-of-center Independence Party, the largest party, and two smaller left-wing parties, Social Democrats and Socialists, leaving the centrist Progressive Party alone in opposition. The new government promised radical changes in the constitution "no later than the second part of next winter." The amended constitution would contain "unambiguous" provisions on the right of all to work, social insurance, and education, a guarantee of "equal voting rights," and "clear prescriptions for the protection and promotion of democracy." The government left office in 1947 without keeping its promise of a new constitution. That year saw the appointment of a new parliamentary constitutional committee, but that committee did not present any proposals for change, nor did other such parliamentary committees that followed. The constitutional stalemate in parliament persisted.

The comprehensive overhaul of the constitution envisaged by all and repeatedly promised by parliament never took place, even if several changes to the constitution were made in the course of time. The story from 1942 repeated itself in 1959 when the constitution was changed once more to reduce the inequality in the weight of votes and to increase the number of parliamentary seats to 60, and again in 1984 when the number of MPs was raised to 63. The underlying problem was that people kept migrating from rural to urban areas leaving their voting rights with those who stayed behind. Yet again, the constitution was changed in 1999 to reduce the inequality of voting rights but the number of seats in parliament was left unchanged on this occasion. The piecemeal reduction in the inequality of voting rights has always been marked by "too little, too late" as can be seen from the fact that in the 2017 parliamentary election the three rural constituencies won 44% of the seats in parliament with the support of 35% of the voters. The three urban constituencies had to contend with 56% of the seats with 65% of the voters behind them.

Other amendments to the 1944 constitution include lowering the voting age to 20 years in 1968 and to 18 years in 1984; the abolition of bicameralism in parliament in 1991; and new human rights provisions in 1995. Since 1944, parliament has rejected or not acted upon 100 bills proposing various amendments to the constitution.

From crowds to constitution

Everything changed in the fall of 2008 when Iceland´s banking system collapsed and thousands of people took to the streets banging their pots and pans and demanding reforms, including a new constitution. This time, wearing its long record of negligence (or worse) on its sleeve, parliament could not deflect the blame. Parliament´s negligence concerned not only its 64-year failure to deliver constitutional reform as promised but also the direct and indirect co-responsibility of the parliament, cabinet ministers, and public officials for the banking crash as was to be confirmed by the parliament´s own Investigation Commission in 2010.[7] Humbled by the collapse, parliament caved and agreed in early 2009 to set constitutional reform in motion. The new constitution was to be drawn up by directly elected representatives of the people without interference from politicians. The parliament´s Investigative Commission concurred: "Ways must be sought to strengthen the moral cognizance of politicians … Ministerial overreach must be reduced … There is a need for an orderly revision of the constitution to fortify the foundations of our democratic society and to elucidate better the main obligations, responsibilities, and purpose of those who govern." (2010, Vol. 8, 184.)[8] Shortly thereafter, parliament made an extraordinary confession, resolving unanimously with all 63 votes cast that "criticism of Iceland's political culture must be taken seriously and [Parliament] stresses the need for lessons to be learned from it." [My translation, TG.]

Parliament took four important steps toward its declared goal.

1. Parliament appointed in June 2010 an extra-parliamentary constitutional committee to prepare the ground for a new constitution. The committee had seven members: four lawyers, a literature professor and poet, a philosopher, and a biophysicist. The composition of the committee was a tacit acknowledgement that constitution making is not exclusively, and perhaps not even primarily, a legal job because a constitution is first and last a nation's political declaration of will, a social compact that the nation´s laws and citizens must respect. The constitutional committee delivered a detailed report on the 1944 constitution and how it might be changed, which would be used by those who would then be tasked with drafting the new constitution.

2. November 2010 saw the convention of a national assembly attended by 950 Icelanders drawn at random from the national register to ensure that all would, in Icelandic parlance, sit at the same table, i.e., that all would have the same opportunity to attend the

assembly. The national assembly can be said to be the democratic backbone of the first part of the constitutional reform process launched by parliament the year before. The national assembly was organized on the principles of the branch of social science known as "collective intelligence." The key idea is that "large groups possess insights and intelligence that individuals within the groups do not realize," to quote the website of Mauraþúfan, a group of individuals who organized a private assembly in 2009 as a precursor to the national assembly called by parliament in 2010.[9] Research seems to suggest that voters think and behave differently in national assemblies than, e.g., in parliamentary elections. Political parties stay away from national assemblies, leaving assembly representatives undisturbed. Each representative thinks and votes of his or her own accord as a citizen with a view to improving his or her lot or that of their offspring or society at large. Parliamentary elections are different. Political parties canvass for votes, expending large sums of money. For this reason, many voters do not really cast their votes in parliamentary elections of their own accord, as unrestrained and independent citizens, but rather as members of groups, party members, or sympathizers. The national assembly was widely considered a success. At the end of its proceedings, the assembly representatives issued a concluding statement calling for a new constitution with provisions on public ownership of natural resources as well as equal voting rights, among other things.[10]

