

Presentation at a training seminar for Civil Society
Organizations in Kiev, Ukraine, 18 September 2015

Public Engagement in Constitution Making



"... criticism of Iceland's political culture must be taken seriously ... Parliament resolves that the report of the Special Investigation Commission of the Parliament constitutes a condemnation of the government, politicians, and public administration."

Unanimous resolution by Icelandic Parliament
28 September 2010

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Outline

- 1) Preliminaries
- 2) Background and history
- 3) Some numbers
- 4) Pots and pans
- 5) Democracy in action
- 6) Resistance
- 7) Conclusion

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Dilemma

- Being asked to talk about the way public engagement was used in the making of a new crowd-sourced constitution in Iceland after the 2008 crash is a bit like being asked to talk about the beauty of a stolen object
 - True, public engagement was quite helpful
 - Less well known is the fact that politicians are at present keeping the constitution on ice
 - Here is the Iceland story, and lessons to be drawn

Preview of conclusions

- Public engagement, including the use of social media, can facilitate policy dialogue on constitutional and other issues, especially when democracy is weak or governance is corrupt, or both
- Yet, public engagement, including the use of ICT (Information and Communications Technology) and crowd sourcing, is not a substitute for representative democracy but rather a tool for fortifying democracy

Overview

- First-world economy, third-world politics
 - Decaying social capital, low trust, etc.
 - Need for public engagement
- Iceland's response to 2008 collapse
 - IMF-supported rescue operation – went well
 - Prosecutions of financial fraud – underway
 - Thirty prison years thus far, and counting
 - Constitutional reform – held hostage
 - Strong popular support in 2012 referendum followed by overt political attempts to thwart the will of the voters
 - Some of what you will hear today will sound familiar

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Background and history

- Many new constitutions in Europe
- After the collapse of communism in 1989-91, East and Central Europe adopted about 25 new constitutions, all except Hungary
- Most constitutions are written or revised following economic or political upheaval because crises often trigger demands for a fresh start or expose flaws to be fixed
 - In quiet times, people and politicians most often feel they have other things to think about
 - Exceptions: Sweden (1974), Canada (1982)

Background and history

- Jon Elster (1995) describes **seven waves** of constitution making following the US Declaration of Independence in 1776
 - 1) During 1780-91 the US, Poland, and France adopted new constitutions, as did Sweden in 1809 and Norway in 1814
 - 2) Following revolutions in **Europe in 1848** several countries adopted new constitutions some of which did not last long because the revolutions producing them were suppressed
 - 3) After World War I (1914-18) Poland, Czechoslovakia, and defeated Germany passed new constitutions
 - 4) After World War II (1939-45) Italy, Germany, and Japan had new constitutions essentially dictated to them by the victors
 - 5) As the sun set on the colonial empires of the UK, France, and others after 1945, new constitutions in Asia and Africa
 - 6) Authoritarian regimes in Southern Europe were driven from power in 1974-78 and Greece, Portugal, and Spain adopted new democratic constitutions
 - 7) The seventh and last wave swept East and Central Europe after the collapse of communism beginning in 1989, with about 25 new constitutions, all except Hungary (until 2012)

Background and history

- Yet, financial crises have not in the past given rise to new constitutions
 - The Great Crash of 1929 was followed by changes in laws, erecting firewalls between commercial banking and investment banking
 - Glass-Steagall Act of 1933 in US plus SEC in 1934
 - Had a constitutional amendment been better?
- Iceland is an exception
 - Financial crash of 2008 had deep roots
 - This is why the pots-and-pans revolution after the crash demanded, among other things, a new, or at least revised, constitution

Background and history

- One of Iceland's key constitutional problems is the absence of effective checks and balances that has bred executive overreach, i.e., made it possible for the executive branch to grab too much power from parliament and the courts
- Two examples
 - On their own, two ministers decided to enlist Iceland in the “Coalition of the willing” invading Iraq in 2003 without any consultation with, or even possible recourse for, the parliament
 - After Supreme Court in 1998 ruled that the system of fisheries management is discriminatory and unconstitutional, Court reversed its opinion in 2000 under visible pressure from same two ministers

