Introduction

1. Evolution of Iceland's constitution

The descendants of the Vikings who settled Iceland in 874 established Althingi in 930, one of the world's oldest parliaments still in existence. The Golden Age that followed produced sophisticated legislation as well as literature, the Icelandic sagas. The good times came to an abrupt end in 1262 following violent strife among competing local chieftains. Tired of lawlessness, the Icelanders acceded to the Norwegian crown. Along with its Icelandic dependency, Norway belonged to Denmark from 1380 until 1814 when Denmark was forced to cede Norway to Sweden, keeping Iceland in the Danish realm.

In 1874, when Icelanders were preparing to celebrate the 1000th anniversary of the island's settlement, Althingi (the Icelandic parliament) was deadlocked in debate about a constitution. King Christian IX of Denmark resolved the impasse on his visit to Iceland in 1874 when he brought Iceland its first constitution, which was essentially an Icelandic translation of the Danish constitution from 1849.

Denmark granted Iceland home rule in 1904, after liberals won a majority in the Danish Parliament in 1901. There were two exceptions. The Danes still handled Iceland's foreign affairs and the Supreme Court of Denmark remained Iceland's highest court. A new agreement (Act of Union) on a royal union between Denmark and Iceland in 1918 marked the beginning of Iceland as a sovereign state, fully in charge also of its judicial affairs.

The 1918 Act of Union agreement included a provision stating that the agreement could be revised after 25 years should either country wish to do so. In 1943, at the height of the Second World War, Althingi decided to prepare a unilateral repeal of the Act of Union with Denmark (occupied at the time by Nazi Germany). Icelanders decided in a May 1944 referendum to declare full independence and establish a republic. Turnout was 98%, with 99.5% supporting the separation from Denmark and 98.5% supporting the new provisional constitution establishing the republic.

Iceland's 1944 constitution was intended to be provisional. This is why, when it declared full independence from Nazi-occupied Denmark in 1944, Iceland did not bother to make any but minimal changes to the 1874 constitution dictated to Iceland by the Danish King. Rather than have a new constitution prepared as befitted a new republic, the parties in Althingi settled on modest changes to the 1874 constitution, the bare minimum required. Most importantly, the word King was replaced by the word President. The political parties in Althingi wanted the new president to be selected by Althingi and to be merely a ceremonial figure head, like a King, but Governor Sveinn Björnsson prevailed, emboldened by Iceland's first scientific opinion poll that showed 70% of respondents in favor of a president elected directly by the people. The political parties in power at the time promised a comprehensive revision of the constitution very soon thereafter, no later than 1946. That promise was not kept.

Iceland's system of government under the 1944 constitution is best described as a semi-presidential parliamentary system, that is, a parliamentary system where the President, by design, has a constitutionally protected authority to veto legislation and also to appoint an extra-parliamentary government in keeping with the precedent from 1942, to appoint and dismiss ministers, and to present bills in Althingi.

Introduction

Before 1944, Iceland's constitution was amended three times:

- The 1874 constitution was amended in 1920 when the Supreme Court of Iceland was established. Foreign affairs remained the responsibility of the King (that is, the Danish government) until Iceland appointed its first foreign minister in 1940.
- In 1934, Iceland's constitution was amended a second time to increase the number of seats in Althingi to keep up with population growth.
- The constitution was amended a third time in 1942 in an effort to reduce the rural bias of the electoral provision of the constitution, raising the number of parliamentary seats to 52 (one for every 2,400 Icelanders).

Since 1944, the constitution has been amended several times:

- First, in 1959, the history from 1942 repeated itself when the Independence Party and the two left-wing parties in Althingi again united against the Progressives by changing the electoral provision in the constitution to make voting rights more equal, increasing the number of seats in Althingi to 60.
- A further change was made in 1984, effective 1987, when the number of parliamentary seats was increased to its current level of 63.
- The constitutional changes of 1942, 1959, and 1984 were mainly intended to reduce the inequality of voting rights by moving parliamentary seats from rural areas with dwindling populations to the emerging towns, including Reykjavík.
- The last such corrective amendment, in 1999, sufficed temporarily to eliminate the systemic rural bias favoring the Progressive Party.
- Other amendments to the constitution include a reduction of the minimum voting age to 20 years in 1968 and to 18 years in 1984. Althingi was made unicameral in 1991 to streamline its work. New but rather modest provisions on human rights were added in 1995.
- Since 1944, Althingi has rejected or not acted on 100 proposed constitutional amendments of various kinds.