3. Later in November 2010 parliament held an election for 25 representatives to a constituent assembly that would draw up a new constitution or revise the 1944 constitution. Such a national election had never been held in Iceland. The 1851 national assembly was of a different kind. It was attended by 43 representatives of whom 22 were MPs, 37 were elected by the nation, and six were royal representatives (no women). In the 2010 constituent assembly election the country was one constituency as in presidential elections, ensuring equal weight of votes (one person, one vote). A new election method, single transferable vote, was applied, a method designed to minimize the number of dead votes by ranking candidates. MPs were not eligible to run. Political parties did not field candidates. No fewer than 522 candidates put their names forward, and the 25 who received the most votes were appointed by parliament to a Constitutional Council after the Supreme Court decided to declare the election null and void on preposterous and perhaps also even illegal grounds.[11] Three individuals with formal connections to the Independence

Party had lodged a complaint against the election, alleging technical flaws. Five of the six justices invalidating the election had been appointed to the bench by a minister of justice from the Independence Party. The Supreme Court virtually admitted its error the following year when it dismissed a parallel complaint about the presidential election of 2012 on the grounds that the alleged technical flaws in the implementation of the election could not possibly have influenced the outcome of the election. The latter complaint was lodged in part to expose the Supreme Court.

The 25 council representatives came from all walks of life, ranging from 26 years of age to 71 and offering experience from a wide array of national life. There were lawyers, doctors, priests, and professors, a champion for the rights of handicapped persons, a farmer, media persons, former MPs, a philosopher, a theater director, a nurse, poets and artists, company board members, political scientists, mathematicians, a labor leader, and an entertainer and environmentalist. This neat cross section of Icelandic society agreed to keep in close touch with the people as the work progressed from early April until the end of July 2011. To this end, drafts of individual provisions were circulated each week on the website of the Council, specially designed for this purpose, which attracted comments and suggestionsfrom a worldwide audience.. This arrangement made it unnecessary to invite organizations or interest groups to send their representatives to meet the Council or its members, as the idea that all should “sit at the same table” ran as a red thread through the Council´s work. At the end of July, the Constitutional Council unanimously passed a constitutional bill that a large number of experts and individual volunteers outside the Council had helped to compose. The bill was duly delivered to the Speaker of Parliament.

4. In October 2012, parliament held a national referendum on the bill, modestly adjusted by parliament, mainly through changes of wording without affecting the substance of the text concerned. The changes were mostly though not exclusively made in consultation with former council members, convened by parliament for a few days in March 2012 to respond to a few technical queries about the bill. In the referendum, two thirds of the voters expressed their support for the bill as a whole as well as for the provision on equal weight of votes (one person, one vote). Five sixth of the voters expressed support for national ownership of natural resources.[12] Under normal circumstances this would have been conclusive, as Jon Elster decribed in a conversation with journalist Egill Helgason on

national television 13 May 2012: “If the people approved the constitutional proposal I think Parliament would find it difficult to override the moral authority of the people.”

All that awaited parliament at this point was to accept the will of the people by ratifying the bill before the 2013 parliamentary election and then to re-ratify the bill after the election. Parliament failed to do so and preferred to menace Iceland´s age-old democracy.

Equal opportunities for everyone

No single provision of the bill describes it better than the opening salvo of the preamble:

“We, the people of Iceland, wish to create a just society with equal opportunities for everyone.”[13]

This is the backbone of the bill. The 114 provisions of the bill are meant to seal and secure this basic point. This can be seen in the provision that prescribes equal weight of votes to eliminate the electoral system bias that favors rural areas, which has marred the country since 1845. One of the Icelandic representatives at the Danish national assembly in 1848-1849 proposed the principle of “one person, one vote” in Iceland immediately thereafter, to no avail. Iceland´s first minister after home rule was achieved in 1904, Hannes Hafstein, warned parliament of the consequences of unequal voting rights, also to no avail. Ever since, there have been vocal demands to equalize voting rights. The constitutional changes made in 1942 and 1959 to reduce the rural bias of the electoral system were bitterly contested, and drove a wedge between the Progressive Party(then the main beneficiary of unequal voting rights) and other parties in parliament. The concluding statement of the national assembly of 2010 states: “The value of votes shall be equal.”[14] Notice the wording: Not more equal, but equal. Two thirds of the voters supported this reform in the 2012 referendum.

