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# Constitution on Ice

## Abstract

This paper reports recent events in Iceland where the political agents of oligarchs didn't even bother to try to influence, let alone contest, a national referendum on a new constitution because, if they didn't like the result, they would simply find ways to nullify the outcome ex post. The paper reviews and explains the making of Iceland's crowd-sourced constitution bill from 2009 to 2014, and also offers an explanation as to why the bill failed to be passed by Parliament, addressing various criticisms leveled against the bill along the way. It needs to be emphasized that these criticisms, whether well founded or not (and they are not), are irrelevant because Parliament held a national referendum on 20 October 2012 in which the bill and its key individual provisions were accepted by an overwhelming majority of the voters. A democratic nation cannot under any circumstances permit the outcome of national elections, let alone a constitutional referendum, to be fixed ex post, but this is what the Icelandic Parliament is at present trying to do, flirting with a farewell to democracy.

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# Constitution on Ice

Thorvaldur Gylfason\*

This article reports recent events in a Nordic country where the political agents of oligarchs didn't even bother to try to influence, let alone contest, a national referendum on a new constitution because, if they didn't like the result, they would simply find ways to nullify the outcome *ex post*. Here is what happened.

## 1. Introduction

After the collapse of Iceland's entire banking system in 2008, resulting in the destruction of assets equivalent at the time to seven times the country's annual GDP, ordinary people from all walks of life took to the streets to confront their visibly shaken politicians who, to their credit, threw in the towel when the Pots and Pans Revolution culminated with the protesters singing patriotic songs on the front steps of the parliament building, knowing that if the Red Army did not dare try to suffocate the Singing Revolution in the Baltic countries in 1991 the Icelandic police would show similar restraint; the Vice Chief of Police, in full gear, a good singer, joined the National Choir outside parliament. The game was up.

The government resigned, paving the way for a new parliamentary election two months later, in April 2009, an election that produced a majority government including neither the Independence Party nor the agrarian Progressive Party which had, one or the other if not both at once, governed Iceland virtually without interruption throughout the history of the Republic, founded in 1944 when Iceland unilaterally declared full independence from Nazi-occupied Denmark. Over the years, those two parties had seen their combined vote in parliamentary elections decrease from 70 percent to less than 50 percent. Simply put, their

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\* The author is Professor of Economics at the University of Iceland, and was one of 25 representatives elected to Iceland's Constitutional Assembly in 2010 and subsequently appointed by Parliament to a Constitutional Council tasked with drafting a constitutional bill that was delivered to Parliament in July 2011 and accepted by two thirds of the voters in a national referendum held by Parliament in October 2012. Readers unfamiliar with Iceland's situation may wish to consult Gylfason *et al.* (2010, Ch. 7) and Gylfason (2013, 2014) for background. Without wanting any of them to be held responsible for the views expressed, the author thanks Reynir Axelsson, Lýður Árnason, Vilhjálmur Árnason, Valgerdur Bjarnadóttir, Thorsteinn Blöndal, Jon Elster, Eyjólfur Kjalar Emilsson, Katrín Fjeldsted, Tom Ginsburg, Arnfríður Gudmundsdóttir, Gudmundur Gunnarsson, Hjördís Hákonardóttir, Thorkell Helgason, Hjörtur Hjartarson, Arne Jon Isachsen, Gudni Th. Jóhannesson, Örn Bárður Jónsson, Gudmundur Jónsson, Svanur Kristjánsson, Hélène Landemore, Maria Elvira Mendez-Pinedo, Njördur P. Njardvík, Katrín Oddsdóttir, Sigríður Ólafsdóttir, Lárus Ýmir Óskarsson, Erlingur Sigurdarson, Birgitta Swedenborg, and Leif Wenar for their reactions to earlier versions of the text which is scheduled to appear in *The Politics of the Icelandic Crisis*, edited by Irma Erlingsdóttir, Valur Ingimundarson, and Philippe Urlfialino. Email: [gylfason@hi.is](mailto:gylfason@hi.is).

legacy is, on the one hand, economic advances that enabled Iceland within two generations to close the gap in living standards as measured by per capita incomes that had separated Iceland from Denmark in 1904<sup>1</sup> when Iceland was granted home rule by Denmark and, on the other hand, a country whose politics is considered corrupt by 67 percent of Gallup's Icelandic respondents compared with 14 percent in Sweden and 15 percent in Denmark (Gallup 2013).<sup>2</sup> As O'Toole (2010) has written of Ireland, Iceland is, in economic terms, a first-world country with a third-world political culture.<sup>3</sup> This was duly acknowledged by Parliament in its unanimous 2010 resolution, adopted with 63 votes to zero, no abstentions, that "criticism of its political culture must be taken seriously" (my translation), a candid declaration recalling that given by Eduardo Duhalde upon taking office as President of Argentina in 2002.<sup>4</sup> In fact, Iceland's political class leaves behind a long record of criminogenic behavior, including bank scandals that were swept under the carpet in the 1930s, illegal profiteering around the US military base in the 1940s and 1950s, and Russian-style treatment of natural resources since the 1980s, declared unconstitutional by the Supreme Court in 1998 (Kristjánsson 2011). Under evident political pressure, the Supreme Court reversed its verdict eighteen months later only to have it reconfirmed in 2007 by the United Nations Human Rights Committee (2007) which, in a binding opinion, instructed Iceland to remove the discriminatory element from its fisheries management system and pay damages to those who had been discriminated against. In 2012, the UNHRC let Iceland off the hook against the government's promise of a new constitution guaranteeing a nondiscriminatory allocation of fishing rights. All this was accompanied by a strong dose of asset stripping à la russe, including a corrupt privatization of the banks that paved their road off the cliff in 2008 and that Parliament has proved unwilling to investigate.

To begin with, the new post-crash government listened to the people and their demands. The ex-Prime Minister turned Governor in Chief of the failed Central Bank, mired in

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<sup>1</sup> Around 1900, Denmark was roughly twice as affluent as Iceland in terms of per capita GDP.

<sup>2</sup> Gallup asked about political corruption whereas Transparency International, which also ranks Iceland behind other Nordic countries, asks about business corruption. The World Values Survey (2014) ranked interpersonal trust in Iceland far behind that in other Nordic countries even long before the crash of 2008.

<sup>3</sup> From 1944 to 2014, the Independence Party was in government for 53 years, the Progressives for 45 years, the Social Democrats for 36 years, and the Left-Greens and their predecessors for 19 years. The four parties are commonly referred to as the 'Gang of Four' by those who see no significant difference between them in terms of their responsibility for Iceland's problems. During 2007-2009, the Social Democrats were in government with the Independence Party with the Progressives and Left-Greens in opposition.