Along the way, from 1944 onward, Althingi appointed one constitutional committee after another, most of them consisting of members of Althingi or their representatives. The four electoral reforms of 1942, 1959, 1984, ad 1999 grew out of such work as did the other less significant changes described above. These committees could never agree on a general overhaul, however, solemn promises from 1944 onward notwithstanding (Jóhannesson 2012).

2. Iceland's current constitutional change process

The post-2008 financial crash Pots and Pans revolutionaries demanded a new constitution. Humbled by the crash, Althingi agreed and promised a new constitution would be drafted by the people. Setting the long overdue constitutional reform project in motion, Althingi took four important steps.

Step 1. In June 2010, Althingi appointed a Constitutional Committee with seven members comprising professionals from a range of fields. The committee was led by Dr. Guðrún Pétursdóttir, a physiologist and director of the Institute for Sustainability Studies at the University of Iceland. Other members included a philosopher and a professor of literature as well as four lawyers. The composition of the committee reflected the understanding that a constitution is not exclusively,

and not even principally, a legal document, but is rather a social compact, a political declaration that supersedes ordinary legislation because the people are superior to Althingi. The committee produced a 700-page report that analyzed the 1944 constitution provision by provision, with suggestions for new or revised text.

Step 2. In November 2010, a National Assembly comprising 950 citizens from 18 to 91 years of age was convened. The representatives were drawn randomly from the National Population Register. They met for one day to define and discuss their views of the new constitution. The meeting was held under foreign expert supervision, based on experience gathered at a similar meeting the year before organized by private citizens interested in collective intelligence. The random invitation to attend the National Assembly was subject to side conditions to insure gender balance, fair representation of different regions, and such. Herein lies the democratic backbone of the constitutional reform project: Every Icelander 18 years or older had an equal chance of being invited to participate in the National Assembly.

Step 3. In November 2010, Althingi held a national election for 25 representatives to form a Constitutional Assembly to draft the constitution in 2011. No such election had ever been held before in Iceland. For the purpose of the election, the country was one constituency, ensuring equal weight of votes in all parts of the country. The political parties did not field candidates or try to influence the election. Members of Althingi were not eligible to run. More than 500 individuals put their names forward. Voter turnout was 37%, a respectable figure in view of the fact that political parties and interest organizations did not encourage their supporters to vote. The 25 candidates who received the most votes were a broad group with diverse experience. A striking feature of those elected 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). The group also included company board members, a labor leader, a farmer, a champion for the rights of handicapped persons, media persons, an entertainer and environmentalist, erstwhile members of Althingi, a nurse, poets and artists, and a theatre director—a good cross section of society. The group was keen to engage members of the public in its work. To this end, draft text was made public week by week for perusal by the public, who were invited to offer comments and suggestions on an interactive website. The Constitutional Assembly received hundreds of thoughtful and constructive comments. This open invitation to all made it unnecessary to invite special interest organization representatives. After four months of work the Constitutional Assembly (renamed Constitutional Council after a botched attempt by the Supreme Court to invalidate the election of the 25 representatives on flimsy grounds) produced a partly crowd-sourced constitutional bill, fully consistent with the conclusions of the National Assembly, passed it unanimously with 25 votes to 0, and delivered it to Althingi in July 2011.

Step 4. In October 2012, Althingi held a national referendum on the bill. Voter turnout was 49%, which again may be considered respectable in view of the fact that the political parties, even the governing coalition parties that had launched the reform project, did little or nothing to promote the bill or to encourage their supporters to vote. Even so, 67% of the voters approved the bill, answering "yes" to the question: "Do you want the proposals of the Constitutional Council to form the basis of a legislative bill for a new Constitution?"

Shortly after the referendum, several critics including opposition politicians, some academics, and others who had remained silent on the bill before the referendum, launched an all-out attack on the bill. They raised objections that no one had raised before concerning provisions that Althingi had seen no reason to put on the ballot in the referendum. Less subtle critics complained about the alleged illegality and lack of mandate of the Constitutional Council following the Supreme Court´s

invalidation of the 2010 election, low turnout in the 2012 referendum that some critics still refer to as an "irrelevant opinion poll," and such. These critics do not appear to respect or understand the fact that their complaints about procedure, whether valid or not, were rendered immaterial after the referendum. Once the voters accept a new constitution it does not matter how it was made.

