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REPORT

**“FISHERIES MANAGEMENT SYSTEM IN ICELAND IN THE LIGHT
OF THE CONSTITUTIONAL PRINCIPLES OF EQUALITY
BEFORE THE LAW (ARTICLE 65 OF THE ICELANDIC
CONSTITUTION) AND OF FREEDOM OF OCCUPATION (ARTICLE
75 OF THE CONSTITUTION)”**

by
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I. Introduction

*I will be discussing Icelandic case law regarding the fisheries sector which constitutes a major component of the Icelandic economy. For more than two decades there has been **intense public discussion** and political argument about the right manner to build the fisheries management system in the most efficient way for the interests of both the nation as a whole, and those who are employed in the fisheries industry, about 20 % of the work force.*

The Icelandic Supreme Court has examined the fisheries management system in light of the constitutional principles of equality (article 65 of the Constitution) and of the freedom to pursue the occupation of one's choice (article 75 of the Constitution). There are primarily two court cases are most important regarding the legality of the allocation of harvest rights in Iceland: the Fishing Permit Case of 1998 and the Vatneyri Case of 2000. In this regard it is also necessary to discuss the views of the United Nations' Human Rights Committee in the Fagrimuli Case of 2007.

This will hopefully shed some light on how the Supreme Court has interpreted these principles with regard to Iceland's obligations under international human rights treaties from the standpoint of the so-called "common property doctrine" - that the fishing banks around Iceland are common property of the Icelandic nation; the right to pursue the occupation of one's choice against *the "entrance barrier" entailed in the Fisheries Management Act which I will briefly describe?*

II. International obligations of Iceland and legislation

Iceland is party to most UN Human Rights conventions; among them the International Covenant on Civil and Political Rights.

Iceland has been a member of the Council of Europe almost from its beginning and the ECHR¹ incorporated into Icelandic law in 1994.

Amendments were made to the human rights provisions of the Icelandic Constitution in 1995, which substantially enhanced the status of other international human rights conventions in Icelandic law and Icelandic authorities are obliged to interpret domestic legislation in light of these.

Icelandic law is based on a dualistic system whereby international conventions Iceland ratifies must be incorporated into national legislation with legal amendments. In the Icelandic legal system stipulations in international agreements cannot be directly applied to individuals or entities without implementing legislation. However, existing laws must be interpreted in accordance with international law, both customary law and international agreements.

There is no administrative or constitutional court in Iceland. District courts and the Supreme Court are empowered to review the constitutionality of all laws and may decide that legislation that they find incompatible with the Constitution cannot be applied.

¹ Ratified the ECHR in 1953 and subsequently most of its protocols as well as a number of CofE human rights conventions.

III. Background to the Fisheries Management Act

During the 1970s the capacity of Iceland's fishing fleet was surpassing the yields of its fishing banks and measures became necessary to safeguard Iceland's main natural resource.

A fisheries management system was adopted by Act 82/1983, initially enacted for one year. It was based on the allocation of catch quotas to individual vessels on the basis of their catch performance and is generally referred to as "the quota system".

With the enactment of the Fisheries Management Act No. 38/1990 with subsequent amendments, the catch quota system was established on a permanent basis.²

The first article of the Fisheries Management Act states that the fishing banks around Iceland are common property of the Icelandic nation and that the issue of **quotas does not give rise to rights of private ownership** or irrevocable domination of the fishing banks by individuals.

Under article 3 of the Act, the Minister of Fisheries shall issue a regulation determining the **total allowable catch (TAC)** to be caught for a designated period or season from the individual exploitable marine stocks in Icelandic waters for which it is deemed necessary to limit the catch.

Harvest rights provided for by the Act are calculated on the basis of this amount and each vessel is allocated a specific share of the TAC for the species, the so-called **quota share**.

Under article 4(1) of the Act, no one may pursue commercial fishing in Icelandic waters without having a general fishing permit.

Article 4(2) allows the Minister to issue regulations requiring special fishing permits for catches of certain species or made with certain type of gear or from certain types of vessels, or in particular areas.

Article 7(1) provides that fishing of those species of living marine resources which are not subject to limits of TAC as provided for in article 3 is open to all vessels with a commercial fishing permit.