<sup>4</sup> President Duhalde told the *Financial Times* (3 January 2002): "The political leadership ... is shit and, of course, I include myself in that."

controversy,<sup>5</sup> was removed from office only to be installed by the oligarchs as editor of what used to be Iceland's largest newspaper.<sup>6</sup> The oligarchs are mostly vessel owners enriched by Parliament's granting them hugely valuable fishing quotas since 1984. The IMF was called to the rescue following a botched attempt by the Central Bank to procure a big loan from Russia to avoid IMF assistance or the "Kiss of Death" as one key Independence Party operative chose to describe it (Gunnarsson 2009, 51). No political party distanced itself from the Central Bank's overture to Russia which came to nothing. A Special Prosecutor's Office was set up, and grew rapidly from three employees to about 100 who managed to secure a number of convictions of senior bankers and others on charges of insider trading, market manipulation, and breach of fiduciary trust, but some of those convictions remain on appeal to the Supreme Court. Several further indictments are expected to result from the roughly 80 cases referred to the Special Prosecutor by the Financial Supervisory Authority (FME) which, designed as it had been to fail, had slept through the crash alongside the international rating agencies but was now alert under a new post-crash director who, three years and 77 referrals to the Special Prosecutor later, was hounded from office. In 2010, a 2,400-page report by a Special Investigation Committee (SIC) appointed by Parliament described legal violations on top of recklessness, regulatory capture, political capture, media capture, academic capture, and so on, even if the report failed to connect its analysis to the relevant law-and-economics literature on white-collar crime (Akerlof and Romer 1993; Black 2005).<sup>7</sup> The academic capture part of the story is recounted to chilling effect in Ferguson (2012, Ch. 8).

### **1.1. Historical background**

A key promise given by the post-crash government in early 2009 concerned the constitution which, drawn up in haste at the time of Iceland's full separation from Denmark in 1944, Parliament had promised to revise ever since without being able or willing to keep its

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<sup>5</sup> Wade (2009) and the Special Investigation Committee (SIC, 2010) describe the ill-fated pegging of the króna to the euro when there were hardly any foreign exchange reserves left, a decision made by the Central Bank governors without consultation even with the bank's chief economist, triggering a still unaccounted-for hemorrhage of remaining reserves. The Central Bank has refused to share with Parliament, let alone make public, a recording or transcript of a telephone conversation just before the crash between the governor and the Prime Minister who was later along with two other ministers, the three Central Bank governors, and the director of the Financial Supervisory Authority declared guilty of negligence in the sense of the law by the SIC (2010). The former Prime Minister, Geir H. Haarde, was likewise found guilty of negligence by a special Court of Impeachment convened by Parliament in 2012 and headed by the Chief Justice of the Supreme Court, and was appointed ambassador in 2014.

<sup>6</sup> There were two other governors. One resigned before being dismissed and the other one moved abroad, joining the staff of the Central Bank of Norway.

<sup>7</sup> Johnsen (2014) reviews the main findings of the SIC report. For a short version of some of the highlights of the story, see Gylfason (2010). For more on the crash in a historical and political context and its aftermath, see Gylfason *et al.* (2010, Ch. 7), Gylfason (2014), and Gylfason and Zoega (2014).

promise, partly perhaps because it was not impelled by crisis to do so (Elster 1995). In his New Year's address to the nation in 1949, Iceland's first president, Sveinn Björnsson, reminded the political parties of their failure to fix the constitution, saying that "... we still have a mended garment, originally made for another country, with other concerns, a hundred years ago" (my translation). The post-crash government concluded that since the politicians had failed to revise the constitution for almost 70 years it was time to bestow the task on a specially elected Constitutional Assembly – that is, to have a new constitution drafted by the people rather than by Parliament. This promise constituted a welcome admission of failure as well as an undeclared acknowledgement that a Constitutional Assembly elected in accordance with the principle of 'one person, one vote' was better suited to the task than MPs elected on the basis of current electoral laws granting rural voters on average twice as much influence in parliamentary elections as voters in the Reykjavík area, one of the most controversial issues in Icelandic politics since 1849 when the first written proposal of equal voting rights – 'one person, one vote' – was put forth, but in vain.

So, the trouble with Iceland started long ago. We could begin the story in the 1870s, but let us wind fast forward to the 1930s that saw a well-documented banking scandal covered up to protect the political interests involved. The 1940s and World War II saw a unilateral decision by Parliament and the electorate to leave the royal union with Nazi-occupied Denmark, unable to fend for itself. The political parties stood united behind this initially controversial decision and made an all-out effort to muster the support of 98 percent of the voters for the decision plus a new constitution, essentially a copy of the Danish one from 1849 with a hereditary king replaced by a president. The parties could enlist broad popular support by promising a new constitution. Meanwhile, the main political parties got along miserably with one another due, among other things, to a deep disagreement about unequal voting rights that culminated in a 1942 constitutional amendment aiming to reduce the rural bias of the electoral laws. The Progressive Party, the main beneficiary of unequal voting rights because of its strength in rural areas, fought the amendment tooth and nail, and lost. The political parties were unable to form a coalition government, inducing the governor, Sveinn Björnsson, elected president in 1944 when the Republic of Iceland was established, to appoint an extra-parliamentary government 1942-44, albeit one firmly anchored in the dominant political parties, the Independence Party and the Progressives, virtually not on speaking terms with one another.

At the outbreak of the war in 1939, Iceland had veered on sovereign default, but World War II intervened and was long thereafter referred to in Iceland as the "Blessed War" due to

the economic upswing the war entailed. In 1946, political parties went back on their promise to hold a national referendum on Iceland's postwar foreign policy, a promise anchored in the 1918 Union Treaty's declaration of "eternal neutrality," deciding with 32 votes against 19 to bypass the voters and sign a defense pact with the United States, followed by a US military presence that lasted until the Americans' unilateral withdrawal of their forces from Iceland in 2006 against the will of the Icelandic government. A precedent had been set: Parliament did not want to call a national referendum unless it could be sure that the result would be agreeable to the political class.

There was no Plan B. Iceland has had no military defenses since 2006, a policy stance that is unique among NATO members and rare around the world. The financial gains from the war had been spent on expanding the fishing fleet (the Independence Party prime minister 1944-47 and then on and off until 1963 was a former long-standing chairman of the Vessel Owners Association). But that was not the end of the story because Iceland stood to gain the equivalent of about two percent of GDP per year on average from the NATO base at Keflavík over the next 60 years.<sup>8</sup> The 1950s saw an uneasy truce among the grand coalition parties, a truce that was broken in a new battle in 1959, a repeat from 1942, about a constitutional amendment to secure more equal voting rights. Once more, the Progressive Party, still heavily overrepresented in Parliament, fought fiercely against the amendment, and lost again. As a result, the two main parties were unable to work together again until the mid-1970s. All along, the economy remained heavily regulated with prices, interest rates, and the exchange rate of the króna determined by politicians and their apparatchiks in the banks. An important albeit not nearly far-reaching enough respite was provided by a major economic liberalization effort in the 1960s when huge fiscal subsidies to the fishing industry were converted to indirect support through devaluation of the króna and privileged access to subsidized bank credits, an arrangement meaning essentially that the króna would be devalued at the whim of the vessel owners to shore up the profitability of fish exports when needed, undermining financial conscientiousness in Iceland's main export industry. In the 1980s and 1990s an attempt to stabilize the króna meant that government support for the fishing industry thereafter took the form of gratis allocations of hugely valuable fishing rights in Icelandic waters, even if the marine resources were shortly thereafter declared to constitute a common property resource by law. The system of gratis quota allocations, ruled discriminatory and unconstitutional by the UNHRC (2007), turned a dispersed resource (fish) into a concentrated

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<sup>8</sup> The base was a source of significant economic rent that the Independence Party, the Progressives, and the Social Democrats, in this order, and their operatives divvied up among themselves.

one (like oil), with all the potential for political cartelization that implies. From then on, the vessel owners were basically able to call the shots in Icelandic politics with a brief interlude during the 2000s when exuberant bankers briefly ran the show until the crash of 2008.<sup>9</sup> The editor of one of Iceland's two main newspapers at the time described as suicidal attempts by politicians to rise against the quota kings.<sup>10</sup> The SIC (2010) reports huge payments by the failed banks, before their demise, to political parties and individual politicians, information that would not have come to light without the crash.