These critics were not alone. Althingi moved slowly. When the Constitutional Council, after four months of work, had delivered the bill to Althingi, the minority in Althingi used filibuster against the bill, for months on end. This was unprecedented in Althingi's history. The majority in Althingi shied away from breaking the filibuster as the law permits. The filibustering minority complained that it did not have enough time and delayed the referendum from June to October 2012. After the referendum, members of the minority claimed that those who stayed at home did so because they were opposed to the bill. When Althingi, or rather the parliamentary committee in charge of the bill, asked local lawyers to polish the language of the bill without changing its substance, they tried to turn the natural resource provision upside down. The parliamentary committee saw through this and restored the original text. The committee asked the Venice Commission for its views, and found them easy to incorporate into the bill. Meanwhile, private citizens opened a website inviting members of Althingi to declare if they wanted to pass the bill in keeping with the results of the referendum. Gradually, and sometimes grudgingly, 32 MPs (a majority) declared their support for ratification. Thus, as Althingi does not permit a closed ballot, the bill could hardly have stranded. Yet by the time the parliamentary session ended with the 2013 election, the Speaker still had not brought the bill to a vote.

The 2013 election brought the Independence Party and the Progressives, the main opponents of the bill, back to power. They appointed yet another constitutional committee comprising four government MPs, four opposition representatives, and an extra-parliamentary chairperson (a law professor known as a sworn opponent of constitutional reform). This committee was designed to fail, and so it did. Its declared aim was initially to revise the bill in a way that all members of the committee could accept, presumably by finding the lowest common denominator. After a while the committee realized that it could revise only four of the 114 provisions. Then they realized that they could not agree on one of the four.[1] That left three provisions (on natural resources, environmental protection, and national referenda) that the committee then went on to water down, leaving all three significantly weaker than the corresponding articles in the Constitutional Council bill. The committee´s work was not even discussed in Althingi.

Following the outbreak of the Panama Papers scandal in 2016 where Icelandic politicians featured prominently the government in office since 2013 resigned. A new election restored the Independence Party to office with two new junior coalition partners, a government that resigned after nine months due to yet another corruption scandal of the type that the provision on the right to information is designed to prevent. Several other contentious issues in the political arena since 2013, including the question of whether to consult the voters on the relationship between Iceland and the EU, could also have been averted under the new constitution.

Constitution making and consensus rarely go together: "Contrary to a traditional view, constitutions are rarely written in calm and reflective moments. Rather, because they tend to be written in periods of social unrest, constituent moments induce strong emotions and, frequently, violence."[2] So this story is unique: Icelanders achieved a rare degree of popular consensus around a

[1] This was the provision on transfer of state powers to remove doubts concerning the constitutionality of Iceland´s membership in the European Economic Area since 1994 as well as to prepare Iceland for potential EU membership.

[2] Jon Elster (2012). "Constitution-Making and Violence. *Journal of Legal Analysis*, Vol. 4, No. 1, Spring, pp. 7-39.

popularly-drafted constitution in a rare moment of peaceful reflection. Yet the constitution bill from 2011, as amended by Althingi during 2011-2013, has remained on ice since 2013, held hostage by politicians whose self-serving behavior should not have been a surprise.[3]

3. The arguments against a new Icelandic constitution

This volume's articles generally support the bill for a new constitution that the Constitutional Council passed unanimously in 2011 and the electorate approved by a two-thirds margin in a 2012 national referendum. For fairness and to provide context, in this section we review the main arguments raised against the bill. We have attempted here to present these opposition arguments objectively, largely leaving the rebuttal to the articles.