The same applies to the provision on national ownership of natural resources:

> “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. … On the basis of law, government authorities my grant permits for the use or utilisation 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."

The formulation "perpetual property of the nation" is taken from the 1928 law on the national park at Thingvellir where Althingi was established in 930. The law states that the land of Thingvellir must be "under Althingi´s protection and the perpetual property of the Icelandic nation. It must never be sold or pledged." The implication is that the present generation shares both Thingvellir and Iceland´s natural resources with later generations and must preserve them. These restrictions apply to the resources themselves as well as to the right to use them. Many constitutions (e.g., Angola, Chile, China, Ghana, Iraq, Kuwait, and Russia) define natural resources as the property of the state. The formulation of the Icelandic resource provision rests on a clear distinction between "national ownership" and "state ownership." State assets such as office buildings the state can sell or rent or pledge at will. National assets, on the other hand, are assets that "may never be sold or mortgaged."

A parallel provision on cultural assets makes the same distinction between national ownership and state ownership: "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." The idea is the same in both instances. National ownership of cultural assets as well as of renewable natural reources is intended to oblige the current generation to preserve both types of asset for the benefit of future generations. State ownership offers no such assurance. The state is supposed to be bound by the people because they are constitutionally superior to the state.

By "full consideration" in the natural resource provision is meant full market price, i.e., the highest price that anyone is willing to pay for the right to fish, at auction or in other arrangements with the state as the representative of the true owner, the people. This provision is intended to repair the current arrangement which, even after nominal fising fees were levied on vessel owners by law in 2002, has left 90% of the fishing rent with the vessel owners and delivered only 10% of the rent to the true owner according to Indriði H. Thorlákssson, a former Director of Internal Revenue.[15] The Supreme Court ruled in 1994 that this violates the 1944 constitution; but the court later reversed itself under visible political pressure in 2000; which in turn was reversed by a binding opinion issued by the

United Nations Human Rights Committee.[16] The first article of the fisheries management law from 1990 states: “Marine stocks in Icelandic waters are the common property of the Icelandic nation.” This provision has secured the people only a small fraction of the full value of the fish in the sea. By contrast, Norwegian law has sufficed to grant the people of Norway, the right owner of the oil reserves within Norwegian jurisdiction, about 80% of the country´s oil rent from 1970 to date. Hence the need for a provision prescribing “full consideration” in the Icelandic constitution to send parliament and the courts an unambiguous signal.

The Constitutional Council discussed the possibility of using the formulation ”fair consideration” rather than “full consideration” but the idea was rejected on the grounds that “fair consideration” might be construed as a constitutionally protected offer of a discount to those granted licences. Further, “fair consideration” would have introduced an internal inconsistency in the bill by treating different owners differently in violation of the equity clause. This is because the property rights provision, unchanged from 1944, prescribes “full price” in the assessment of compensation for confiscated property.

Those two key provisions of the bill, the electoral provision and the natural resource provision, share an important feature. Both concern human rights.

Take the electoral provisions first. The deviations from the principle of “one person, one vote” have been so extensive since the mid-19th century that they constitute human rights violations, as election observers from the Organization for Security and Co-operation in Europe (OSCE) have noted in their reports. OSCE´s first priority recommendation following the 2013 parliamentary election wasto address this problem: “Consideration should be given to continue the review of the legal provisions for the distribution of parliamentary seats among constituencies to ensure compliance with the principle of equal suffrage.”[17] This criticism could have ben avoided had parliament ratified the new constitution.