Background and history

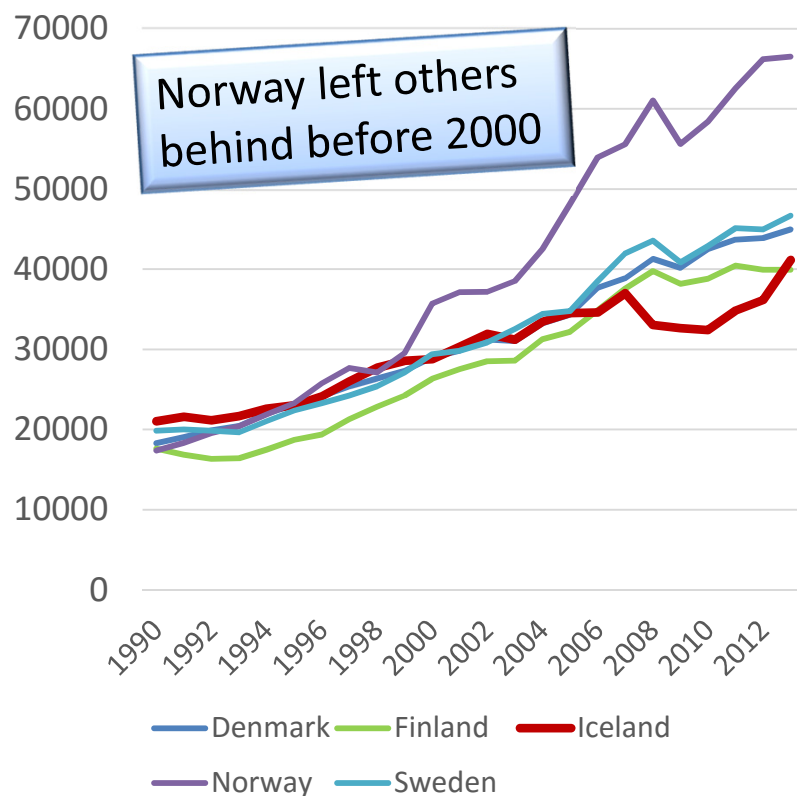
- The supremacy of the executive branch over the legislative and judicial branches made it easier for the government to join hands – some would say jump into bed – with the bankers
 - First, by selling their political cronies state banks at ‘modest’ prices, Russian style
 - Then, by making sure that the banks would not be bothered too much by regulatory restraint and inquisitive financial supervision
 - The banks gave and lent money generously to political parties as well as to individual politicians (SIC report)
 - \$8 per person compared with 60 cents in US in 2010

Background and history

- Iceland's constitution dates from 1944 when Iceland separated from Nazi-occupied Denmark
 - Derived from Denmark's (and Norway's) constitution, with nationally elected president substituted for hereditary king, the Icelandic constitution was intended to be only provisional
 - Hails from 1874, or rather 1849
 - Parliament promised to revise it, but has failed to do so since 1944 despite repeated attempts
 - Strange for a newly independent country to copy the mother country's constitution rather than make a new one
- It took the crash of 2008 for the government to give in at last and decide to convene a Constitutional Assembly to do the job