The constitutional change process was contested from the very beginning. When discussion started on the idea of convening a constituent assembly the right-wing Independence party—which had led the government between 1991 and 2009—made it clear that it would oppose this plan. The reasons, at first, were focused on practical issues more than on substance. The Independence party argued that given the country's dire economic situation, extensive work on the constitution was a luxury beyond the country's means, both because of cost and because it would divert the government's attention from more important things.[4] Later Independent party MP's claimed that a revision of the constitution was unnecessary because the financial crisis of 2008 was not a result of any constitutional flaws. They also argued that the 1944 constitution was in fact a document dear to Icelanders and should not be altered. This conflicted with the generally-shared view that the 1944 constitution had not been intended as a final document; instead, it was provisional and meant to do its job until a new and lasting constitution could be created.[5]

While the discussion of constitutional amendments was presented from the beginning in terms of general constitutional revision, there were several well-defined issues that created controversy after the financial crisis. Those issues reflected both ideological differences and interests of powerful corporations in the fishing industry. Among them were proposals to make natural resources national property; to make voting power equal; to create a mechanism through which the public could compel a referendum on legislation passed by Althingi; to permit a more personalized election system; and to make environmental protection a constitutional priority. All these proposals had strong public support. It was also clear that there was public interest in changing the office of the presidency and creating constitutional mechanisms to strengthen the independence of both the judiciary and the legislature. Constitutional Council members had taken a stand on most of these questions before they were elected, and it therefore was expected that the principal discussion in the Constitutional Council would concern the more controversial issues, and even that the Council might split on some of those.

The parliamentary resolution that created the Constitutional Council emphasized eight general topics (which reflected the most common concerns about the existing constitution's shortcomings)

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[3] "[A]n 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." Jon Elster (2016). "Icelandic Constitution-making in Comparative Perspective." In V. Ingimundarson, P. Urlfalino & I. Erlingsdóttir (eds.), *Iceland's Financial Crisis: The Politics of Blame, Protest, and Reconstruction*. London & New York: Routledge.

[4] See first round of discussion on Prime Minister Jóhanna Sigurðardóttir's bill on changes to the constitution and on the Constituent Assembly in Althingi http://www.althingi.is/thingstorf/thingmalalistar-eftir-thingum/ferill/?ltg=136&mnr=385.

[5] See e.g. Bjarni Benediktsson (1965). "Endurskoðun stjórnarskrár." *Land og Lýðveldi*, fyrri hluti. Reykjavík: Almenna bókafélagið, pp. 179–80.

but also allowed the council to go beyond those.[6] Yet when the council met, much as the Philadelphia Convention did in 1787, it decided not to concentrate on particular issues, but to write a whole new constitution starting from a blank slate. This meant of course that the council's work was perceived accordingly: It was not merely an elected or appointed body working on a limited set of constitutional revisions. The decision to write a new constitution and to make substantial use of social media to do so, to the effect that the result was later often referred to as the "crowdsourced constitution," transformed the council into a constitution-making body seeking to create a fresh constitution in an entirely new way: in full public view.

It is necessary to keep these things in mind when attempting to assess the reaction to the draft constitution the council delivered to Althingi in July 2011. While public support was always strong—if not overly enthusiastic—the draft received mixed reactions from the academic community, especially from legal scholars and political scientists. The opposition of the Independence party was no less after the draft was submitted than it had been at the beginning of the project, and once the draft appeared the Progressive party joined the opposition. Within the government coalition there was still considerable support, but there was apparent uncertainty about how to proceed and how to deal with the draft constitution—for example regarding what kind of revisions were appropriate and what needed to be done before Althingi would actually vote on the constitutional bill.

To give an overview of the most important and vocal criticisms, we review the public discussion beginning in the fall of 2011, particularly the scholarly debates organized by academic institutions in Iceland after the 2012 referendum. Some of these criticisms emerged soon after the draft's submission to Althingi. The critical voices grew stronger after the 2012 referendum. The most outspoken critics began to cause serious doubts among MPs about the wisdom of adopting the new constitution. While Althingi had relied on the referendum as a vital step in legitimizing the draft, some legal scholars argued that the vote created even more confusion since it made no sense to ask for the public's approval without a thorough examination of the draft by experts.[7]

The scholarly and political arguments against the draft were of roughly three kinds. First, opposition to the project itself, represented by the Independence party and the most conservative part of the public, as outlined above. Second was a critical view of the process. Such a view could have different reasons: doubts about the council's legitimacy, doubts about the wisdom of its choices, and so on. Third, criticism about the quality of the draft itself. This third view can be divided into two strands. On the one hand there was criticism of individual articles in the draft, such as those that created a mechanism for more direct democratic participation. On the other hand there was a more holistic criticism of the draft arguing that some of the rewritten articles on (for example) the governmental and administrative order were confusing and would create unnecessary problems for the judiciary—even to the point of inadvertently causing a constitutional crisis.