The natural resource provision in the Constitutional Council bill is in a chapter entitled “Human Rights and Nature” to underscore the importance of the human rights aspect of the issues at stake. The International Covenant on Civil and Political Rights,[18] which Iceland along with 165 other countries has signed and ratified, states (Article 1): “All peoples may, for their own ends, freely dispose of their natural wealth and resources . . . .” The covenant also states (Article 26): “All persons are equal before the law and are entitled without any

discrimination to the equal protection of the law." The latter provision is substantively identical to Article 65 of Iceland´s 1944 constitution. It was on these grounds that the United Nations Human Rights Committee (UNHRC) based its binding opinion in 2007 that granting fishing quotas free of charge to those who had boats at sea during 1980-1983 violated Article 26 of the international covenant and thus also Article 65 of the Icelandic constitution from 1944. This arbitrary way of granting fishing licences does not satisfy the requirement of equal opportunities for everyone, equality before the law, and the right to freedom from discrimination. The committee instructed the Icelandic government to remove the discriminatory element — the violation of human rights — from the fisheries management system and to pay damages to the two fishermen who had brought the charge against the Icelandic state.

The constitutional bill goes further. While offering continuity, it proposes far-ranging judicial reforms as well as a new constitutional basis for a more open and more just society that prefers diversification of political power, accountability, and transparency to clan-based political party power, privilege, secrecy, and corruption. Checks and balances run like a red thread through the bill, aimed at preventing executive overreach at the expense of the legislative and judicial branches of government. As required or at least suggested by law, the bill broadly reflects the concluding statement of the 2010 national assembly. The bill aims to lay the foundation for equal suffrage in all parts of the country along with greater freedom to vote for individuals and party lists side by side, more equality among parliament, the executive branch, and the courts with mutual curbs and supervision, transparent public administration with ready access to information in government possession, national ownership of natural resources, sustainable development of natural resources for public benefit, strong provisions on environmental protection, merit-based appointments to public office, and more. Further, the bill removes some anomalies from the 1944 constitution, including some provisions that were meant for a 19th century king, not for a modern republic.[19]

Also, the bill changes the provision on the election of the president to ensure that the office has the support of the majority of the voters, which can be accomplished by ranking candidates in a single round of voting.

Focused as it is on the future, the bill would already have made a significant impact in Iceland had it taken effect in 2013 as it should have. For example, the parliamentary elections of 2016 and 2017 would have taken place in accordance with new laws guaranteeing equal suffrage. By blocking the new constitution, the Independence Party was able to secure for itself three extra seats in parliament in 2016, seats without which the party would have been unlikely to be able to form the government it did with [only?] 29% of the vote behind it. Fisheries management would already have been revamped to remove discrimination and to grant the public a full return on its resource, a change that would have relieved the debilitating financial distress of social security, education, and health care provision. Haggling in parliament about how to handle Iceland´s application for European Union membership (pending since 2009) would have been unneccesary as the constitution would have enabled the voters to bypass parliament and settle the dispute in a referendum.

Disrespect for democracy

Soon after the national referendum in 2012 critical voices emerged, voices that had been mostly silent before the referendum. The oppositition in parliament became vocal in its disapproval as did a few academics.[20] They complained about provisions of the bill that no one had opposed before and parliament had seen no reason to refer to the voters in the referendum. Some critics even described the Constitutional Council as lacking a legal mandate, as if it did not matter that the Council was both elected by the people and then appointed by parliament. The critics did not seem to understand or respect that their complaints regarding the process, or the substance of the bill, whether justified or not, ceased to matter after the referendum.[21] When the voters have accepted a new constitution in a national referendum called by parliament, the verdict is in. Thereafter, it no longer matters how the bill was put together or what it says. No one can be allowed to change the outcome of an election after the fact, let alone a constitutional referendum.

Parliament took its time. The opposition resorted to the longest filibuster in parliament´s history, complaining along the way about not having had enough time to consider the bill. The majority in parliament did not muster the courage to break the filibuster as the law permits. When the parliament´s constitutional and supervisory

committee in charge of the bill asked a group of local lawyers to review the bill and adjust its wording if needed without changing its substance the lawyers tried to turn the natural resourve clause upside down. The committee saw through this and restored the council´s original wording. The parliamentary committee also asked the Venice Committee for a review, and found it easy to incorporate its suggestions into the bill.

Around the same time, parliament decided to substitute the words “fair consideration” for “full consideration” in the bill even if council representatives had warned against this change of wording at their extra meeting in March 2012. The intent of this change seems clear: to add a double discount offered by parliament to the vessel owners at the expense of the rightful owner, the people. The generosity shown by parliament to the vessel owners needs to be viewed in the light of large amounts of money that have flowed, openly and clandestinely, from fishing firms to political parties, especially the Independence Party and the Progressive Party.