Article 7(2) establishes that harvest rights for the species of which the total catch is limited shall be allocated to individual vessels. When quota shares are determined for species that have not been previously subject to TAC, they are based on the catch performance for the last three fishing periods. When quota shares are set for species that have been subject to restricted fishing, they are based on the allocation in previous years.

Under article 11 (6) of the Act, the quota share of a vessel may be transferred wholly or in part and merged with the quota share of another vessel, provided that the transfer does not result in the harvest rights of the receiving vessel becoming obviously in excess of its fishing capacity. If those parties who are permanently entitled to a quota share do not exercise their right in a satisfactory manner, this may result in their forfeiting the right permanently.

² Since 1991, a number of amendments have been made to the fisheries management system. In August 2006 the legislation was re-issued as Law nr 116/2006, thus including all the changes made to the original 1990 legislation.

The Fisheries Management Act also imposes restrictions on the size of the quota share that individuals and legal persons may own.

The Act finally sets penalties for violations of the Act, ranging from fines of ISK 400 000 to imprisonment of up to six years.

Iceland is the second biggest fisheries nation in the North East Atlantic and the fisheries sector constitutes a major component of the Icelandic economy; it is estimated that around 20 % of the workforce depend on this sector for their livelihood

and authorities have emphasized that all changes in the management system may have immense effects on the economic well-being of the country.

IV. The Fishing Permit Case of 1998 (so-called Valdimar-judgment)

The case was initiated by a Valdimar Jóhannesson,³ who applied in 1996 for a general permit to engage in commercial fishing in the forthcoming fishing year with specified quota. His application was rejected on the grounds that he did not own a fishing vessel falling under par. 1 of Article 5 of Fisheries Management Act⁴, which was then in force.⁵

Valdimar took his case to court and claimed that the decision of the Ministry of Fisheries ought to be invalidated on the premises **that Section 5 of the Act No. 38/1990** violated the constitutional principle of equality protected under Article 65 of the Icelandic Constitution as well as the freedom of employment protected in Article 75 of the Constitution.

A district court found in favour of the State.

The Supreme Court in its reasoning referred to the background of the Fisheries Management Act stating that the legislator's scope must be viewed in the framework of the general policy underlying the legislation that the fishing banks around Iceland are **the common property of the Icelandic Nation** and that the issue of quotas does not give rise to private ownership or irrevocable domination of the fishing banks by individuals.

The Supreme Court reiterated that the legislator **was right in restricting** fishing within the Icelandic fisheries' jurisdiction to protect the fish stocks if endangered.

⁶

The constitutional right to freedom of employment was not a barrier to the above measures if they were in the public interest as evident from the background of the Fisheries Management Act and the need for restrictions per se was not subject to judicial review. **Any restrictions would however have to be in accordance with the fundamental principles of the Constitution and it was subject to judicial review whether the legislator had taken all those considerations into account.**

³ <https://notendur.hi.is/gylfason/ValdimarHaestarettarmal.pdf>

⁴ This provision stipulated that only vessels having received general fishing permits according to Art. 4 and 10 of Act No. 3/1998 on Fisheries Management 1988-1990, which had not been permanently decommissioned, were eligible for general commercial fishing permits. Lines 2 and 3 of the provision related to small boats and hook-and-line boats. The provision had the effect that owners of new fishing vessels could not take part in commercial fisheries unless another vessel, of comparable effort capacity, was scrapped.

⁵ The Ministry of Fisheries rejected his request on the grounds that fishing permits were limited to vessels and would not be granted to individuals or legal persons.

⁶ in accordance with the Act No. 41/1979 on Territorial Waters, Economic Zone Act and Continental Shelf.

The Supreme Court reasoned that it was inevitable that the Fisheries Management Act by limiting fishing permits to vessels was discriminatory to those who did not fulfill the Act's requirements. The Court held that "although temporary measures of this kind to avert the collapse of fish stocks may have been justifiable, providing permanently by law for the discrimination ensuing from the rule contained in section 5 of the Act No. 38/1990 on the issue of fishing entitlements cannot be regarded as logically necessary. The authorities had not demonstrated that other means cannot be employed for attaining the lawful objective of protecting the fish stocks around Iceland".