Criticisms of the process were made at every level: as the original legislation was prepared and then passed; as the Constituent Assembly elections were prepared and held; as Althingi reacted to the invalidation of those elections and then reappointed the winners as the Constitutional Council;

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[6] Þingsályktun 19/139, 24 March 2011 (http://www.althingi.is/altext/139/s/1120.html). The parliamentary resolution was different from the original law on the Constituent Assembly (Lög nr. 90, 25 June 2010 (http://www.althingi.is/altext/138/s/1397.html)). Therefore, although it was expected that the Constitutional Council would work as if it was the unchanged Constituent Assembly, it was in fact freer than the Assembly would have been to make its own decisions on how to proceed.

[7] Björg Thorarensen 2016. The Icelandic Constitutional Council: Assessment and Comparisons. V. Ingimundarson, I. Erlingsdóttir, & P. Urfalino (Eds.), *Iceland's Financial Crisis The Politics of Blame, Protest and Reconstruction*. Taylor & Francis, p. 246.

and as the council worked on its draft. Some of these criticisms were directed at the legitimacy of the council's work. For example, Gunnar Helgi Kristinsson, a professor of political science at the University of Iceland argued that the real fault of the Constituent Assembly elections lay in how they were organized, which allowed more than five hundred candidates to qualify and which effectively meant that there could be no real campaigning and discussion of the various different candidate platforms. That, he argued, also meant that these representatives had no real political mandate.[8]

Kristinsson and his colleague Indriði Indriðason approached the draft from a political science viewpoint, arguing that the council had in fact neither an intellectual nor a political basis to propose the sweeping changes in the draft. Therefore, its work should be seen as the beginning of constitutional revisions, rather than as a completed process. Indriðason claimed that it should be seen as a major fault of the council not to have consulted a sufficient amount of works by political scientists. According to him only seven percent of references to scholarly literature mentioned works of political science, and some key findings had been ignored: "In short, there is no evidence that the constitutional council has given any serious consideration to how the political institutions it proposes might actually work in reality."[9]

The time frame the Constitutional Council had to complete its work was also a source of criticisms. The council rewrote the constitution during an intensive four-month period, which included three weeks during which the council deliberated on how it should approach its task.[10] Some critics argued that it was unlikely that a passable constitution could be completed so quickly and claimed that the council had possibly made a mistake with its decision to write a new constitution rather than concentrate on a few important revisions.[11] Doubts were sometimes voiced in public debates as well that perhaps the idea of electing an assembly to do the actual writing might be a fundamentally flawed methodology and that such assemblies should instead be asked to identify basic directions and policies that MPs should then be responsible for working out.

Criticism about the quality of the draft arose more slowly. The constitutional bill was first put to discussion and vote in Althingi on 11 October 2011, two months after the council's president Salvör Nordal submitted it.[12] Althingi passed the bill on its first reading and sent it to the Constitutional and Supervisory Committee for further review. That committee received 179 commentaries on the draft (solicited and unsolicited), some with detailed criticisms of particular issues or themes, others more general in nature. These included some detailed and comprehensive critiques of the draft by legal scholars.

It was only a year later that critical voices from the academic community were systematically brought to the public's attention through a series of conferences organized by the four law departments of Iceland's universities. Between 9 November 2012 and 27 February 2013 seven public conferences were held, in which legal scholars, political scientists, philosophers, and historians

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[8] Gunnar Helgi Kristinsson (2012). Ráðskast með stjórnarskrá. Tímarit um stjórnmál og stjórnsýslu 8 (2) pp. 565-570.

[9] Indriði Indriðason (2012). The Constitutional Council & Political Science. Personal blog (http://www.constitutionalassembly.politicaldata.org/?p=41).

[10] We note that the 1787 Philadelphia Convention met for approximately the same four-month period, from May 25 to September 17, during which it wrote a document describing a novel system of government that has endured for over 200 years.

[11] Jón Ólafsson (2016). The Constituent Assembly: A study in failure. In V. Ingimundarson, I. Erlingsdóttir, & P. Urfalino (Eds.), *Iceland's Financial Crisis: The Politics of Blame, Protest and Reconstruction*. Taylor & Francis, p. 255.