3 Income per person and per hour (Current international \$, ppp)

GNI per capita 1990-2013



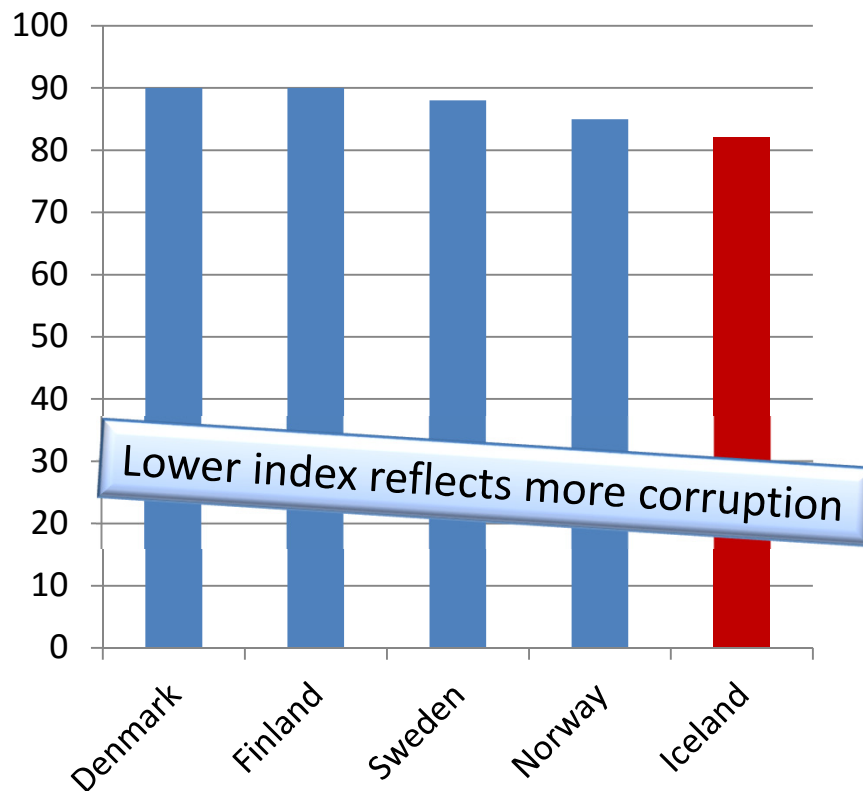
GNI per hour worked 1990-2013



Source: World Bank *World Development Indicators* and The Conference Board *Total Economy Database™*, January 2013, <http://www.conference-board.org/data/economydatabase/>.

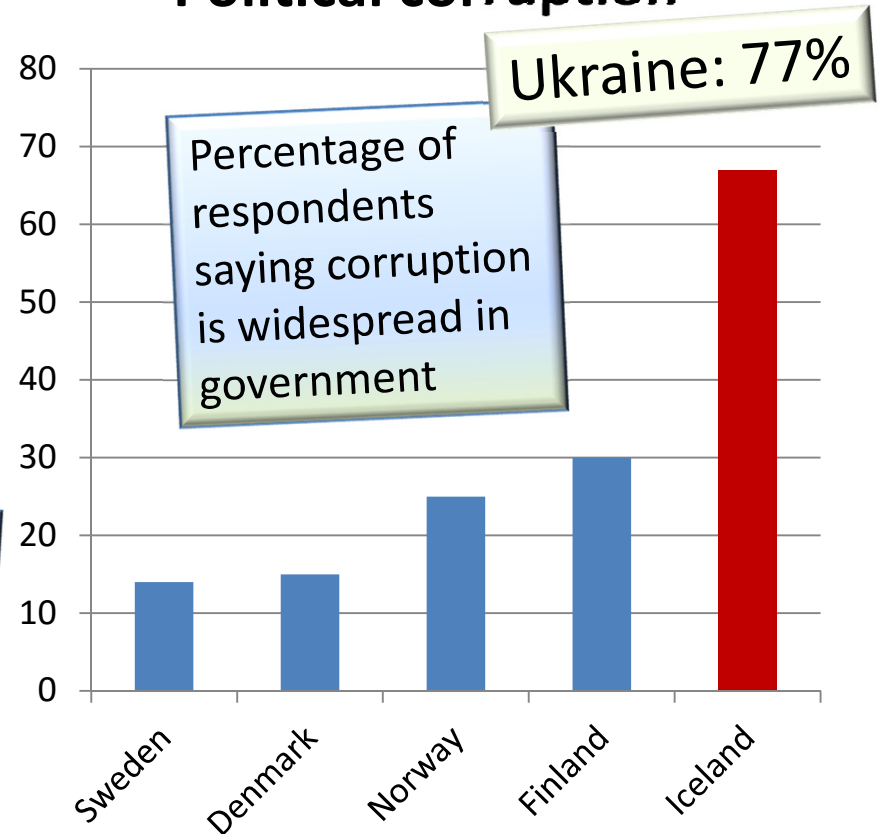
Corruption 2012

Business corruption



Source: Transparency International.

