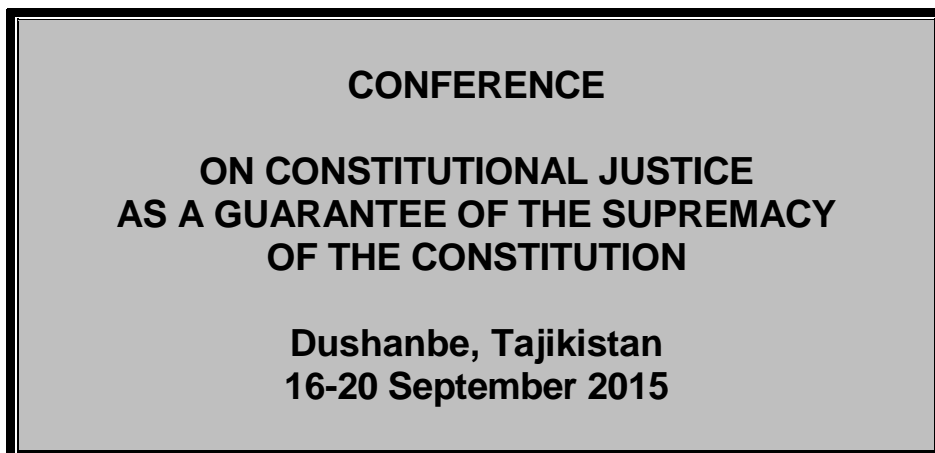




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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)



REPORT

“THE ICELANDIC CONSTITUTIONAL EXPERIMENT”

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Introduction

The Icelandic financial disaster in the fall of 2008 where three of the country's major privately owned commercial banks defaulted was the largest banking collapse experienced by any country in economic history. The crisis led to a severe economic depression and significant political unrest.

On an unusual night in January 2009 in otherwise quiet and peaceful Reykjavík, the capital of Iceland - the police fired tear gas in front of the Althing – the oldest parliament in the world (established in 930)¹ in order to disperse protesters. This was the peak of the first almost a real revolution in Iceland. It began in October 2008 when thousands of Icelanders took to the streets of Reykjavík to demonstrate against their government's handling of the banking crisis. The government had taken control of all three of Iceland's major banks in October 2008 in an effort to stabilize the financial system after its collapse. A few weeks later Iceland applied to the International Monetary Fund (IMF) for emergency financial aid – the first western country to do so since 1976.

A Special Investigation Commission (SIC) was established in December 2008 to investigate and analyse the processes leading to the collapse of the banking system two months earlier.² The Committee's report was introduced in April 2010 and its conclusions shocked the people of Iceland. The report confirmed that the political system, the administration and ties to the financial world were rampant with corruption.

The poor performance of the media, the corrupt ties between the financial sector and politics and the administrative sector, the impact of the "laissez-faire" ideology and shady social values of key actors are illustrated in the findings of a work group established by law on the special investigation committee, which assessed the "morality" and practices in the above sectors in the wider social context.³

The government, the so-called crash coalition resigned in February of 2009.

In April 2009 the Social Democrats (a part of the "Crash-coalition" with the conservatives as they came to be known) along with the left greens won majority of 34 out of 63 seats at parliamentary elections. The new Prime Minister, the leader of the Social Democrats, called for a new constitution against this backdrop.⁴ **A new social contract** symbolized the growing request for drastic reform and increased democratization with transparency and accountability.⁵

It was however not clarified how the collapse and loss of trust towards political and financial actors was traceable to the shortcomings in the current Constitution. (Evidently, it did not prevent the collapse. Political and legislative responses to the crisis have since created constitutionality issues, which is another subject matter.)

¹ <http://news.bbc.co.uk/2/hi/europe/7704634.stm>

² Act No. 142/2008 <http://www.rna.is/eldri-nefndir/addragandi-og-orsakir-falls-islensku-bankanna-2008/skyrsla-nefndarinnar/english/>

³ <http://www.rna.is/eldri-nefndir/addragandi-og-orsakir-falls-islensku-bankanna-2008/skyrsla-nefndarinnar/english/>

⁴ <http://www.althingi.is/altext/138/s/0168.html>

⁵ As stated in the Explanatory report, chapter V.

In June 2010 an Act on a Constitutional Assembly No. 90/2010 was adopted by the Althing. The purpose of the Assembly was to review the Constitution of the Republic No. 33 of 17 June 1944 by also consulting a report⁶ prepared by a Constitutional Committee appointed by Parliament on the basis of the same act.⁷ The chairman of the Constitutional Committee was a neurobiologist.

The Assembly was to be composed of 25 delegates that were elected by direct personal election on 27 November 2010. Over 500 candidates from various walks of life filed to run for the elections. The Supreme Court invalidated the results of the election on 25 January 2011 following complaints about several faults in how the election was conducted (potentially traceable ballot papers; construction of ballot boxes etc.) On the basis of a parliamentary resolution the members elected in the invalid elections were instead appointed to take a seat in a Constitutional Council in April 2011. (The majority of parliament was criticized for infringing the division of the three branches of government by invading the sphere of the judiciary.)