The Supreme Court stated that the above Article 5 of the Fisheries Management Act entailed a prior restriction against the majority of the Icelandic nation fishing permits were granted only to certain vessels that had been in the fishing fleet during a particular period, or new vessels that replaced them. It followed from this that the only persons having an opportunity to fish commercially were those who had received a right to do so as a result of private ownership, either by themselves or through purchase, inheritance or other transfer. In this judgment the Supreme Court confirms the objectives of the constitutionally protected freedom of employment where the contested Section 5 of the Fisheries Management Act is seen as excluding permanently the right to pursue the work of one's choice. The conclusion was that it could not be justified to restrict freedom of employment permanently with the "entrance barrier" entailed in the Fisheries Management Act?

However it did not adopt a position on article 7 (2), regarding the restrictions on access by the holders of fishing permits to the fish stocks. Parliament then adopted Act No. 1/1999 which substantially relaxed the conditions for obtaining commercial fishing permits. (With the adoption of this act, the decommissioning of a vessel already in the fleet was no longer a prerequisite for the granting of a fishing permit to a new vessel. Instead, general conditions were set for the issuance of fishing permits to all vessels.)

The Vatneyri case – Supreme Court judgement 8 April 2000 (Case No. 12/2000)

Shortly after the Valdimars-judgment the Supreme Court rendered a judgment on 8 April 2000 regarding the conformity of the Fisheries Management Act to the constitutional principle of equality and the right to freedom of employment.

The Supreme Court overturned the judgment of a District Court which in line with the judgment in the Valdimar-case dismissed the charges against them, on the grounds that the allocation of quota entitlements violated the Constitution's principle of equality.

The captain of the vessel was prosecuted for having gone trawls fishing without any catch entitlement for the fishing gear used and the owner of the company operating the vessel for participating in illegal activity and having encouraged this illegal fishing and also for breaking the Act No. 57/1996 concerning the Treatment of the Commercial Marine Stocks for not having weighed the specified catch of another vessel owned by Hyrna ehf. Both defendants admitted guilty regarding the part of the charge of fishing without permit but sought acquittal in respect of certain provisions of the Fisheries Management Act No. 38/1990 conflicting with the Constitution.

In the Supreme Court's view it was in the public interest to restrict the right to fishing. Hence the constitutional protection to pursue the occupation of one's choice was not a barrier against legislating on the limitation of the catch quota from specified fish stock out of necessity. The Court noted that the Fisheries Management Act had been adopted on the basis of the legislator's assessment that this system of management, to allocate to certain individuals or legal persons a distinct permanent or transferable quota of the total allowable catch, to ensure the protection of the fish stocks, the common property of the Icelandic

nation and to guarantee secure employment and habitation in the country in accordance with Article 1 of the above Act. The approach to allocate quota on the basis of fishing experience during designated periods and divide the limited total allowable catch between vessels fishing at that time, had been regarded as objective and not in conflict with the constitutional principle of equality. The arrangement of the fisheries management of the permanent and transferable quota was based on the view of practicality that would lead to a profitable utilization of the fish stocks for the Icelandic economy in accordance with Article 1 of the Act on the Fisheries Management. Furthermore, the quota was only permanent to the extent that it could not be cancelled or altered except with law and the Althing (the Icelandic parliament) could stipulate further on the right to fish, made it subject to certain conditions or charged a higher payment than it is doing at present. In light of the above the Court held that the law was based on objective premises and there was no reason for the judiciary to contest that. The allocation of quota as provided for in Section 7 of the Fisheries Management Act No. 38/1990 was in accordance with the principle of equality and its application when restricting the right to freedom of employment.

Hence the defendants were convicted on basis of the public prosecutor's charges and ordered to pay fines as they had profited from their illegal activities.

Fagramúli-case Supreme Court case No. 473/2002

This was a case of two professional fishermen, Haraldsson and Sveinsson, who were prosecuted under the penalty provisions of the Act on Fishing in Iceland's Exclusive Fishing Zone, no. 79/1997, Fisheries Management Act No. 38/1990 and the Treatment of Exploitable Marine Stocks Act No. 57/1996. The Supreme Court on 20 March 2003 confirmed a district court's ruling regarding the constitutional validity of the Fisheries Management Act No.38/1990 referring to its previous judgment in the Vatneyri case No. 12/2000. The defendants were each ordered to pay a fee of ISK 1 million to the State Treasury and the equivalent of catch and fishing gear for the amount ISK 1,9 million was confiscated.