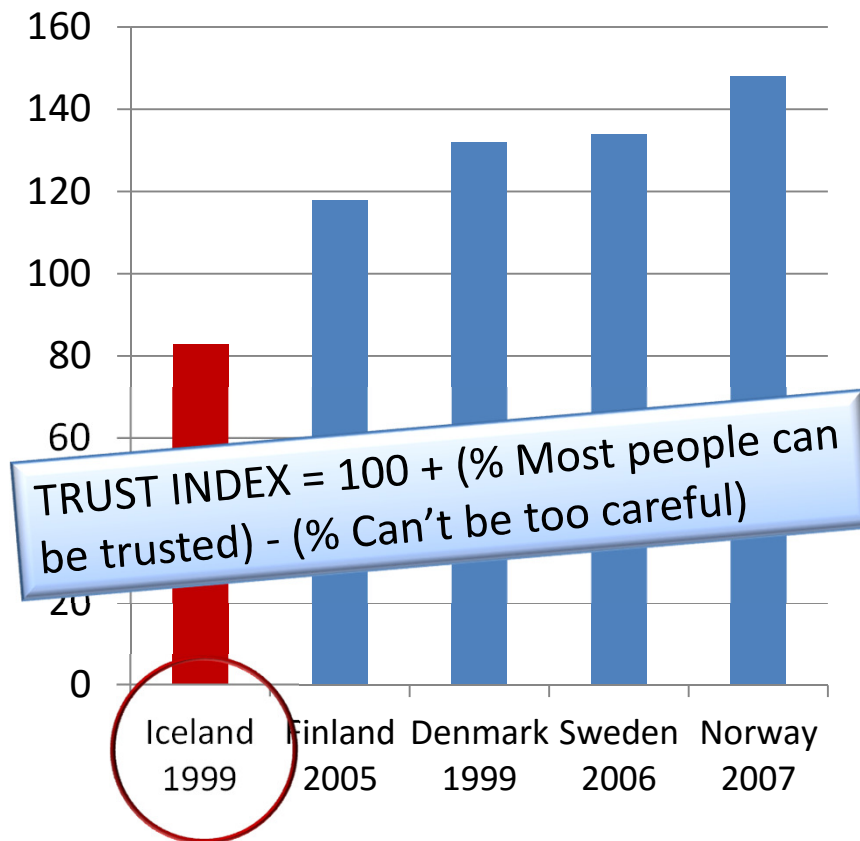
Political corruption



Source: Gallup,
<http://www.gallup.com/poll/165476/government-corruption-viewed-pervasive-worldwide.aspx>.

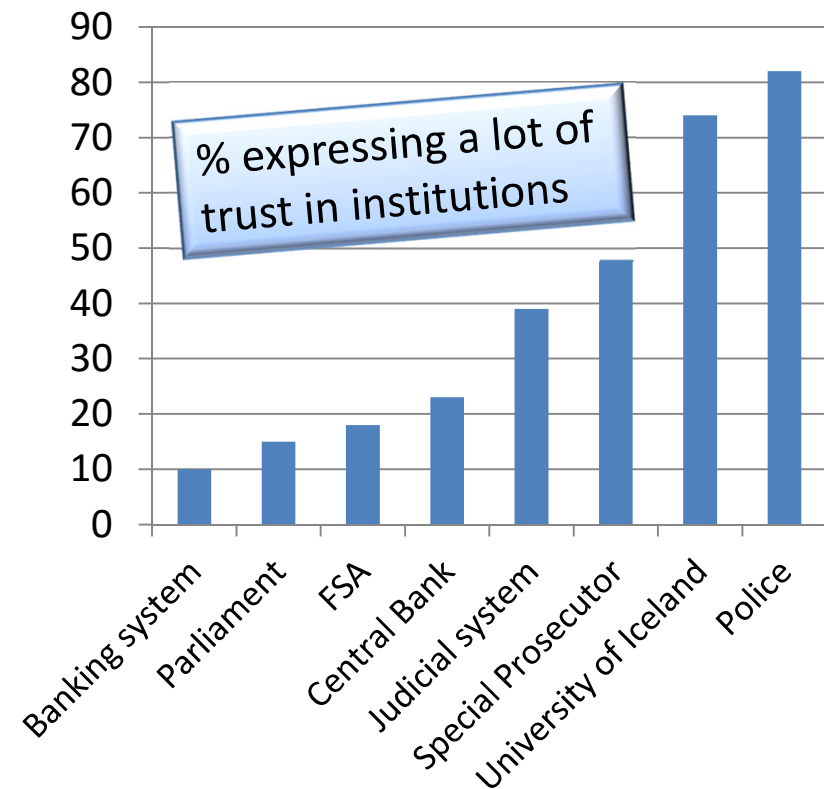
Interpersonal trust and trust in institutions