From then on it was inevitable that the work of the Constitutional Council would be disputed for political and other reasons.

The task of the appointed Constitutional Council

The current Constitution of the Republic of Iceland (Act No. 33 of 17 June 1944) is based on the Constitution of 1874 (and 1920), with the same roots as the Danish Constitution from 1849 as revised in 1866 – built on the same principles as in other European Constitutions from that time; the division of powers; civil and political rights the self-determination of the people.⁸

When the Republic was established in 1944, the only amendments that were made were those necessarily entailed by the dissolution of the union with Denmark, where the monarchy was replaced with a republic, with the post of President replacing the King. While the King had been allotted definite veto power the President was granted the power of refusing to sign a bill passed by the Althing and to refer it to a public referendum.

Since 1944 various amendments have been made to the Constitution, mostly regarding elections and constituency boundaries. In 1995 the whole section on human rights was amended in accordance with international obligations and the incorporation of the European Convention on Human Rights into domestic law in 1994. Later attempts to have a comprehensive review of the Constitution had not proven to be successful.

The task of the Constitutional Council was according to the Parliamentary Resolution No. 19/139 was to propose amendments to the Constitution on the following:⁹

- The foundation of the Icelandic Constitution and its basic concepts;
- The organization of the legislative and executive powers and their limits;
- The role and position of the President of the Republic
- The independence of the courts and their supervision of other holders of state authority
- Provisions about elections and the constituency system

⁶http://www.stjornlagarad.is/other_files/stjornlagarad/skyrslastjornlaganefndar/skyrsla_stjornlaganefndar_fyrri_bindi.pdf/http://www.stjornlagarad.is/other_files/stjornlagarad/skyrslastjornlaganefndar/skyrsla_stjornlaganefndar_s_einna_bindi.pdf

⁷http://www.stjornlagarad.is/other_files/stjornlagarad/skyrslastjornlaganefndar/skyrsla_stjornlaganefndar_fyrri_bindi.pdf;

⁸ Cf.: http://blogs.helsinki.fi/erere-project/files/2008/11/erere_project.pdf

⁹ <http://www.althingi.is/altext/139/s/1120.html>

- Democratic public participation, e.g. timing and arrangement of referendum, including a bill about constitutional laws
- Transfer of state authority to international organizations and handling of foreign affairs
- Environmental affairs, such as regarding ownership and utilization of natural resources.
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According to the Parliamentary resolution the Constitutional Council was granted wider scope to include other areas than the above. The Constitutional Council in the few months it was given to draft the amendments did in fact revise the whole Constitution with the new draft of 114 provisions). The “drafters” submitted the draft proposals (hereinafter the Bill) to parliament by the end of July 2011.¹⁰

The members of the Constitutional Council, none of them experts in constitutional law, albeit a few lawyers, a professor of economics, a pastor, medical doctors and media people used the internet to gather input from citizens; such as the proposal to entrench a constitutional right to the Internet, which resulted in Article 14 of the final proposal.

The Bill was discussed in meetings of the Constitutional and Surveillance Committee of the Parliament (from Oct. 2011 until Feb. 2012) consulting with various parties from civil society.

A consultative referendum on the Constitutional Council’s draft proposals

Discussions within Parliament on the process with the draft constitution ended in a stalemate where substantial issues were never thoroughly discussed.¹¹ A non-binding, consultative referendum was held in October 2012. The voter turnout was 49% and 70% were in favour of the draft.¹² The most popular provision of the Bill was the proposal that Iceland’s **natural resources which were not subject to private property should be the perpetual property of the nation** (83% in favour).

(The questions on the ballot concerned five substantial amendments regarding natural resources; an established national church; election of individuals; weight of votes and referendums. The opposition in Parliament withdrew its proposed amendments to the questions to be asked on the ballot before the resolution was adopted the Parliament in May 2012.¹³)

A group of legal specialist’s was hired by the office of the Parliament to oversee legal technicalities, such as internal inconsistencies, extent of protection and the justiciability of rights and to write an explanatory report. This group handed in its revised Bill in November 2012 taking into account the conclusions of the consultative referendum.

The Venice Commission, to which the text was then submitted, noted obscurities in the text and warned the Icelandic authorities against rushing into adoption of the measures proposed.