## 1.2. Outline

The moral of this prelude is twofold. First, it demonstrates the impressive foresight and wisdom of Iceland's first president, Sveinn Björnsson, when he, as governor in 1944, emboldened by the first scientific public opinion poll conducted in Iceland, managed to have two key novelties inserted into the provisional constitution that was otherwise kept essentially unchanged from 1874, or 1849. The novelties were that the President of the Republic (a) would be elected by the people, not by Parliament as the parties wanted (this gave Iceland one of the first popularly elected presidents in Europe)<sup>11</sup> and (b) could veto legislation from Parliament and refer it to a national referendum, a provision that was initially proposed by Bjarni Benediktsson, later Independence Party Chairman and Prime Minister, in 1940 and lay dormant for 60 years until it was activated for the first time in 2004 to block – successfully as it turned out – the government's plan to regulate media ownership in a way that would have forced Iceland's largest daily newspaper and the sole television station competing with state television to close down.<sup>12</sup> Second, as even Iceland's own fairly uneventful and yet acrimonious constitutional history shows, constitutions are by their very nature political declarations outlining the rights and obligations of citizens, including the powers of the organized few versus the unorganized masses (Lasalle 1862) and, as such, naturally conducive to deep disagreements about individual provisions. Rights protected in constitutions entail obligations that may understandably meet resistance. Those who, like the

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<sup>9</sup> For an account of events in Iceland before and after the crash, see Gylfason *et al.* (2010), Benediktsdóttir, Danielsson and Zoega (2011), Gylfason (2014), and Johnsen (2014).

<sup>10</sup> See Gunnarsson (2009, 206). "Quota kings" and "quota queens" are commonly used terms in public debate in Iceland, like "oligarchs" in Russia. By contrast, oil kings and oil queens are unheard of in Norway because the Norwegian government made sure from the outset that Norway's oil discoveries would not result in the creation of a class of oligarchs.

<sup>11</sup> Precedents include France in 1848 and Germany in 1919.

<sup>12</sup> A staunch member of the political class, the president who activated the veto clause in 2004 had earlier as professor of political science taught that, according to the 1944 constitution, the president was only a figurehead without any substantive powers. The politicians had forgot or pretended to forget that they had lost a key battle with the governor in 1944 (Kristjánsson 2012).

President of Iceland, Ólafur Ragnar Grímsson, claim that constitutional amendments must be approved by consensus are fundamentally at odds with the historical evidence, but their position serves the special interests of those opposed to constitutional reform.

The rest of this article is arranged as follows. Section 2 reviews and explains the making of Iceland's crowd-sourced constitution bill from 2009 to 2014 and then, in Section 3, offers a further explanation as to why the bill failed to be passed by Parliament, addressing various criticisms leveled against the bill along the way. It needs to be emphasized up front that these criticisms, whether well founded or not, are irrelevant because Parliament held a national referendum on 20 October 2012 in which the bill and its key individual provisions were accepted by an overwhelming majority of the voters. A democratic nation cannot under any circumstances permit the outcome of national elections, let alone a constitutional referendum, to be fixed *ex post*, but this is what the Icelandic Parliament is at present trying to do, flirting with a farewell to democracy. Section 4 concludes.

## **2. The making of Iceland's post-crash constitution**

The constitutional revision process launched by the government of the Social Democratic Alliance and Left-Green Movement in 2009 was in many ways admirable and exemplary (Ginsburg *et al.* 2012; Landemore 2014; Meuwese 2013). To start with, the government decided to task directly elected representatives of the people with drafting a new post-crash constitution or revising the one from 1944. To launch the process, Parliament appointed a seven-member Constitutional Committee consisting mainly of academic experts from a range of fields (law, literature, natural science, and social science). The composition of the committee reflected Parliament's unspoken understanding that the constitution is not exclusively, and not even principally, a legal document, but primarily a social compact, a political declaration. Legal expertise, even if it can be helpful, is not really essential to writing a constitution because the constitution supersedes ordinary legislation by virtue of the fact that the people are superior to Parliament. Even so, lawyers are needed to help draft ordinary legislation to insure, *inter alia*, its consistency with the constitution adopted by the people.

### **2.1. Constitutional Committee**

The role of the Constitutional Committee was threefold: (a) to organize a National Assembly (or Forum) where citizens selected at random from the national register would, under expert supervision, convene for a day to define and discuss their views on the constitution 's

contents; (b) prepare a nationwide election of 25 representatives to a Constitutional Assembly whose task would be to draft a new constitution reflecting as far as possible the views of the National Assembly; and (c) prepare the ground for the Constitutional Assembly by offering analysis of the 1944 constitution and gathering and making available in print as well as on the internet information about foreign constitutions and other relevant material. The Constitutional Committee went slightly, and rather innocently, beyond its legal mandate by suggesting options for the wording of individual provisions. Its work was uniformly hailed by members of the Constitutional Council<sup>13</sup> and others.

In the beginning, there was reasonable harmony in Parliament, its members either encouraged or humbled by the results of the 2009 election that produced Iceland's first majority government without both the Independence Party and the Progressive Party. Government and opposition collaborated on to how to proceed. One key promise given by the Progressive Party before the 2009 election was a new constitution to be drafted by directly elected representatives of the people. To its credit, the Independence Party, also in opposition after the 2009 election, went along, proposing the idea of convening a National Assembly. A similar national assembly had been elected and convened in Reykjavík in 1851 during the wave of revolutions then sweeping Europe only to be unilaterally dissolved in mid-stream by the representative of the Danish King, a historic debacle known to every Icelander. An experimental, privately organized national assembly had been held in Iceland in 2009 (Maurapúfan 2009), shortly after the crash, with foreign expert input based on the principle of collective intelligence, and this became the prototype of the National Assembly of 2010 to which 950 citizens from 18 to 91 years of age were selected at random from the national population register subject to side conditions to insure gender balance, fair representation of different regions, and such. This means – and this point is the key to the democratic backbone of the project – that every Icelander 18 years or older had an equal chance of being invited to a seat in the National Assembly. The Assembly met for a day in early November 2010 at the end of which it issued a resolution or set of conclusions stating that a new constitution was called for and that it needed to contain certain provisions on national ownership of natural resources and equal voting rights and to foster accountability, decentralization of power, environmental protection, transparency, and so on. All this material was made accessible to the public on the Constitutional Committee's website. The resolution accorded well with the results of public opinion polls that had consistently reported for many years that a majority of

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<sup>13</sup> Before its work commenced in April 2011, the name of the Constitutional Assembly was changed to Constitutional Council. In the text, the two terms are used interchangeably.

the voters do want national ownership of natural resources, equal voting rights, etc. There were no surprises. This is why criticisms of the way the National Assembly was organized do not matter in the Icelandic context.