Trust in other people



Source: World Values Survey.

Iceland: Trust in institutions 2013



Source: Capacent (Gallup).

4

Beginnings: Pots and pans

- Iceland's banking system crashed in 2008
 - Biggest trauma in nation's history
 - Existential threat
 - People took to the streets, young and old, banging their pots and pans, demanding action
 - Government resigned
- New post-crash government listened to the people
 - Admitted to mistakes and structural flaws
 - Offered to clean up the political culture
 - Promised reforms, including a new constitution



Beginnings: Pots and pans

- “Criticism of Iceland’s political culture must be taken seriously and [Parliament] stresses the need for lessons to be learned from it. Parliament resolves that the report of the Special Investigation Commission of the Parliament constitutes a condemnation of the government, politicians, and public administration.”
 - Parliament’s unanimous resolution in 2010

New post-crash constitution

- When countries crash, it is natural to question their constitutional foundations
 - Iceland has a provisional constitution from 1944 that failed to avert executive overreach at the expense of the legislative and judicial branches of government
 - Politicians promised a constitutional overhaul for 70 years, but failed to deliver
- Up against the wall after the crash, the government admitted that the game was up
 - Promised a new people's constitution drafted by a directly elected Constitutional Assembly, not by politicians or political appointees and their lawyers

New constitution: Why?

- Two important reasons for having the constitution written by the people rather than by politicians and their lawyers, one local, one universal
 - Parliament's long-standing failure to deliver, since 1945
 - Other examples of country-specific reasons
 - Catalonia, Scotland
 - Constitution is meant to limit the powers of parliament and to lay out, *inter alia*, the method by which MPs are elected, tasks that would create a conflict of interest if assumed by parliament itself
 - Karl Popper (1966) put the problem well:
 - “How can we organize political institutions so that bad or incompetent rulers can be prevented from doing too much damage?”

New constitution: Why?

- Since 1944, when Iceland adopted what was essentially a translation of the Danish constitution from 1849, Parliament had consistently failed to keep its promise of constitutional reform
 - Appears inconsistent to declare independence and still retain constitution of mother country
 - Consider Catalonia and Scotland today
 - Only piecemeal adjustments of electoral clauses
- Without crash in 2008, no new constitution

5 New constitution: Four steps

Step 1: Parliament appointed in 2009 a Constitutional Committee comprising mostly academics from a range of fields (law, literature, science) to gather information, provide analysis, propose ideas

- Seven members from different directions produced a 700-page report
 - Constitution is not exclusively, and not even principally, a legal document, but primarily a social compact, a political declaration that supersedes ordinary legislation by virtue of the fact that the people's legitimacy is superior to that of Parliament

New constitution: Four steps

Step 2: Parliament convened a National Assembly in 2010 at which 950 citizens, drawn at random from National Register through stratified sampling, defined and discussed under expert supervision what should be in the new constitution



- Every Icelander 18 years or older had an equal chance of being invited to take a seat
- Stratified sampling was used to ensure gender balance as well as balance across regions, etc.