In its opinion on the draft Constitution¹⁴ the Venice Commission welcomed that the draft was not confined to the protection of human rights against violation by the government

¹⁰ <http://www.althingi.is/altext/139/s/1120.html>

¹¹ <http://www.althingi.is/raeda/141/rad20130308T103624.html> /

<http://www.althingi.is/raeda/141/rad20130308T103747.html>

¹² http://en.wikipedia.org/wiki/Icelandic_constitutional_referendum,_2012

¹³ <http://www.althingi.is/dba-bin/ferill.pl?ltq=140&mnr=636>

¹⁴ CDL-AD (2013)010, Opinion No. 702/2013

("horizontal effect"), mentioning the risks of violations of human rights by private actors and the increasing role of powerful corporations.¹⁵

There is a growing awakening that elected authorities are widely an easy prey for financial powers and that the foundations of the globalised business world are political ---- an example of what is going on worldwide is the much debated United States Supreme Court decision in *Citizens United v. the Federal Election Commission* giving unfettered free speech rights to corporations. Ronald Dworkin, one of the greatest legal and moral philosopher in recent times – emphasized that this “appalling” decision threatened democracy by paving the way of unlimited amounts of money into election campaigns and hence legitimising the control that corporations gain over elected authorities through their financial support.¹⁶

An interesting example of an explicit recognition of the ties between elected authorities and powerful financial entities threatening the foundations of democracy and human rights is the acknowledgement of Donald Trump who seeks nomination as the presidential candidate for the Republican party in the United States forthcoming Presidential elections in 2016. He describes how he deliberately gave money to politicians so that he could later get favors from them. It was an effective, diagnosis of the deep corruption in American politics. Reformers tend to present themselves as blameless. Trump is presenting himself as someone who has so mastered the corruption of American politics that he can be trusted to resist it.

Trump's analysis of how money influences politics isn't about straight bribery. It's about building a long-term relationship in which each side does favors for the other. He gives to politicians, and then, he says, "When I need something from them, two years later, three years later, I call them."¹⁷

Yet, there was no mention of the word corruption in the Icelandic draft despite the recognition that corruption was the root of the financial collapse and that this was one of the key reasons for writing a new constitution in the wake of the Parliament Special Investigation Commission's Report.

International law does not currently regard an act of official corruption as the violation of a human right, as noted in an interesting, recent article by two lawyers.¹⁸ An international consensus is emerging that corruption is a pervasive and pernicious social problem, structural obstacle to economic growth and threat to global security.¹⁹

Official corruption is usually understood as a means by which fundamental rights are violated, but not as a direct violation. Freedom from official corruption is not enshrined as a universal and inalienable right to which a person is inherently entitled.²⁰

¹⁵ CDL-AD (2013)010, Opinion No. 702/2013, paragraph 35. Article 9 of the draft provides that “government authorities [are?] at all times required to protect the public against violations of human rights, whether committed by holders of government power or others”. Furthermore Article 5 of the Bill stipulates (as does Art. 1 of the ECHR) that the government is required to ensure that everyone has the opportunity to enjoy the rights and freedoms entailed by the Constitution and that private “persons” shall, as applicable, respect the rights provided in the human rights section.

¹⁶ <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/?pagination=false>

¹⁷ During the first debate of Republican candidates in August 2015.

¹⁸ Freedom from Official Corruption as a Human Right By Matthew Murray and Andrew Spalding (see http://www.brookings.edu/~media/research/files/papers/2015/01/27-freedom-corruption-human-right-murray-spalding/murray-and-spalding_v06.pdf)

¹⁹ Freedom from Official Corruption as a Human Right By Matthew Murray and Andrew Spalding

²⁰ http://www.brookings.edu/~media/research/files/papers/2015/01/27-freedom-corruption-human-right-murray-spalding/murray-and-spalding_v06.pdf

Even the founding fathers of the modern constitutional thought in the late 18th century were aware of the danger that corruption entails for fundamental liberty and rights. Indeed, corruption was discussed at the Constitutional Convention more often than factions, violence, or instability; Madison recorded the term fifty-four times.²¹

The idea of a new constitution in Iceland carried with it high expectations that have bred deep frustrations.²² On the one hand there is frustration with the manner in which the constitutional process was conducted and subsequently that an opportunity has been lost – as the current government is not as enthusiastic to amend the Constitution, albeit reacting in the face of widespread pressure with present efforts regarding certain issues such as national referendum and ownership of natural resources – and thirdly there appears to be loss of hope in the belief that drastic change for the better can be achieved with or without a new constitution. Many saw the collapse as a catastrophe that would teach the political sphere a lesson and corruption would subsequently be reduced. A new Constitution was to be the symbol for the „New Iceland“ emerging from the ruins of the 2008 financial, political and even moral collapse. It was however never demonstrated how the current Constitution was to blame for the collapse of the financial system, albeit the shocking conclusions of the Parliament Special Investigation Commission’s Report concerning corruption in Iceland.

*- Herdís Kjerulf Thorgeirsdóttir
Dushanbe, 17 September 2015*

²¹ http://www.brookings.edu/~media/research/files/papers/2015/01/27-freedom-corruption-human-right-murray-spalding/murray-and-spalding_v06.pdf (see also: <http://www.weeklystandard.com/keyword/James-Madison>)

²² A special political party was founded by members of the Constitutional Council before the parliamentary elections in the spring of 2013 as they claimed that lack of political will, even among the majority of Parliament that launched the initiative to revise the Constitution, had terminated this effort.