While this was going on, private citizens opened a new website inviting MPs to register their views as to whether the constitutional bill should be ratified by parliament or not. Publicly, 32 MPs out of 63 declared their support for the ratification of the bill. A parliamentary majority had been established. In an open ballot in parliament, the bill could hardly have failed. The speaker decided to adjourn parliament in the middle of the night rather than bring the bill to a vote.

After the 2013 election, the chief opponents of the bill, the Indpendence Party and the Progressives, returned to office. Due to the rural bias of the electoral system that the voters had resoundlingly rejected the year before, the Progressive Party, the most vocal opponent of equal voting rights, won 30% of the seats in parliament with 24% of the vote. This is how the two coalition parties won a total of 60% of the seats in parliament with 51% of the popular vote in an election where 12% of the voters did not get a single MP elected. The new parliament appointed yet another designed-to-fail constitution committee whose 50 meetings behind closed doors produced such meagre results that they were not even discussed in parliament.[22]

And this is where matters now stand, with the new constitution held hostage in parliament, on ice. The government of the Independence Party and the Progressives was driven from office in 2016 after the names of three cabinet ministers were found in the

Panama papers, a huge international scandal. Icelandic corruption became known around the world. The failed government was replaced by a new one headed by the Independence Party, a government that collapsed after nine months due to yet another scandal. After the 2017 election the Independence Party and the Progressives entered the government together once more, now fortified and led by the Left Greens, a government that is unlikely to ratify the new constitution or to make any progress toward that goal.

Words of three presidents

Every constitution aims to build fences to protect the people against the powers that be as described by James Madison. This is why the people themselves need to write constitutions, not politicians. The Icelandic parliament followed this princple when it launched the constitutional reform process in 2009. But then it reversed itself. The crux of the matter is that the people are superior to parliament, not the other way round. This is stated explicitly in Article 2 of the bill from 2011: "The Althing holds legislative powers under a mandate from the nation." The 1944 constitution only says: "Althingi and the President of Iceland jointly exercise legislative power."

Sveinn Björnsson, the first President of Iceland 1944-1952, shared this view of popular sovereignty, as when he advocated in 1944 for a provision on a nationally elected president. In his New Year´s address to the nation in 1949, President Björnsson rebuked parliament for having neglected to revise the constitution:

> we still have a mended garment, originally made for another country, with other concerns, a hundred years ago. When the republic was founded, care was taken not to make any changes in the constitution other than those that were inevitable due to the change from monarchy to republic. The past century has seen significant development with greatly changed attitudes in many areas. Let us hope that it will not take much longer to make a new constitution.[23] [My translation, TG.]

Vigdís Finnbogadóttir, President of Iceland 1980-1996, in her address to an international conference on Icelandic democracy at U.C. Berkeley in 2017, shares her predecessor´s hope:

> In 2008 our Parliament launched a truly remarkable process whose aim was to make the dream of a new constitution come true – at last. It is widely regarded as the most inclusive and democratic constitution-making process

> in history, and has, naturally, sparked interest all around. A Constitutional Council was democratically elected to reflect diverse voices in Icelandic society, and a new constitution was drafted with the consensus of all its members. Furthermore, a national referendum confirmed that the will of Icelandic voters was for the new constitution to be adopted. But to date that will has not been implemented. In my view, the people of Iceland have waited long enough.

Guðni Th. Jóhannesson, President of Iceland since 2016, said in his inauguration address to Althingi in 2017:

> There is strong support, inside parliament as well as outside, for a new constitution with provisions on environmental protection, national ownership of natural resources, and national referenda, for example. Furthermore, political leaders, constitutional scholars, and others have repeatedly acknowledged, not least in this century, that our constitution needs to convey a clearer picture of our prevailing constitutional order. It is necessary to reiterate that cabinet ministers are the supreme holders of executive powers, each in his or her own area, and to outline explicitly the constitutional power of the president in practice, including the president´s role in connection with the formation of governments, dissolution of parliament, and the appointment of various public officials. Finally, it is important that power and accountability go hand in hand. The constitutionally protected absence of presidential accountability, even for granting formal ratification of decisions made by others, does not conform to the people´s concept of justice and has no place in modern governance.[24] [My translation, TG.]
> The constitutional bill from 2011 does all this and much more.