New constitution: Four steps

Step 3: Constitutional Committee organized election of 25 Constitutional Assembly representatives to draft the constitution in 2011

- Constitutional Assembly produced a partly crowd-sourced constitutional bill, fully consistent with the conclusions of the National Assembly, and passed it unanimously with 25 votes to 0
- Assembly included 5 professors plus 3 junior academics
- 25 representatives were elected from among 523 candidates by STV (Single Transferable Vote) method to minimize number of 'dead' votes
- Elected representatives were a good cross section of society, with education well above average

New constitution: Four steps

- Civilized election campaign – not a campaign, really
- Candidates viewed themselves not as competitors but rather as advocates of a common cause
- The 25 elected were doctors, lawyers, priests, and professors, yes, ...
- ... but also company board members, a farmer, a fighter for the rights of handicapped persons, mathematicians, media people, erstwhile MPs, a nurse, a philosopher, poets and artists, political scientists, a theatre director, and a labor union leader
 - 10 women, 15 men, about a half with no political affiliation

New constitution: Four steps

Step 4: Parliament held a national referendum on the bill in 2012

- Opposition in parliament tried to derail referendum, but managed only to delay it
- Even government parties and their MPs showed little interest in the referendum
- Main advocates of bill were members of civil society
- Bill was accepted by 67% of the voters
- Its individual key provisions, also put on the ballot by Parliament, were approved by 67%-83% of the voters

New constitution: Popular support

- Parliament was prevented through filibuster by minority from holding a promised national referendum at the time of the presidential election in June 2012
 - Parliament decided by 35 votes against 15 to hold a special advisory national referendum on the bill in October 2012
 - Ballot included five auxiliary questions on substance, e.g., about equal voting rights and whether to declare natural resources to be the property of the nation
 - Voter turnout was 49% even if the bill was practically a political orphan

New constitution: Popular support

- Clear and unequivocal results of referendum
 - General support for the bill: **67% said Yes**
 - Public ownership of natural resources: **83% said Yes**
 - Election of persons to parliament: **78% said Yes**
 - Equal voting rights: **67% said Yes**
 - Direct democracy through national referenda: **73% said Yes**
- Yet, political parties did not express support for the bill, most of them did not even encourage their supporters to vote

New constitution: Popular support

Broad consensus in favor
of significant changes

- People wanted change
 - Conclusions of National Assembly were cohesive and clear
 - Answers given by elected Constitutional Assembly members to media were equally clear
 - Overwhelmingly, they favored
 - Changing the constitution
 - Equal voting rights everywhere in the country
 - Public ownership of natural resources
 - More national referenda
 - Strengthening the right of the public to information
 - Checks on the Minister of Justice's ability to appoint judges on his or her own
 - Public opinion polls reflected similar sentiments

New constitution: Echo from US

- Assembly/Council had 4 months to do its work
 - No problem
 - US constitution was written in 4 months in 1787
 - Strong emphasis on human rights, including equal voting rights and national ownership of natural resources as well as on checks and balances
 - Preamble declares that
 - “We, the people of Iceland, wish to create a just society with equal opportunities for everyone.”

New constitution: Echo from US

◉ Similarities with US 1787-88

- Bill was 4 months in the making
- Put to a referendum 9 months thereafter, following intense political debate and outpouring of writing
- Federalists beat anti-federalists by narrow margins
 - Virginia: 89 to 79 votes
 - New York: 30 to 27 votes
 - Massachusetts: 187 to 168 votes
 - Rhode Island referendum: Bill was rejected
 - But approval by 9 states out of 13 was enough
 - If 20 people had voted No rather than Yes, the bill would have failed!

New constitution: Process I

- Council decided to invite public to participate
 - There was interest: 522 persons ran for 25 assembly seats
 - This was a way to invite them, and others, to participate
 - Everyone was free to step forward and put suggestions on the table
 - Three overlapping rounds
 - Each week, Council posted on its interactive website, the first of its kind, some new provisional articles for perusal by the public
 - 2-3 weeks later, after receiving comments and suggestions from the public as well as from experts, Council posted revised versions of those articles on the website
 - In a final round, proposals for changes in the document as a whole were debated and voted upon article by article, and the final version of the bill was prepared
 - At the end of the last round, each article was approved by an overwhelming majority of votes
- Bill as a whole was passed unanimously, by 25 votes against 0, a rare feat