The facts of the case were that in 2001 the two professional fishers since boyhood, Haraldsson and Sveinsson, a captain and a boatswain respectively, owners of a private company with the vessel Sveinn Sveinsson decided to denounce the fisheries management system. They wrote on 9 September 2001 to the Ministry of Fisheries declaring that they intended to catch fish without catch entitlements in order to obtain a judicial decision on the issue. The Fisheries Agency stated that there was no legal authorization to provide them with a quota. As a result they had to lease all catch entitlements from others at exorbitant prices and eventually faced bankruptcy.

Their vessel Sveinn Sveinsson had been purchased in 1997-1998 and that year various harvest rights (catch entitlements) were transferred but no specific quota share was associated with the ship. At the beginning of the fishing year 2000-2001 the Sveinn Sveinsson was allocated very small harvest rights for the first time. The had repeatedly applied for catch entitlements on various grounds but unsuccessfully.

By obtaining a judicial decision they sought a decision on whether they could continue their occupation without paying exorbitant amount of money to others. The Ministry of Fisheries drew the fishermen's attention to the fact that under the penalty provisions of the Fisheries Management Act No. 38/1990 and the Treatment of Exploitable Marine Stocks Act No. 57/1996, catches made in excess of fishing permits were punishable by fines or up to six years' imprisonment, as well as the deprivation of fishing permits.

UN Human Rights Committee in the case of Haraldsson and Sveinsson v. Iceland of 24 October 2007, No. 1306/2004.

After the Supreme Court's decision the two fishermen complained to the United Nations Human Rights Committee (UNHRC) which for the first time issued an opinion in a complaint against Iceland under the Optional Protocol to the ICCPR.

The UNHRC came to the decision that the Government of Iceland had not shown that the particular design and modalities of implementation of the quota system according to the Icelandic Fisheries Management Act No 38/1990 met the requirement of reasonableness. The Committee concluded that, in the particular circumstances of the case, the property entitlement privilege accorded permanently to the original quota owners, to the detriment of the authors, was not based on reasonable grounds and that this disclosed a violation of Article 26 of the Covenant.

The main issue before the UNHRC was whether the two fishermen, lawfully obliged to pay money to fellow citizens in order to acquire quotas necessary for exercising commercial fishing of certain species and thus to have access to such fish stocks that are the common property of the Icelandic nation, were victims of discrimination in violation of Article 26 of the ICCPR. The UNHRC recalled its jurisprudence that under Article 26, States parties are bound, in their legislative, judicial and executive action, to ensure that everyone is treated equally and without discrimination based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The UNHRC reiterated that discrimination should not only be understood to imply exclusions and restrictions but also preferences based on any such grounds if they had the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons on an equal footing, of rights and freedoms. It recalled that not every distinction constituted discrimination, in violation of Article 26, but that distinctions must be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate under the ICCPR.

The UNHRC firstly noted that "the authors' claim was based on the differentiation between groups of fishers. The first group received a free quota share because they engaged in fishing of quota-affected species during the period between 1 November 1980 and 31 October 1983. Members of this group are not only entitled to use these quotas themselves but can sell or lease them to others. The second group of fishers must buy or rent a quota share from the first group if they wish to fish quota-affected species for the simple reason that they were not owning or operating fishing vessels during the reference period. The UNHRC concluded that such distinction is based on grounds equivalent to those of property. While it found that the aim of the distinction adopted by authorities in Iceland, namely the protection of its fish stocks, which constitute a limited resource, was a legitimate one, it must determine whether the distinction is based on reasonable and objective criteria. The UNHRC noted that every quota system introduced to regulate access to limited resources privileged, to some extent, the holders of such quotas and disadvantaged others without necessarily being discriminatory. At the same time, it noted the specificities of the present case: - On the one hand, the first Article of the Fisheries Management Act No. 38/1990 stating that the fishing banks around Iceland are common property of the Icelandic nation. - On the other hand, the distinction based on the activity during the reference period, which initially, as a temporary measure, might have been a reasonable and objective criterion, became not only permanent with the adoption of the Act but also transformed original rights to use and exploit a public property into individual property. Allocated quotas no longer used by their original holders could be sold or leased at market prices instead of reverting to the State for allocation to new quota holders, in accordance with equitable criteria."