[12] Þingskjal 3, 3. mál 11 October 2011 (https://www.althingi.is/altext/140/s/0003.html).

commented on the constitutional bill. The conferences were extensively covered by the media. Although some speakers were supportive, most expressed strong criticisms of one or more aspects of the bill. Unfortunately, few of the papers given at these conferences were ever published.

At Althingi's request, in early 2013 the Venice Commission issued a report on the draft. The report contained serious criticisms that to some extent reflected commentaries made by Icelandic scholars, but also went further. In its conclusion the commission expressed concern that doubt in Iceland about process legitimacy might itself prevent the general consensus necessary (in the commission's view) for adopting a new constitution. But its main area of concern was the document's lack of clarity. The commission argued that articles on human rights (which extended human rights protections to violations by private as well as state actors) were vague regarding their implementation such rights. Provisions on third generation rights and socio-economic rights also seemed unclear to the commission, yet it was generally supportive of including such rights in the new constitution.

More serious were its concerns about chapters dealing with institutional structure, which it considered overly complex lacking consistency. Many of the commission's detailed comments on Althingi, the president, elections, the executive, and the judiciary point out that the mechanisms created by the Constitutional Council are complex and need to be substantially rethought to ensure that results will be as intended.[13] For example, the commission was concerned that the formation of the cabinet and government organization are contradictory and employ mixed conceptions. It therefore recommended a complete revision of the system proposed by the Constitutional Council. The commission also recommended revising provisions concerning the electoral system, which it also saw as overly complicated. Regarding the judiciary, the commission was generally supportive, but noted that there is a real danger for the mechanism for appointing judges to be politicized—which is not what the Constitutional Council intended.[14]

Finally, the Venice Commission expressed concern about the council's effort to increase direct public influence on policy and decision making with new provisions granting the electorate powers to demand a referendum on new legislation and to propose new legislation. The commission found the language and provisions too vague, the mechanism too complicated, and its consequences not sufficiently foreseeable. It declared support for the general direction of increasing public participation, but recommended a "more cautious approach" and a more "thorough review of the relevant provisions."[15] This criticism echoed the worries expressed by some legal scholars and by some of the more conservative Independence party members. And this criticism came up for renewed discussion when a parliamentary commission discussed proposals for changing the constitution after the Constitutional Council's draft was abandoned.

The Venice Commission report calls for a rather comprehensive revision of the draft even to the point of substantially changing some of the proposed mechanisms and procedural rules the Constitutional Council had created to make the roles of the executive and the legislature more transparent. Yet some of its criticisms are difficult to understand. For example, the commission was worried that it would be too easy to challenge unpopular legislation by referendum. But the commission also argued that the draft makes public participation too complicated. It seems (although this is not expressed in a direct manner) that the Venice Commission shared one of the main

[13] European Commission for Democracy through Law (Venice Commission) (2013). "Opinion On the draft new constitution of Iceland." (http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)010-e), p. 31.

[14] Venice Commission pp. 14–15, 18–19, 25.

[15] Venice Commission p. 23.

worries of those who criticized the draft or the process itself: that the new constitution created intolerable uncertainty, such that it would be difficult for courts to interpret some of its main parts.

This question of interpretive uncertainty was the basis of the most serious critiques of the draft after the 2012 referendum. Tryggvi Gunnarsson, the parliamentary ombudsperson, argued that without a comprehensive assessment of the new constitution's aims and the foreseeable effects of its principal innovations, its implementation could be very problematic. He also pointed out that the draft seemed to borrow from several different legal traditions, which made the judicial interpretive task even more complicated.[16] Kristrún Heimisdóttir, a legal specialist, argued similarly that this mix of legal approaches made the draft so difficult to understand and interpret that a constitutional crisis would be inevitable should it be adopted without serious revisions.[17]

Björg Thorarensen, a professor of law at the University of Iceland and a member of Althingi's Constitutional Committee, leveled the same criticism at the chapter on rights. She argued that not only is the language imprecise but that "the use of concepts . . . departs from the traditional meaning of the same concepts in international human rights conventions such as the ECHR."[18] Some legal specialists who submitted critical remarks to Althingi's Constitutional Committee also pointed out that rewriting the human rights chapter was unnecessary because that part of the constitution had recently been revised, and the Constitutional Council had in fact not been asked to review the human rights provisions.[19] Fifteen years earlier Althingi had indeed updated language and provisions in that chapter to reflect contemporary understandings of human rights. Whether the chapter still needed to be revised was disputed among legal specialists. Some pointed out that this area of constitutional law was developing quickly, and that revision was needed despite the recent changes, even though at the time they were seen as quite far-reaching.[20]

Among the most discussed criticisms of the draft's alleged lack of clarity concerned the state's obligations to react to violations or to guarantee certain conditions. For example, some argued that the Constitutional Council had not clarified to what extent the state was liable for violations of human rights rules by private citizens. And some legal specialists claimed that the state might be obligated to secure certain living conditions, including minimal salaries.