## **2.2. Constitutional Council elected**

The next step was to elect the 25 representatives of the Constitutional Council in late November 2010 as laid down by the law that stipulated that current MPs and Supreme Court judges were not eligible to run. By that time, however, two years after the crash, reform fatigue had set in, partly perhaps because the economic rescue operation sponsored by the IMF already appeared likely to succeed against serious odds, emboldening those politicians and parties held primarily responsible for the crash in the SIC report (2010) to blame the crash on foreign conspirators (Gunnarsson 2009) and to oppose the government's rescue effort, including the constitutional project. Some opposition politicians spoke of the 'so called crash' as if nothing had happened. Even so, the months leading up to the November 2010 Constitutional Assembly election went by without fanfare. Until the deadline for putting one's name forward as a candidate it was impossible to know whether the election would prove to be a fiasco for lack of interest or not. But after the deadline passed about a month before the election, it became known that 522 individuals had stepped forward, each supported by between 30 and 50 signatures.<sup>14</sup> Thus, there were at least 15,660 – and possibly as many as 26,100 – signatures behind the 522 candidates, i.e., between seven percent and eleven percent of eligible voters. On the other hand, political parties and interest groups showed little interest in the election, partly perhaps to underline that this was to be the people's constitution as opposed to the political elite's constitution, and made no visible effort to encourage people to vote. The opposition parties had already turned their back on the project. Only the Independence Party sent lukewarm letters to their members with two slightly different lists of approved candidates. Even the governing coalition parties that had launched the project appeared listless. With one significant exception (the newspaper *DV*, see below), the media showed little interest in presenting the views of the 522 candidates to the voters except each was given three to four minutes on public radio. There was no campaign to speak of, no competition for votes among the candidates, just amicable chat among friends on Facebook and such.<sup>15</sup> Even so, 37 percent of the electorate turned out to vote.

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<sup>14</sup> The number of candidates was actually 523, but one candidate was found ineligible for lack of valid signatures.

<sup>15</sup> I was asked by my editor to take a break from my long-standing weekly newspaper column until after the election, and spent the three weeks before the election far away from home, in South Africa.

The 25 candidates who got the most votes came from all walks of life. Perhaps the most striking feature of the group is that five of them were professors (economics, mathematics, medicine, political science, and theology) and three others were junior academics (mathematics, philosophy, and political science), a much higher proportion of PhDs – six out of 25 – than in Parliament, or, presumably, in any other legislature for that matter, ever. This, plus the uniformly high level of education and varied experience of the elected representatives, helped ensure excellent access to outside expertise. After the election results were announced, the leaders of the opposition in Parliament went on the attack against the government, calling the election a failure on account of the 37 percent turnout which, nonetheless, is comparable with earlier national referenda without direct political party involvement in Iceland (Gylfason 2013) or Switzerland, for that matter. The gloves were off.

When confronted by a group of 25 directly elected representatives to the Constitutional Assembly, some politicians had reason to become uneasy. It was, for them, one thing to have under pressure from protesters in the streets felt obliged to prepare for a directly elected constituent assembly and quite another 18 months later to face a group of 25 elected members clearly beyond the control of the political parties used to behaving like a state within the state. Before the election, the answers given by the 23 of the 25 elected representatives to questions concerning the constitution posed by *DV*, the only newspaper showing genuine interest in the election (and the only one with no Independence Party connections), were remarkably homogeneous. They showed that a vast majority of the representatives agreed with the resolution of the National Assembly. For example, 19 out of 23 representatives favored changing the constitution, 22 favored national ownership of natural resources, 22 favored equal voting rights, and 21 favored more frequent national referenda (Gylfason 2013). Further, the answers given by a large majority of all 522 candidates showed a similar pattern, suggesting that a random draw of representatives from the list of 522 candidates or from the population at large would also most likely have produced a constitutional bill containing these key provisions. Unmistakably, there was a broad and clear popular consensus in favor of substantive constitutional reform that would, among other things, aim to (a) sever the corrupt relationship between the political class and parts of the business community, particularly the vessel owners who had grown used to regarding Iceland's common-property fish resources as their private possession and (b) reduce the power of political party leaders to surround themselves in Parliament with provincial MPs with few votes behind them and correspondingly limited qualifications. Would this have been possible had there been no crash? No. The 1944 constitution was not directly responsible for the crash, true, but it was

clearly not able to prevent the crash either. The weak separation of powers between the three branches of government had led to executive overreach that produced, among other things, a Russian-style privatization of the banks 1998-2003, paving their way off the cliff in 2008 (Gylfason 2013). In retrospect, it appears unlikely that the privatization of the banks as it was carried out would have been accepted in a national referendum. The same applies to the discriminatory quota system in the fisheries and the organized profiteering around the US military base. Unsurprisingly, therefore, many Icelanders, including the new majority in Parliament, thought it reasonable to take a close look at the constitution after the crash.

### **2.3. Enter the Supreme Court**

It is, all things considered, hardly a coincidence that three technical complaints about the vote count, the shape of the voting booths and such were filed immediately after the Constitutional Assembly election by individuals with documented connections to the Independence Party. On the basis of these complaints, six Supreme Court justices out of nine – five of them Independence Party appointees – issued an unprecedented administrative decision to annul the election. Of the six judges who annulled the election, four had, in one way or another, openly declared their opposition to national ownership of natural resources, known to have the support of 24 of the 25 elected representatives – one by reversing his vote on the Court between 1998 and 2000 (the first decision declared the quota system by which fishing rights are allocated to vessel owners unconstitutional, the second one did not); another by, as Attorney General, defending the quota system before the UNHRC (and losing the case); a third by serving as permanent secretary in the Ministry of Fisheries tasked with implementing the quota system; the fourth by writing and speaking publicly in support of the quota system – and the fifth is the brother of a vessel owner who is one of the biggest beneficiaries of the quota system (Hauksson 2011). None of those five judges chose to recuse himself from the decision to annul the election.

Never before had a national election in a democracy been invalidated *ex post*. Further, there was no basis in law for the judges to make this decision because the law permits such a decision to be made only if an elected representative can be shown to have been ineligible to run or if fraudulent behavior can be shown to have influenced the election outcome, neither of which was claimed to have been the case. As a voter, one of the lawyers elected to the Assembly, Mr. Gísli Tryggvason, appealed to the Supreme Court to reconsider its decision or at least to permit a recount to address “significant deficiencies” alleged by the Court decision, but his well-argued appeal was dismissed by the Court (Tryggvason 2011).

Axelsson (2011) concludes his scathing analysis of the Supreme Court decision thus: “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.”<sup>16</sup> The decision by the Supreme Court judges to annul the Constitutional Assembly election is, in terms of the gravity of its possible local consequences, comparable to the ruling by the US Supreme Court to hand the presidency to George W. Bush in 2001 by five votes to four along party lines (five judges appointed by a Republican president against four appointed by a Democratic president), a ruling that led John Paul Stevens, the third longest serving justice in the history of the Supreme Court, to state that “Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.”<sup>17</sup>

Parliament reacted to the Supreme Court’s decision by offering the 25 elected Constitutional Assembly representatives appointment to a Constitutional Council. The opponents of constitutional reform were jubilant, reveling in the alleged lack of legitimacy of the council and calling it an ‘irrelevant conference.’<sup>18</sup> Among other things, the 25 elected members were accused of dishonoring the 1944 constitution by accepting the Parliament’s appointment.<sup>19</sup> None of us took such charges seriously, nor did any of us, apart from Mr. Tryggvason’s appeal, bother to consider mounting a legal challenge to the Supreme Court decision which Parliament declared binding. We had been asked by the people and Parliament to draft a post-crash constitution, and this is what we set out to do.

#### **2.4. Constitutional Council at work**

We first held a few informal meetings to get to know one another. We used these meetings also to prepare a set of operating rules as allowed by the law on the council. In preparation for

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<sup>16</sup> The Organization of Disabled in Iceland made an equivalent technical complaint about the 2012 presidential election, but the complaint was dismissed by the Supreme Court on the grounds that the alleged irregularities could not have affected the outcome of the election.