New constitution: Process II

- Open invitation was well received
 - Council received 323 formal proposals
 - All were discussed and answered by one of three committees
 - Over 3,600 comments were posted on website by visitors
 - Council representatives answered many if not most of them
 - Direct webcasts, also aired on TV, were regularly watched by about 150-450 viewers
 - Over 50 interviews with Council members and others concerned were posted on YouTube
 - They had, by late 2011, been viewed 5,000 times

You need to multiply these figures by 140 to find comparable ones for Ukraine

New constitution: Process III

- At the same time, many experts advised the Council every step of the way
 - Lawyers and others
 - In meetings as well as in writing
- Council could not seek the advice of all available and eligible experts
 - However, like everyone else, those who had points to make were welcome to do so
- Council did not invite representatives of interest organizations to special meetings
 - These organizations had same access as everyone else to Council (bankers, boat owners, environmentalists, farmers, labor unions, etc.)

New constitution: Process IV

- How the bill was made
 - Drafted from scratch, based on 1944 constitution
 - Text was made public week by week for perusal by the public that was invited to offer comments and suggestions on an interactive website, as hundreds did
 - Thoughtful and constructive comments were received
 - Key point again: Open invitation to all made it unnecessary to invite representatives of special interest organizations to express their views
- Bill reflects broad consensus in favor of change
 - Firmly grounded in 2010 National Assembly
 - Helps explain 67% support in 2012 national referendum



New constitution: Process V

- Bill embraces continuity plus new provisions
 - Checks and balances to limit executive overreach
 - Equal voting rights, i.e., ‘one person, one vote’
 - National ownership of natural resources
 - Environmental protection
 - Freedom of information
 - Safeguards against corrupt appointments to public office
- Some of these provisions are feared by politicians owing their political careers to, yes,
 - Unequal voting rights
 - Discriminatory management of natural resources

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Resistance to reform I

- With time, support in Parliament for constitutional reform weakened
 - Opposition emerged gradually
 - Political parties showed no interest in Constitutional Assembly election in 2010, could not field candidates
 - Supreme Court annulled the election on flimsy grounds
 - Unprecedented event, never happened before in a democracy
 - Political parties did nothing to promote the bill before referendum in 2012; the bill was an orphan
 - Only after the bill was accepted by 67% of the voters, its opponents turned openly against it, waving objections that no one had raised before concerning provisions that Parliament had seen no reason to put on the ballot
 - Their criticism, sometimes dressed up in legal jargon, was political – and irrelevant, i.e., it came too late

Resistance to reform II

- Parliament had moved slowly
 - When Constitutional Council, after 4 months of work, had delivered the bill to Parliament, the minority in Parliament used filibuster against the bill, for months
 - Majority in Parliament shied away from breaking the filibuster
 - Minority complained that it did not have enough time (!) and delayed referendum from June to October 2012
 - After referendum, where turnout was 49%, minority claimed that those who stayed at home were opposed to the bill (!)
 - Parliament asked local lawyers to polish language without changing the substance of the bill
 - They tried but failed to turn natural resource provision upside down
 - Parliament asked Venice Commission for its views, and found them easy to incorporate into the bill

Resistance to reform II

- Some MPs have at least two strong reasons for not wanting to see the bill go through
 - Equal voting rights article will make some MPs unelectable because they are the products of an electoral system allowing political parties to allocate ‘safe seats’ to candidates with limited following
 - Some MPs are being asked to vote against their own interest
 - Natural resources article will not please some MPs either because, to quote a former newspaper editor, a keen observer, “it means political suicide to rise against the quota holders [i.e., oligarchs] in rural areas”
- Hence, we say to MPs:
 - The people have spoken (67% for, 33% against)
 - Do the right thing: Set personal interests aside and respect the people’s acceptance of their new constitution
 - “All state powers spring from the nation”