The idea of national ownership or national property had, as mentioned above, been widely discussed in Icelandic society after the financial crisis and was seen by many as a vital step in the restoration of the "social contract"—a relationship of trust between the public and the government.

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[16] Umboðsmaður Alþingis. Erindi nr. Þ. 141/1276, 21 January 2013, p. 3-5 (Comments on the Constitutional Bill sent to Althingi's Constitutional and Supervisory Committee, http://www.althingi.is/altext/erindi/141/141-1276.pdf).

[17] "Gerðu umtalsverðar breytingar" *Morgunblaðið* 17 November 2012, p. 12 (http://timarit.is/view_page_init.jsp?pubId=58&lang=is). The remarks were made in a talk delivered at an open meeting on the Constitutional bill to discuss proposals made by a working group of legal advisors who had tried to make the language of the draft legally clearer and more in tune with what the Constitutional Council had intended. Fundur um niðurstöðu sérfræðingahóps um stjórnarskrárdrögin og næstu skref. Reykjavík University 16 November 2012. (Recording available here: http://upptokur.ru.is/16112012/SupportingFiles/ViewerWM7.html).

[18] Björg Thorarensen 2013. "The Impact of the Financial Crisis on Icelandic Constitutional Law: Legislative Reforms, Judicial Review and Revision of the Constitution." *Constitutions in the Global Financial Crisis. A Comparative Analysis*. Franham & Burlington: Ashgate, p. 280.

[19] Skúli Magnússon & Ágúst Þór Árnason. Erindi nr. Þ. 140/909, 18 January 2012, p. 10. (Comments on the Constitutional Bill sent to Althingi's Constitutional and Supervisory Committee, https://www.althingi.is/altext/erindi/140/140-909.pdf); Björg Thorarensen 2011. Constitutional Reform Process in Iceland—Involving the people in the Process. Talk given at the Oslo-Rome International Workshop on Democracy 7–9 November 2011, p. 12. (https://www.uio.no/english/research/interfaculty-research-areas/democracy/news-and-events/events/seminars/2011/papers-roma-2011/Rome-Thorarensen.pdf).

[20] Oddný Mjöll Arnardóttir. "Mannréttindi í stjórnarskrá." *Fréttablaðið*, 3 May 2011, p. 18.

The concept itself was disputed, and some legal specialists attacked the way the Constitutional Council treated this issue. Thus, Skúli Magnússon and Ágúst Þór Árnason, both former Constitutional Committee members, argued that in the draft the idea of national ownership is made synonymous with state ownership, whereas it would be more useful (and make more sense) to understand it as a primarily moral concept imposing restrictions on the use of natural resources, which should be exploited for the benefit of all (i.e., in a sustainable way) independently of ownership.[21]

These legal criticisms of the draft involved a mix of structural arguments, which applied both to the document's relationship to legal traditions and to the mechanisms created to achieve the Constitutional Council's intended goals, and substantive arguments about individual provisions. The structural arguments were more acute, since responding to them would in most cases require a revision of the intended goals as well, and in turn that the Constitutional Council's work would be largely abandoned. Therefore, structural critics of the draft were often seen as hostile to the entire project, although this was not always the case. Many scholars were severely critical of the Constitutional Council's decision to revise the language of certain parts of the constitution without intending to change their meaning. These scholars argued that instead of increasing clarity and making interpretation easier, such revisions in fact only served to make legal precedent irrelevant and destroy a long tradition of judicial interpretation.[22]