<sup>17</sup> See also Dershowitz (2002). The number of US Gallup respondents expressing a great deal or quite a lot of confidence in the Supreme Court fell from 50% in the late 1990s to 30% in mid-2014 (<http://www.gallup.com/poll/4732/supreme-court.aspx>). Comparable figures for Iceland are not available.

<sup>18</sup> One of the six justices who annulled the Constitutional Assembly election sued me for libel, and lost his case in a lower court and again, on appeal, in the Supreme Court. The case concerned a short, parenthesized paragraph in an earlier, unpublished version of Gylfason (2013) which reported an unchallenged, unproven rumor, published in *DV*, of collusion between one of the individuals who complained about the election and the judge in question, both unnamed in my text. I regarded the mention of the rumor as a relevant part of my description of the charged atmosphere in which the opponents of constitutional reform made an all-out effort to derail the reform. The commissioned Supreme Court judges saw it may way, upholding my freedom of speech.

<sup>19</sup> One elected representative declined to accept parliamentary appointment, and was replaced by the candidate next in line, a lawyer.

my contribution to our joint work, I used my time to consult with colleagues at home and abroad, including one of the authors of the South African constitution from 1994-96 and other constitutional experts abroad as well as a number of local academics, lawyers, and others. Armed also with an excellent 700-page report from the Constitutional Committee plus other material, we came well prepared to our first formal meeting at the beginning of April 2011. After dividing the group of representatives into three subcommittees (A, B, and C), each charged with preparing initial drafts of about one third of the bill, one of the first decisions we needed to make was whether to start our work with a clean slate or let it suffice to amend individual provisions of the 1944 constitution. Quickly, it became clear that there was a broad consensus in favor of drafting a new constitution *ab initio*, even if the old constitution would naturally serve as a point of departure. This consensus appeared to result from the widely held view that the financial collapse called for a general overhaul of the constitution rather than marginal amendments. Another early decision concerned the extent to which our work would be carried out in full view of the public. Without any major reservations, it was decided that transparency through crowd sourcing should be attempted, a decision that perhaps came especially easily to the council members from academia where peer review is standard operating procedure. In practice, this meant that all General Assembly meetings were simulcast on the internet and subsequently posted on the council website whereas subcommittee meetings were held behind closed doors except when the subcommittees invited the members of other subcommittees and expert witnesses to visit on occasion. Little by little, the transcripts of all General Assembly meetings as well as the minutes of all meetings were posted on the council website. As the work progressed, it became clear that transparency through crowd sourcing was a good thing, both because of the impressive quality and seriousness of the input received from members of the public who accepted the council's invitation to review and react to our written text week by week, but also because it made it unnecessary to extend invitations to representatives of interest organizations – artists, farmers, fishermen, pensioners, teachers, and so on. This was in the spirit of the opening salvo of the preamble of the bill: “We, the people of Iceland, wish to create a just society with equal opportunities for everyone.”<sup>20</sup> This marked a major departure from the *modus operandi* of Parliament where it is common practice for strong interest organizations – e.g., vessel owners – to be invited to singlehandedly draft laws that concern them. Citizens from all walks of life generously offered their help: artists, farmers, and so on. Few academics did, however, and

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<sup>20</sup> A literal translation of the original would replace “with equal opportunities for everyone” by “where everyone has a seat at the same table.”

even fewer lawyers – perhaps because they viewed the Constitutional Council as intruders on their traditional turf.<sup>21</sup>

Virtually without exception, the Constitutional Council went about its business in harmony, an easy accomplishment perhaps in view of the broad consensus on the main issues. Naturally, though, there were some disagreements that needed to be addressed. For example, in view of the need for the new constitution to be approved by two successive parliaments in keeping with the 1944 constitution, some members thought it advisable to try to anticipate the will of Parliament by avoiding formulations considered likely to meet with its disapproval. Others thought it more important to stay true to the consensus reflected in the 2010 resolution of the National Assembly, arguing that only thus would a new constitution win approval in a national referendum which Parliament could not permit itself to disregard. For another example, some members wanted fairly radical change through a direct strengthening of the role of the President, direct national election of the Prime Minister, and so on. Others thought it enough to erect checks and balances between the three branches of government within the existing structure of government proscribed by the 1944 constitution, pointing out that the National Assembly had not asked for a strengthened role of the President. As a third example, some representatives felt that specific provisions if such could be devised were needed as precautions against another financial crash, while others thought that general provisions to strengthen checks and balances would suffice (Gylfason 2013). Some of the issues arising were settled by voting in subcommittees or in the General Assembly, which always had the last word, others were settled by compromise and consensus. For example, there was no need to take a vote on the natural resource clause in the A-subcommittee charged with drafting that provision because consensus prevailed in full agreement with the National Assembly. On occasion, the compromises reached required hard work as well as gentle diplomacy.

The debates in the General Assembly and, for the most part in the subcommittees as well, were marked by calm, courtesy, and respect in visible contrast to Parliament. Otherwise, the work of the council could hardly have been completed in the four months assigned to the task by Parliament, least of all with a unanimous acceptance of the bill in the end by 25 votes to zero, no abstentions, an impressive political feat by any standard. The substance of the bill and its main provisions is reviewed in Gylfason (2013). Perhaps the main point here is that, even if council members considered themselves bound only by their own conscience, they

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<sup>21</sup> In a newspaper interview after the referendum, a political science professor who had kept silent throughout the process called the council “completely illegitimate,” adding that “a certain elite” (presumably including himself) should rewrite the constitution. Among the 25 Constitutional Council representatives, there were two political scientists one of whom was shortly afterward promoted to a professorship.

produced a bill that was in nearly perfect harmony with the 2010 resolution of the National Assembly. The only substantive difference is that while the National Assembly called for a reduction in the number of MPs, the Constitutional Council decided to keep their number unchanged at 63 so as not to signal an apparent internal inconsistency in a bill aiming to strengthen the legislative and judicial branches of government vis-à-vis the executive branch.<sup>22</sup>

As the work of the Constitutional Council progressed, it became apparent to several council members, especially perhaps to those with good contacts in Parliament, that parliamentary support for a new constitution was waning. When the bill was delivered to the Speaker of Parliament at a formal ceremony 29 July 2011, many of us were struck by the Speaker's visible lack of enthusiasm (more on her in Section 3). Parliament declined to have the bill translated into English to facilitate foreign reaction to the bill, so that an official translation had to be privately financed by the Constitutional Society, an NGO.<sup>23</sup> Upon receiving the bill, Parliament sent it on to its Constitutional and Supervisory Committee (CSC) which took several months to read and discuss the bill. In March 2012, nearly eight months after delivery, the former council members were summoned on short notice to a four-day special meeting to respond to several written queries by the CSC on behalf of Parliament. Most but not quite all (21 of 25) former council members were able to attend that special meeting. As before, the council's answers to the Parliament's questions were unanimous. Perhaps the most significant query had to do with the natural resource clause stipulating, among other things, that "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." Parliament asked if the formulation "full consideration" could be replaced by "fair consideration." The council members' answer was a polite but resolute No, for two reasons. First, the replacement of "full" by "fair" might be interpreted as a constitutionally protected discount from full price to vessel owners which was not intended. Second, because the article on the right of ownership, unchanged from 1944, stipulates "full compensation" for confiscation of property, internal consistency requires full price in both clauses so as not to introduce discrimination among different types of ownership. Another question from Parliament led to a rewording of the electoral clause stipulating 'one person,

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<sup>22</sup> This decision signals the council's unadversarial attitude toward Parliament. Had the council wanted to make it more difficult in the eyes of the public for MPs to oppose the bill, it could have decided on a reduced number of seats in Parliament.