The UNHRC concluded that Icelandic authorities had not shown that the particular design and modalities of implementation of the quota system met the requirement of reasonableness. While not required to address the compatibility of quota systems for the use of limited resources with the ICCPR as such, the Committee concluded that, in the particular circumstances of the present case, the property entitlement privilege accorded permanently to the original quota owners, to the detriment of the fishermen in the case, was not based on reasonable grounds. The UNHRC held that Iceland had violated Article 26 and the state was hence under an obligation to provide the two fishermen with an effective remedy, including adequate compensation and review of its fisheries management system.

Aftermath of UNHRC's view

Much public debate followed in the wake of the UNHRC's conclusion. The Minister of Fisheries' response was that Icelandic authorities were not in a position to make drastic changes in the fisheries management immediately. A comprehensive revision of the fisheries' management system in the near future would take into consideration the Committee's views.

A 2014 report by the VC echoed the widely accepted view that even though the HRC's Views are not binding judgments; the states parties have an obligation to consider the UN HRCs views in good faith.⁷

A letter to the UNHRC dated 23 June 2008 and signed by Professor Thorsteinn Vilhjálmsson and others (receipt acknowledged by Noemie Crottaz 24 June) protested against the Minister's argument by pointing out that fisheries management is entirely feasible without discrimination among individuals that amounts to human rights violations as detailed in the UNHRC's opinion No. 1306/2004

The UN Human Rights Office of the High Commissioner informed the government of Iceland during its 104th session in **March 2012** that the Committee had "decided, in light of the measures taken so far by the State party to give effect to the Committee's Views, not to examine the case further under the follow up procedure, with a note of partly satisfactory implementation of its recommendation."

On 12 **March 2015** members of an NGO called the Constitutional Society sent a letter to the UN High Commissioner of Human Rights calling attention to Iceland's failure to honour the recommendations of the UN HRC – as the proposed amendment of the draft Constitution from 2011 of adding a clause to the effect that Iceland's fish resources belong to the people had been considered by the UNHRC as a measure taken by the State to give effect to its Views not to examine the case further – had not passed through the Althing.

Fishing is one of the main pillars of Iceland's economy and the quota system is one of the most controversial issues in the country.

⁷ CDL-AD(2014)036. See also: <http://ohrh.law.ox.ac.uk/states-are-bound-to-consider-the-un-human-rights-committees-views-in-good-faith/> In its **General Comment No 33** (2008), the HRC noted that even though it is not a judicial body, its Views "exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members". It added that the Views are "an authoritative determination by a quasi-judicial organ established by ICCPR tasked with the interpretation of this treaty". As a consequence, every state party to ICCPR and its OP is bound by their provisions and the findings of the HRC, in accordance with the fundamental principle of *pacta sunt servanda*. Article 26 of the Vienna Convention on the Law of Treaties (VCLT) exemplifies this principle as follows: "Every treaty in force is binding upon the parties to it and must be performed in good faith".

The President of Iceland said during the presidential elections in 2012 that “it is difficult to think of a bigger subject which would be natural to put up for national referendum” than the fishing quota system.

Those – and they are many – who want a new progressive system want to sell the quotas on an open market while those enjoying them at present want to own it for longer periods of time without paying more. These voices maintain that the fish quotas are harvesting contracts of the fish resource owned by the Icelandic people. Public auctioning of such contracts are seen as by far the most efficient system to maximize the added value of the fish resources for the Icelandic people as owners.⁸

ICCPR

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Icelandic Constitution

Article 65

Everyone shall be equal before the law and enjoy human rights irrespective of sex, religion, opinion, national origin, race, colour, property, birth or other status.

Men and women shall enjoy equal rights in all respects.

Article 75

Everyone is free to pursue the occupation of his choosing. This right may however be restricted by law, if such restriction is required with regard to the public interest.

The right of people to negotiate terms of employment and other labour-related matters shall be regulated by law.

⁸ A good auction organizes a fair competition between the fishing companies and secures quota access for smaller innovative fishing firms.”