Conclusion

In his essay on Iceland, Jon Elster writes: “an ordinary legislature should not serve as a constituent assembly or as a ratifying body. In either capacity, there is risk that it might act in a self-serving manner.”[25] Elster has also highlighted that new constitutions most often meet strong opposition. This is natural. Elster writes: “Contrary to a traditional view, constitutions are rarely written in calm and reflective moments. Rather, because they tend to be written in periods of social unrest, constituent moments induce strong emotions and, frequently, violence.”[26]

From an international perspective, the present state of Iceland´s stalled constitutional reform is unique. The people of Iceland reached a broad and rarely seen consensus on a new constitution drafted in deliberative peace and quiet despite significant turmoil after

the financial collapse of 2008; a constitution that took its cue from the 2010 national assembly; was unanimously passed by a constitutional council elected by the nation and appointed by parliament; and was then approved again by an overwhelming majority of votes in the 2012 national referendum called by parliament; a majority still intact in 2017 according to opinion polls.[27] Despite this exceptional success the constitutional bill has been held hostage in parliament for five years by MPs who seem to be more concerned with their own interests and other special interests than with the public interest.

No fully fledged democratic state can accept or tolerate disrespect for the outcome of a national referendum called by parliament, least of all a constitutional referendum, even if the referendum was advisory. Yet parliament persists in thwarting the desire of the people for their new constitution, undermining still further the trust that the people have in parliament and other institutions. Althingi seems to have turned its back on its own unanimous resolution from 2010 that "criticism of Iceland's political culture must be taken seriously."

Althingi´s behavior constitutes an assault on Icelandic democracy. Such sabotage against democracy is an especially serious matter given that democracy is at present under stress in several neighboring countries. This must stop. We have waited long enough.

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1 See Jon Elster (1995), "Forces and Mechanisms in the Constitution-Making Process," *Duke Law Journal*, 45 (2), 364-396. See also Thorvaldur Gylfason (2012), "From Collapse to Constitution: The Case of Iceland," in Luigi Paganetto (ed.), *Public Debt, Global Governance and Economic Dynamism*, Springer Verlag, Berlin.

2 See Pauline Maier (2010), *Ratification: The People Debate the Constitution, 1787–1788*, Simon and Schuster, New York.

3 See Zachary Elkins, Tom Ginsburg, and James Melton (2009), *Endurance of National Constitutions*, Cambridge University Press, Cambridge, England.

4 See https://founders.archives.gov/documents/Madison/01-12-02-0248, accessed 8 June 2018.

5 See Sanford Levinson (2006), *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)*, Oxford University Press, Oxford, England, and New York.

6 See Guðni Th. Jóhannesson (2012), "Tjaldað til einnar nætur. Uppruni bráðabirgðastjórnarskrárinnar" ("The Origins and Provisional Nature of Iceland's 1944 Constitution"), *Stjórnmál og stjórnsýsla* (Icelandic Review of Politics and Administration), 7 (1), 61-72, http://www.irpa.is/article/view/1116, accessed 8 June 2018.

[7] See "Report of the Special Investigation Commission," delivered to Parliament 12 April 2010, http://www.rna.is/eldri-nefndir/addragandi-og-orsakir-falls-islensku-bankanna-2008/skyrsla-nefndarinnar/english/, accessed 9 June 2018. See also Thorvaldur Gylfason, Bengt Holmström, Sixten Korkman, Hans Tson Söderström, and Vesa Vihriala (2010), *Nordics in Global Crisis*, Ch. 7, Research Institute of the Finnish Economy (ETLA), Taloustieto Oy, Helsinki; Sigríður Benediktsdóttir, Jón Daníelsson, and Gylfi Zoega (2011), "Lessons from a Collapse of a Financial System," *Economic Policy* 26 (66), 183-231; Thorvaldur Logason (2011), "Valdselítur og spilling. Um spillingarorsakir hrunsins á Íslandi árið 2008" ("Power Elites and Corruption. On the Corrupt Causes of the Crash in Iceland in 2008"), M.A. thesis, University of Iceland; and Guðrún Johnsen (2014), *Bringing Down the Banking System: Lessons from Iceland*, Palgrave MacMillan, London. See also Robert Z. Aliber and Gylfi Zoega (eds.) (2011), *Preludes to the Icelandic Financial Crisis*, Palgrave MacMillan, New York, and Valur Ingimundarson, Philippe Urlfalino, and Irma Erlingsdóttir (eds.) (2016), *Iceland's Financial Crisis: The Politics of Blame, Protest, and Reconstruction*, Routledge, London and New York.