<sup>23</sup> Parliament also refused to sponsor an English translation of the SIC report (2010), making it necessary for foreign victims of the failed banks to finance such translations. Only a small fraction of the SIC report is available in English on the Parliament's website.

one vote' that reduced the number of words in the provision by a third without affecting its substance, a welcome change. In a few other cases, the former council members responded to the CSC's queries by suggesting alternative wording for clarification. The CSC, or rather its majority of six of nine members, had declared that only changes in wording could be made, but no changes of substance.

## **2.5. National referendum**

Time passed. The government intended to hold a referendum on the bill at the time of the presidential election in June 2012 to encourage voter turnout, but the minority in Parliament, increasingly ferocious in its opposition to the bill, used filibuster to block this plan. Instead, the referendum was held on 20 October 2012. I asked the chairperson of the CSC if the governing parties holding the referendum would explain the bill to the electorate before the referendum. The answer was No. Who then? I asked. You, was the answer, by which, I presumed, was meant the former Constitutional Council members whose legal mandate had expired in July 2011. This is why the Alliance for a New Constitution (SaNS) was founded, an advocacy group whose aim was, and remains, to secure the adoption of the constitutional bill.<sup>24</sup> The Alliance had no financial resources apart from a small amount supplied by the Movement, the smallest opposition party in Parliament, and the Constitutional Society. The government declined to provide financial support to the effort to promote the bill as did both governing parties, the Social Democrats and the Left-Greens. SaNS was on its own; without it, the bill was an orphan. Even so, assisted by the Movement and its successor, Dawn, some meetings were held around the country to provide a modicum of visibility and to publish some articles explaining the bill. As had been the case before the Constitutional Assembly election, even the political parties who had laid the bill before the voters were mostly absent from the scene before the referendum. Nonetheless, 49 percent of eligible voters turned out and 67 percent of them said Yes to the first question: "Do you want the proposals of the Constitutional Council to form the basis of a legislative bill for a new Constitution?" The formulation of this question could be seen to hold open the possibility that Parliament might turn against its original intention by trying to build something completely different on the basis of the bill. Ingenuously, however, Parliament had put five auxiliary questions on the ballot, including one on national ownership of natural resources (83 percent said Yes), another on equal voting rights, i.e., 'one person, one vote,' (67 percent said Yes), and yet another on

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<sup>24</sup> The establishment of SaNS was necessary because the articles of the Constitutional Society prescribed that society's neutrality concerning the content of the constitution. The two merged in 2014.

more frequent use of national referenda (73 percent said Yes.)<sup>25</sup> This meant that the majority in Parliament, including the Movement, could say to the filibustering minority: Look, not only does an overwhelming majority of the voters support the bill, but they also accept its key individual provisions. After the referendum, which they chose to refer to as an opinion poll, members of the opposition claimed that the absentees would have voted against the bill.

After the referendum, the CSC asked a team of local lawyers, led by an official at the Prime Minister's office, to go over the bill once more to suggest improved wording if needed from a legal and technical point of view, again with clear instructions to the effect that no changes in substance would be allowed. Landemore (2014) gives two examples of substantive changes for the worse suggested by the lawyers beyond their mandate. Here is a third example. The lawyers suggested a redrafting of the natural resource provision that fundamentally changed its meaning – in favor of the vessel owners. To its credit, the CSC restored the original formulation that had been proposed by the Constitutional Council and presented to the public before the referendum. The story does not end here, however, because at a later stage the CSC did change the natural resource clause by replacing the words “full consideration” by “normal consideration.”

At the eleventh hour, in a surprise move, the CSC asked the Venice Commission (VC) to review the bill, a proposal that members of the Constitutional Council had made to Parliament more than a year earlier without success.<sup>26</sup> Members of the VC visited Iceland in January 2013, and delivered a month later a provisional report (Venice Commission 2013) the main points of which the CSC found it easy to incorporate into the final version of the bill. In places, it must be said, the VC showed a lack of familiarity with Iceland's situation and history, briefly described in Section 1, and admitted as much. In particular, the VC's thoughts on the nationally elected President and his or her constitutional authority to refer legislation from Parliament to a national referendum were unhelpful but harmless. Some of the VC's more useful comments concerned changes of wording that the CSC had introduced into the bill, changes that were easily reversible, as well as new formulations here and there that were easy to accept. The most important substantive comment offered by the VC concerned the provisions on Parliament, provisions that neither MPs nor other observers had reacted against

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<sup>25</sup> These numbers understate the level of support for the bill because many voters said Yes to the first question without voting on the remaining questions. Specifically, twice or more than twice as many passed on questions 2-6 as on question 1. This may be understood to impart a negative bias to the vote tally on questions 2-6 because if you vote for the bill as a whole you are likely to approve of at least some of its main provisions listed in questions 2-6 even if you do not say so on your ballot. For more on the results of the referendum, see Gylfason (2012) and Helgason (2013).

<sup>26</sup> In a comic turn of events, Parliament asked the Constitutional Society for permission to use the latter's privately financed English translation of the bill. The permission was gladly granted.

during the eighteen months that the bill had been under scrutiny in Parliament and that Parliament, accordingly, had not put on the ballot in the 2012 referendum. In particular, the VC speculated that the bill perhaps went too far in strengthening Parliament vis-à-vis the executive branch, a point that the CSC promptly rejected. Most importantly, however, the VC expressed its agreement with the key provisions of the bill on equal voting rights, personal elections to Parliament (as an alternative to party slates), direct democracy, freedom of information, and national ownership of natural resources. It took the CSC only a short while to adjust the bill to the VC's comments. Parliament was ready to vote.

## **2.6. Parliament's turn**

As the parliamentary election of April 2013 drew closer, less and less time was left for Parliament to pass the amended bill in accordance with the results of the referendum the year before. To encourage MPs, members of the Constitutional Society opened a website inviting MPs to declare whether they favored passing the bill before Parliament would adjourn. Gradually, and sometimes grudgingly, MPs submitted these declarations of support one after another until there was a majority of 32 votes in favor of passing the bill, in full view of the public. It seemed clear that not all of the remaining 31 MPs would vote against the bill. For comparison, the vote on holding the October 2012 referendum had been 35 in favor and 15 against with 13 abstentions.<sup>27</sup> While MPs might have rejected the bill in a secret ballot, the point here is that in Parliament there is no such thing as a secret ballot. When the new leaders of the governing parties (their older predecessors had stepped aside ahead of the approaching parliamentary election) presented a motion in Parliament aimed at defusing the constitutional debate, an MP for the Movement, Margrét Tryggvadóttir, presented an amendment to their proposal, an amendment comprising the constitutional bill *in toto* that the Speaker of Parliament, in keeping with universal procedural rules, had to bring to a vote first. The proposed amendment was a last-minute attempt to bring the bill to a vote, a bill openly if grudgingly supported by a majority of MPs. It was long past midnight, the last day of Parliament before recess. The Speaker, in violation of parliamentary procedure, did not bring the amendment – that is, the bill – to a vote. As a result, Parliament adjourned without voting on the bill that two thirds of the voters had accepted the year before. Said the outgoing Prime Minister, Jóhanna Sigurðardóttir, whose Social Democratic Alliance would a month later

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<sup>27</sup>The rural bias against the bill in Parliament can be discerned from the fact that MPs from the two urban (i.e., Reykjavík) electoral districts delivered 14 Yes votes against 6 No votes and 2 abstentions whereas MPs from the four rural districts delivered 21 Yes votes against 9 No votes and 11 abstentions.

suffer the worst defeat in the history of parliamentary elections in Iceland: “The past few weeks were the saddest period of my 35 years in Parliament.”<sup>28</sup>

Why did the people not take to the streets banging their pots and pans in protest against the putsch? A likely explanation is that a parliamentary election was only a month away and the opposition parties managed to steer the campaign toward short-term economic issues, promising instant debt relief to distressed households to escape punishment for having derailed the constitutional bill.