Resistance to reform IV

- Private citizens opened a website inviting MPs to declare in writing if they wanted to pass the bill in keeping with the results of the referendum
- ★ – Gradually, 32 MPs (majority) declared their support
 - If Parliament voted in secret, bill might have stranded
- On last day of Parliament before 2013 election, violating procedure, Speaker did not bring bill to a vote
 - 2013 election brought the old rascals – main opponents of the bill – back to power
 - Bill was put on ice by MPs who refer to the 2012 national referendum as an irrelevant ‘opinion poll’

Resistance to reform V

Classic contest between
special vs. public interest

- Two main obstacles
 - Parliament, as always
 - New constitution requires consent by simple majorities in two parliaments, with an election in between
 - Powerful special interest groups and oligarchs
 - Vessel owners, with lots of public money in their pockets, have strong influence on MPs
 - There is, understandably, strong opposition to constitutionally protected removal of privileges
 - Equal voting rights
 - Equal, unprivileged access to natural resources
 - Ready access to information
 - Protection against corrupt appointments to public office

Resistance to reform VI

- As Jon 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 ...”
- The conduct of Parliament, one of world’s oldest, is seen by many as a direct affront to democracy
 - Events like some of those described here – six Supreme Court judges annulling a national election on flimsy grounds, Parliament deliberately disrespecting the overwhelming result of a constitutional referendum – are not supposed to happen in a healthy democracy

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New constitution: Lessons

- ◎ Bill is available in English
 - <http://stjornarskrarfelagid.is/english/constitutional-bill/>
- ◎ Bill has been intensely studied and scrutinized
 - It was favorably reviewed on national TV by [Prof. Jon Elster](#) of Columbia University as well as by [Prof. Tom Ginsburg of the University of Chicago and his associates](#) who predict that it will, if ratified, last for 60 years
 - It was fine-combed by a team of Icelandic lawyers appointed by parliament which accepted several of their proposed changes of wording, but not of substance
 - It was, at the last minute, reviewed by the Venice Commission some of whose usable suggestions Parliament incorporated
 - Local critical voices, silent until after the referendum, echo special interests (boat owners, politicians) keen to preserve the *status quo* for their own benefit
 - Impervious to the demonstrable quality and deeply democratic nature of the bill, opponents continue their sabotage in Parliament

New constitution: Lessons

- Lessons for other countries
 - With the world's largest per capita number of internet users, or 98%, compared with 87% in US and 43% in Ukraine, Iceland's constitutional crowd sourcing can hardly raise concerns about unequal access
 - Unconnected 2% are disproportionately old people
 - Democratic gains seem to easily outweigh losses from slightly unequal access
 - Applicability to less well connected countries is debatable
 - Can argue that the young, well-connected minority merits a good position to sway new constitutions in the public interest
 - US founding fathers: Every generation needs its own constitution

Lessons for other countries

- The Icelandic process was practically flawless
 - Quite similar to US constitutional process in 1787
- The sole problem has been political sabotage in Parliament as well as, perhaps, public apathy
- Other countries can do the same in three steps
 - Democratically elected constitutional assembly, free from political interference
 - Drafting of constitution with crowd-sourced input screened by statistical sampling techniques
 - National referendum, binding as in US in 1787

Democracy on ice

- Deeply democratic process by design
 - National Assembly
 - Constitutional Assembly with crowd sourcing
 - National referendum in 2012 , decisive acceptance
 - 67% said Yes to the bill as a whole (voter turnout was 49%)
 - 67% to 83% said Yes to individual key provisions
 - These results make criticism of method and substance irrelevant
- Parliament failed to ratify the will of the people, putting the bill on ice
 - Direct and dangerous affront to democracy
 - Will have grave consequences if politicians persist in disrespecting results of a national referendum
 - If so, Iceland will never be the same
 - My prognosis: Democracy will prevail

Conclusion

These [slides](#) and the [paper](#) behind the slides are accessible on my [website](#)

- Iceland faces uncertain prospects
- Many see Iceland as having gradually become a Russian-style oligarchy marred by sometimes cartoonish corruption
 - Parliament's disrespect for the constitutional referendum deepens such concerns, further undermining social cohesion and public trust
- Parliament flirts with a farewell to democracy
 - Also in other areas, including EU membership application and fisheries policy

THE END