[8] "Report of the Special Investigation Commission," see preceding endnote.

[9] See http://www.thjodfundur2009.is/thjodfundur/maurathufan/, accessed 10 June 2018.

[10] See http://www.thjodfundur2010.is/, accessed 10 June 2018.

[11] See Reynir Axelsson (2011), "Comments on the Decision of the Supreme Court to invalidate the election to the Constitutional Assembly," http://stjornarskrarfelagid.is/wp-content/uploads/2011/07/Article_by_Reynir_Axelsson.pdf, accessed X June 2018.

[12] See Thorkell Helgason, "Niðurstöður þjóðaratkvæðagreiðslu 20. október 2012," ("Results of National Referendum 20 October 2012"), 15 April 2013, http://thorkellhelgason.is/?p=1915, accessed 14 June 2018.

[13] Literally, "... where everyone has a seat at the same table."

[14] See "The main conclusions from the National Forum 2010," http://www.thjodfundur2010.is/frettir/lesa/item32858/, accessed 14 June 2018.

[15] See Indriði H. Thorlákssson (2015), "Veiðigjöld 2015. Annar hluti" ("Fishing Fees 2015. Part Two"), *Herðubreið*, 15 April, http://herdubreid.is/veidigjold-2015-annar-hluti/, accessed 4 June 2018.

[16] See United Nations Human Rights Committee (2007), International Covenant on Civil and Political Rights, CCPR/C/91/D/1306/2004, 14 December, http://ccprcentre.org/wp-content/uploads/2012/12/1306_2004-Iceland.pdf, accessed 4 June 2018. See also Aðalheiður Ámundadóttir (2008), "Um íslenska fiskveiðistjórnunarkerfið og skyldu íslenska ríkisins til að virða álit Mannréttindanefndar Sameinuðu þjóðanna" ("On the Icelandic Fisheries Management System and the Obligation of the Icelandic State to Respect the Opinion of the United Nations Human Rights Committee"), *Lögfræðingur*, Vol. 2, No. 1, 8-22.

[17] Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, https://www.osce.org/odihr/elections/iceland/103053?download=true, accessed 14 June 2018.

[18] See https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx, accessed 14 June 2018.

[19] The English translation of the 1944 constitution is taken from the ConstituteProject, see https://www.constituteproject.org/constitution/Iceland_1999.pdf, accessed 14 June 2018.

[20] See, e.g., Gunnar Helgi Kristinsson (2012), "Ráðskast með stjórnarskrá" ("Messing with the Constitution"), *Stjórnmál og stjórnsýsla*, Vol. 8, No. 2, 565-569.

[21] See Thorvaldur Gylfason (2016), "Constitution on Ice," in Valur Ingimundarson, Philippe Urlfalino, and Irma Erlingsdóttir (eds.), *Iceland's Financial Crisis: The Politics of Blame, Protest, and Reconstruction*, Routledge, London and New York.

[22] Thorvaldur Gylfason (2018), "Chain of Legitimacy: Constitution Making in Iceland," in Jon Elster, Roberto Gargarella, Vatsal Naresh, and Bjørn Erik Rasch (eds.), *Constituent Assemblies*, Cambridge University Press, New York.

[23] Sveinn Björnsson (1949), Nýársávarp til þjóðarinnar 1949 (New Year´s Addrss to the Nation 1949), https://www.forseti.is/media/1355/010149sbnyarsavarp.pdf, accessed 14 June 2018.
[24] Guðni Th. Jóhannesson (2017), Ávarp við setningu Alþingis 2017 (Inaugural Address to Althingi 2017), https://forseti.is/media/2641/2017_09_12_thingsetning.pdf, accessed 14 June 2018.
[25] Jon Elster (2016), "Icelandic Constitution-making in Comparative Perspective", in Valur Ingimundarson, Philippe Urlfalino, and Irma Erlingsdóttir (eds.), *Iceland's Financial Crisis: The Politics of Blame, Protest, and Reconstruction*, Routledge, London og New York.
[26] Jon Elster (2012), "Constitution-Making and Violence," *Journal of Legal Analysis*, Vol. 4, No. 1, Spring, 7-39.
[27] See https://mmr.is/frettir/birtar-nieurstoeeur/640-meirihluti-vill-nyja-stjornarskra, accessed 14 June 2018. The Social Science Institute of the University of Iceland also published a similar poll in 2017 showing similar results.