### **3. What went wrong? – and criticisms**

Why did the bill fail to win acceptance in Parliament? As I see it, this outcome – which, for reasons laid out in what follows, I still view only as a temporary setback – had nothing to do with the alleged flaws of the bill. Rather, this occurred because the bill was designed to decentralize authority through redistribution of power from the political class to the people in accordance with clear instructions from the National Assembly of 2010 and because MPs were in a position, granted them by the 1944 constitution, to block the bill. The fact that the referendum was advisory as opposed to legally binding is immaterial by virtue of the fact that the people are superior to Parliament.<sup>29</sup> The sole significant failure of the process was that the Speaker of Parliament could not be held accountable to have a vote on the bill. In an open vote, MPs would almost surely not have dared kill the bill against the clear will of the people as expressed in the 2012 referendum. Had Parliament taken a vote as it should have and, especially, had a second referendum been held at the time of the 2013 parliamentary election,<sup>30</sup> a new Parliament in 2013, however composed, would hardly have dared block the bill because that might have triggered an open revolt in the streets, a second Pots and Pans Revolution. This is why a parliamentary vote was blocked by the Speaker in the middle of the night. To repeat, the process did not fail. A vocal minority in Parliament used filibuster with unprecedented determination and the majority shied away from responding with the ‘nuclear option’ of breaking the filibuster, fearing the consequences of such an extraordinary response.

#### **3.1. Does the bill go too far?**

Perhaps you wonder: Did Parliament perhaps do the right thing? Does the bill go too far?

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<sup>28</sup> Reported on Icelandic State Radio (2013).

<sup>29</sup> The 1944 constitution does not permit legally binding referenda, but the constitutional bill does. This particular provision of the bill was approved by 73% of the voters in the 2012 referendum (Gylfason 2012).

<sup>30</sup> By law, Parliament needed to decide three months in advance to hold a second referendum on the bill coinciding with the parliamentary election in April 2013, and let the deadline pass.

Should the Constitutional Council have taken its cue from Philadelphia in 1787 and left national ownership of natural resources and equal voting rights out of the bill to appease Parliament? – just as the lifting of slavery was left out of the US constitution in Philadelphia. The answer is No. The National Assembly did not leave that option on the table. Besides, it would have been wrong to leave these issues out of the bill because, unlike slavery in 18<sup>th</sup>-century America, national ownership of natural resources, particularly as regards the fisheries, and equal voting rights have for a long time been the two most hotly contested issues in Icelandic politics, natural resource management since the early 1970s and equal voting rights since 1849. The provincial bias of the electoral laws – the absence of ‘one person, one vote’ – has blocked a political resolution of these age-old issues. This is why the constitutional referendum of 2012 was the most important and most democratic election in the history of the nation. This was the first time the voters were invited to a referendum to express their views on natural resource management, equal voting rights, and a few other key issues on a level playing field – one person, one vote! – without interference from the political parties with their coffers full of taxpayers’ money plus private contributions. When the political parties began to comprehend the likely consequences of the constitutional reform process they had set in motion they turned against themselves. Remember: They believe that it amounts to political suicide to rise against the vessel owners (Gunnarsson 2009, 206).

That was not all. There were other, less prominent provisions in the bill intended to protect and promote human rights, thus imposing obligations on others. The environmental protection clauses would restrain the freedom of polluters to continue spoiling nature as before. The freedom of information clauses would restrict the freedom of those used to operating with impunity under a veil of secrecy, and so on. Yet, no one stepped forward to declare opposition to these clauses just as hardly anyone openly declared opposition even to the clauses on equal voting rights and national ownership of natural resources apart from the afore-mentioned botched attempt by the government’s lawyers to pull the teeth out of the natural resource provision. This was understandable because the Constitutional Council’s careful wording of the natural resource clause was consistent with and borrowed some of its language from official policy declarations of all the political parties – declarations that they, it now appeared, intended to remain empty words. This is why criticism of the bill that surfaced after the national referendum did not focus on any of the above-mentioned issues but on something completely different – that is, on issues that Parliament, correctly, had seen no reason to put before the voters in the 2012 referendum.

### 3.2. The plot thickens

Opponents of the bill behaved as if they hoped the 2012 referendum would sink the bill, because otherwise they would have expressed their opposition to the bill before the referendum and warned the voters against accepting it. Here the plot thickens. Three members of the seven-member Constitutional Committee that had in unison prepared the ground for the Constitutional Council now broke rank, raising individual objections to aspects of the bill – aspects that, based on careful analysis and debate on record,<sup>31</sup> the Constitutional Council had settled and the voters had accepted. Two of the former Constitutional Committee members even published an alternative bill – their personal constitution if you prefer – leaving out both national ownership of natural resources and equal voting rights as if no referendum had taken place. Having supplied more elected representatives to the Constitutional Council than any other single workplace, the University of Iceland or rather some of its units suddenly held a series of conferences at which mostly self-selected opponents of the bill, including the three minority members of the Constitutional Committee, aired their criticisms with increased fervor. As a rule, former members of the Constitutional Council were not invited to speak at these conferences<sup>32</sup> but some of them tried from their seats in the audience afterward and on blogs to correct some of the falsehoods propagated by several speakers. Professors were invited to give testimony to parliamentary committees. At one such parliamentary committee meeting two economics professors testified that the adoption of the bill, especially the natural resource provision, would be ruinous to the point of triggering a mass exodus from the country. No minutes were kept at these parliamentary committee meetings, a revelation *per se*; however, a member of the committee in question has published a description of the two professors' testimony, corroborated by a third witness at the meeting in question.<sup>33</sup> It needs to be added that many other academics not directly involved in the process supported the bill at the drafting stage and afterward, both as (mostly unofficial) advisors to (members of) the Constitutional Council and as external observers.

Even if the criticisms leveled at the bill are not really worth discussing because they missed the boat, I will do so below, briefly. If you are an architect, you do not submit your designs after the submission deadline has passed. You respect the rules, and await the next competition. This common rule of courtesy the opponents of constitutional reform in Iceland

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<sup>31</sup> The minutes of Constitutional Council deliberations are available only in Icelandic.

<sup>32</sup> An exception to the rule is the conference at which several of the chapters in this volume were presented (not including this chapter, however).