A general assessment of these scholarly and political criticisms leaves one with a mixed impression. On the one hand many criticisms reflect genuine ideological disagreements that must be dealt with democratically. But the deep disagreement concerns, perhaps, the worth of the constitutional project itself. Conservative critics maintained from the start that the basis of the revisions was fundamentally flawed. Subsequent attempts to reconcile those critics with the outcome were pointless for that reason. From another perspective, however, the process was unique. It created a new process of constitution-making by attempting (and succeeding to some extent) to engage the public in revising the country's constitution. This is arguably an immensely important feature of the resulting document and may create a strong incentive to preserve its identity through any potential revisions of the draft. Many of the legal scholars, political scientists, and philosophers who criticized the draft nevertheless agreed on the project's great significance from that perspective.[23]

Again, we do not endorse these arguments, nor do we respond to them here. The reader can judge their merits after reading this volume's articles.

4. How the Icelandic Federalist Papers came to be

The articles in this volume were part of a larger effort by the California Constitution Center at the UC Berkeley School of Law to study Iceland's constitutional change process. California's constitution reserves ultimate sovereignty to the state's people, and reserves to its electorate significant direct democracy powers. Iceland's draft constitution would create some similar direct democracy tools. A society's decision to adopt such tools, and the unique constitutional design process itself, are interesting present-day examples of the principles and institutions the center's scholars study.

A diverse group of international legal scholars answered the center's call for authors to write articles modeled on the Federalist Papers, which were written while the nascent United States debated whether to adopt the draft constitution produced by the 1787 Philadelphia Convention.

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[21] Skúli Magnússon & Ágúst Þór Árnason, p. 15–16.

[22] See e.g. Skúli Magnússon & Ágúst Þór Árnason, p. 7.

[23] See also Hélène Landemore (2015). Inclusive Constitution-Making: The Icelandic Experiment. *The Journal of Political Philosophy* 23(2) pp. 166–191.

That period is comparable to Iceland's ongoing debate about its own draft charter, and these articles serve a purpose similar to the original Federalist Papers. To maintain academic objectivity, the authors had total freedom to apply their expertise to any aspect of Iceland's draft constitution, and to take either the Federalist or Anti-Federalist position pro or con any aspect of the draft. In the tradition of Madison's pseudonym Publius, all authors agreed to write anonymously as Civis—which means that a group of academics volunteered to produce scholarly work for which they received no individual credit, compensation, or glory. They have our heartfelt gratitude.

The result was a series of twenty-one articles, originally published separately by the California Journal of Politics and Policy, now collected in this volume. The staff at the UC Berkeley Institute of Governmental Studies was exceptionally generous with their time and resources in publishing the articles and this volume, and we are deeply appreciative. Borrowing a trick from Bryan Garner's *The Law of Judicial Precedent*, we describe the following as coauthors of this volume's articles (without identifying who wrote which article) in alphabetical order: Robert Boatright, Cynthia Boyer, David A. Carrillo, Luis Díe, Stephen M. Duvernay, Susanna F. Fischer, Joshua Gellers, Thorvaldur Gylfason, Alexander Hudson, Sanford V. Levinson, Jón Ólafsson, Lisa K. Parshall, Mary M. Penrose, Pasquale Policastro, Jonathan Schwartz, Brandon V. Stracener.

The authors were at liberty to source their arguments from wherever they deemed appropriate, or to write entirely original essays. A few were intentionally written as pastiches, in respectful homage to the original Federalist Papers authors; others adopted a polemic style in the tradition of Cicero; some offer quietly philosophical discourse. Because the authors were at liberty in this unusual writing project, these articles have not been peer reviewed, nor have the sources and citations been checked. The editors caution readers to cite-check and verify sources for themselves before relying on anything in this volume as an authoritative reference source.

No one knows how Iceland's political situation will evolve from here. Those who oppose the new constitution do so because the status quo benefits them, and change necessarily presents a risk to their position. Those who advocate change have so far failed to simultaneously achieve a political majority *and* consensus on a change in direction. Until some change in circumstance occurs, or one actor implements a successful new strategy, these opposing vectors will continue to operate in parallel, stalemated. And that means the status quo will abide.

Whether this is as it should be is not for observers like us to say. A people gets the government it deserves, and the people of Iceland must make for themselves this fundamental decision about who they are and what kind of society they want. Change is possible, if Icelanders choose it. Doing nothing is also a choice. We hope this volume helps the people of Iceland make the best decision.

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David A. Carrillo
Thorvaldur Gylfason
Jón Ólafsson