<sup>33</sup> Bertelsson and Gylfason (2014). Not long afterward, the two professors in question were appointed the Independence Party chairman and Finance Minister's chief economic advisors.

proved unwilling to respect. To repeat, the criticisms of the constitutional bill are irrelevant because the bill was accepted by the people in a national referendum called by Parliament and, as if that were not enough, the bill accords minutely – with a single significant exception described before, in Parliament’s favor as it happens – with the will of the nation as expressed by the National Assembly of 2010. No evidence has been presented to show that any provision of the bill contradicts the resolution of the National Assembly of 2010. The sole significant source of opposition to the bill springs from the political class and the special interests it represents, the usual suspects described by Elster (2015) as an *engrenage* of “cheap access to natural resources, a skewed electoral system, unsound banking practices, and corrupt politicians.” The criticism has been political through and through, not legal, even if some lawyers have tried to dress it up in terms of legal jargon.

### **3.3. Some criticisms**

For the record, let me review a few of the criticisms directed against the bill and describe why I disagree with them. One member of the CSC complained that the bill included a provision on the appointment of judges, an issue that all 23 representatives when asked had told the newspaper *DV* before the Constitutional Assembly election needed to be addressed in a new constitution. The CSC member’s complaint was that a new law had already been passed in the spirit of the constitutional provision proposed. We were, of course, aware of the new law, and inserted the provision into the bill simply to prevent the politicians from reverting to their old habits by retracting their recent reform of judicial appointments.

Some observers have remarked that the Constitutional Council lacked legal expertise. This complaint is misplaced. First, as stated earlier, a constitution is not a legal document but a political declaration of principle: In practice, a constitution can say whatever its framers want it to say. Second, there were four lawyers among the elected representatives on the council, and still more on its staff and among its advisors, including the lawyers on the Constitutional Committee. Third, Eiríkur Tómasson, a respected law professor, now Supreme Court justice, acted as the Council’s official legal advisor during the last few weeks of our work. I consulted with several other law professors and judges throughout the process as I am sure several of my council colleagues did as well. Constitution makers do not need to be experts in law or anything else for that matter just as MPs do not need to be experts. The key is to have democratically elected, competent, and well-intentioned representatives with good access to experts as well as to other citizens as needed. This we had, and this is an important reason why the council succeeded and the bill was accepted by the voters. For example, the

stipulation in one of the environmental protection clauses that “Previous damage shall be repaired to the extent possible” was suggested by Ingvi Thorsteinsson, a well-respected natural scientist who is the main author of Iceland’s maps of vegetation that show how the country changed color from green to gray over the centuries, primarily due to grazing on public lands. For another example, both my council colleague Ómar Ragnarsson, one of Iceland’s foremost environmentalists, and I consulted with Magnús Thoroddsen, a former Supreme Court Chief Justice who had been instrumental in winning a landmark case before the UNHRC on behalf of two fishermen who sued the Icelandic state for violating their human rights by discrimination *via* unequal access to the nation’s common property fish resources. Even more importantly, whether experts or not, among the nearly 500 people who ran for Constitutional Council but were not elected there were many, including Mr. Thoroddsen, who helped shape the bill and helped it win public acceptance in the 2012 referendum.

Some have complained about the bill being drafted by a group most of whose members reside in the Reykjavík area. This concern is not, however, born out by the results of the 2012 referendum. All six questions except the one on church and state were answered in accordance with the bill in all six constituencies, with only two exceptions: The two rural northern constituencies (northwest and northeast) came out against ‘one person, one vote.’ The other two rural constituencies – against their own interests, you might think – came out in favor of ‘one person, one vote’ as did the two urban ones (Helgason 2013). Accordingly, not too much should be made of the conflict between the rural voters and the rest in this case. In fact, most of the council members residing in the Reykjavík area had strong roots in other parts of the country. Once again, the bill is fully consistent with the resolution of the National Assembly where all regions had fair representation.

The single most often heard criticism of the bill is that the ‘academic community’ turned against it. This is, of course, irrelevant and also false for the simple reason that in a pluralistic, democratic society there is no such thing as an ‘academic community’ as far as politics is concerned. Like other professions, academics can naturally disagree on politics. The fact that some university employees resort to dressing up their political beliefs and loyalties in academic garb is a different thing, familiar mostly from former communist countries but new in Iceland.

## 4. Conclusion

As Elster (2015) points out, “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 ...”

This problem is at the heart of Iceland’s predicament at present, making it even relevant to consider extra-constitutional means of respecting the popular will as expressed in the 2012 referendum rather than caving in to politicians keen to thwart the will of the people to protect their own interests and those of their principals. The situation is quite serious. The next parliamentary election, to be held no later than 2017, is likely to be challenged in court at home and abroad because it will be held according to election laws that 67 percent of the voters rejected in the 2012 referendum by declaring their support for ‘one person, one vote.’<sup>34</sup> This prospect would have been averted had Parliament abided by the will of the people before and after the 2013 parliamentary election.

The conduct of Parliament is seen by many as a direct affront to democracy in Iceland. Events like some of those described in this chapter – six Supreme Court judges annulling a national election on flimsy if not illegal grounds, Parliament deliberately disrespecting the overwhelming result of a constitutional referendum – are unprecedented. They are not supposed to occur in a democracy. The constitution remains on ice, held hostage by a new parliamentary majority of the Independence Party and the Progressive Party, in government together again since mid-2013. Parliament set up a new Constitutional Committee, modeled on the many such committees that failed to produce a new constitution in the past and headed by a resolute opponent of constitutional reform who suddenly, a year later, at age 83, stepped aside on the grounds that he was too busy with other things.<sup>35</sup> The committee views the constitution bill as one among several ‘options’ as if no referendum had taken place. Such flirting with a farewell to democracy would be unthinkable in Denmark, Finland, Norway, or Sweden – and many other countries as well. But then, as described in Section 1, two thirds of Icelanders describe their politics as corrupt, a proportion much closer to those observed in Russia and Ukraine than in the rest of the Nordic region (Gallup 2013).

The new government’s readiness to disrespect the will of the people is not confined to the new constitution. In early 2014, thousands gathered in Parliament Square every Saturday like in 2008-2009 to protest against the government’s plan to unilaterally pull out from the

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<sup>34</sup> Further, 78% of the voters said Yes to permitting personal elections to Parliament to a greater degree than at present and 73% said Yes to including provisions enabling a specific proportion of the electorate to call for a national referendum on a specific matter (Gylfason 2012).

<sup>35</sup> His place was promptly taken by the lawyer from the Prime Minister’s office mentioned in Section 2.5.

accession negotiations with the EU, underway since 2009, without keeping its explicit promise to allow the voters to have the last say in a referendum. About 22 percent of those eligible to vote signed a petition demanding a referendum on the pullout, over twice as many as would have sufficed to take the matter out of Parliament's hands had the new constitution taken force already. Several of the problems that have made the coalition parties' popular support plunge from 51 percent in the April 2013 election to 36 percent in the latest poll (July 2014) could have been averted had the new constitution been in place. In particular, the government's plan to give the vessel owners exclusive rights to the fishing grounds for 20-25 years would be rendered impossible, a plan which the government had to postpone because it lost courage in the face of the protests against its planned pullout from the EU negotiations. Many see Iceland as having gradually become a Russian-style oligarchy. The suffocating embrace between vessel owners and politicians is at the heart of Iceland's deep-seated 'Socialism of the Devil' that made Iceland crash.<sup>36</sup> Hence the emphasis of the constitutional bill on checks and balances intended to strengthen Parliament and the courts, including the way MPs and judges are selected, to reduce the risk of continued executive overreach. In a nutshell, the new constitution would help bring Iceland back into the Nordic fold.

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<sup>36</sup> By 'Socialism of the Devil' is meant an arrangement where gains accrue to the so called private sector and losses are imposed on the tax-paying public.

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