



Strasbourg, 11 February 2013

Opinion no. 702/2012

CDL-REF(2013)010  
Engl. Only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**MEMORANDUM**

**ON THE BILL FOR A NEW CONSTITUTION  
OF ICELAND**

**prepared by**

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**(18 January 2013)**

## Memorandum to the Venice Commission

### Introduction

This memorandum is prepared in response to the preliminary remarks of Mr. Wolfgang Hoffmann-Riem on the provisions on human rights of the Constitutional Bill for a new Constitution for the Republic of Iceland.

It should be noted at the outset that the translated excerpts from the explanatory report to the Constitutional Bill reflect only a small minority (usually only the first paragraph) of the full explanatory notes to each Article. The general explanatory introduction to the human rights chapter is also omitted from the translation. Finally, the translation of the Bill itself contains some errors, as will be explained in the following where relevant. My own translations of certain parts of the Bill and explanatory report are, therefore, provided in the following.

### Ad. para. 4:

The explanatory report contains a general introduction of which over 4 pages (pp. 44-48) are devoted to a general theoretical explanation of the different “generations” of rights, including the different emphasis on negative and positive obligations, the different obligations of immediate or progressive implementation, their different substantive content and the different levels of justiciability implied.

In addition to the above, the specific explanatory comments to Articles 17 and 22-25 (socioeconomic rights) and 32-36 (third-generation rights) define the relevant obligations in more concrete terms, i.e. the concrete obligation (minimum core content) that may be enforced by the courts on the basis of the Constitution itself on one hand and the elements of the right in question that are referred to the discretion of the legislature on the other.

Although not rich, there also exists some domestic jurisprudence on the justiciability of the minimum core content of socioeconomic rights in Icelandic constitutional law (particularly Supreme Court Judgment of 19 December 2000, case no. 125/2000). The explanatory report reflects this jurisprudence as well.

In sum, care has been taken at various locations in the explanatory report to reflect the difference between the different generations of rights. This will be further reflected in my comments and the selected translations from the explanatory report that follow. Unfortunately, however, the translation of the full explanatory report cannot be provided.

### Ad. para. 6:

Article 6 is based on Article 65 of the Constitution of the Republic of Iceland (no. 33/1944). The reference to “equality before the law” in Article 6 reflects the wording of Article 65. Despite this wording, it is settled constitutional doctrine that the equality clause provides a substantive right that is not limited to the application of the law (whatever its content). Numerous Supreme Court judgments confirm this.

The explanatory report (p. 50) also makes clear that Article 6 has a wider scope of application than only in relation to the enjoyment of constitutionally protected human rights (despite the wording “and enjoy human rights without discrimination”). It also refers to the concepts of direct and indirect discrimination, mentions the possibility that the lack of reasonable accommodation may contravene the ban against discrimination and explains that Article 6 will not prevent the adoption of temporary positive measures in support of

disadvantaged groups unless such measures lack objective and reasonable justification. All these comments indicate the substantive conception of the principle of equality stipulated in Article 6.

**Ad para. 7:**

It is clear, and in line with settled constitutional doctrine, that the human rights chapter provides individual rights. The wording of Article 9(1) was changed from referring to the protection of “citizens” (in Icelandic “borgarana”) to the protection of the “public” (in Icelandic “almennning”). This is explained in the explanatory report in the following terms (p. 58): “...according to Article 2 of the Bill its scope of protection is not limited to citizens, as it applies to everyone on the territory or under the effective control of the Icelandic state. The concept of “the public” refers to individuals and private legal persons alike, but obligations and rights under the Bill can in some instances apply to legal persons.”

**Ad paras. 10 and 11:**

The policy of a single limitations clause is new to Icelandic constitutional law, but was adopted *i.a.* with reference to the work of the Venice Commission (opinions no. 444/2007 (Bulgaria), no. 420/2007 (Finland) and no. 54/2009 (Luxembourg)). Some 4 pages in the explanatory report (pp. 58-62) are devoted to explaining the theoretical framework for the single limitations clause. This will underpin the further development of constitutional doctrine on limitations of rights, but such doctrine already exists to some extent based on the specific limitations clauses currently stipulated in the Constitution. Both the current doctrine and the theoretical framework set out in the explanatory report are informed by the doctrines on limitations of rights developed by the European Court of Human Rights. The theoretical framework provided in the explanatory report also takes into account the different nature of different rights. Although only a small part of the whole body of explanations to the limitations clause, two concise examples can be mentioned. On p. 61, the following statement relates to the explanation of the principle of proportionality as stipulated in Article 9(2): “By this a reference is made to the fact that the extent of allowed limitations shall be evaluated in light of both the nature of the right that is to be subject to a limitation and in light of the importance of the public interest or rights of others that the limitation aims to protect.” Similarly on p. 60, it is stated that Article 9(2): “...does not apply in the same manner in relation to all the provisions of the human rights chapter, and some human rights are also not considered subject to limitations.”

In addition to the comments on Article 9(2) the specific explanatory comments to individual Articles may provide additional guidance on the scope of limitations in specific contexts. This applies primarily with respect to certain civil and political rights where the delimitation of possible limitations is considered especially relevant. For example, the explanatory report to Article 22 on the freedom of assembly (p. 90) provides the specific guidance that: “...the general limitations clause in Article 9, Paragraph 2, authorises limitations on the right of the public to assemble under arms or with an unpeaceful purpose. The same can be said about police presence at public assemblies, provided that there is a reason for such presence in the interests of public order and that the principle of proportionality is respected. In this respect it should be emphasised that in the proportionality assessment under the provision it can be assumed that the public authorities have a wide reaching authority to place limitations on assemblies and protests that have a violent or unpeaceful purpose.”

Generally it can be stated that care has been taken at various locations in the explanatory report to explain, to the extent practicable, the framework for and the possible differentiations that may exist within the single limitations clause.

**Ad para. 12:**

There is an error in the translation of the Bill. Correctly translated, Article 9(2) *i.f.* reads as follows:

“The rights provided by Article 7, the first sentence of Article 8, Article 27, Article 28, paragraphs 2 and 3, Article 29 and Article 30 may, however, never be limited on the basis of this provision.”

The general provision on “fair process” in Article 28(1) is therefore subject to the limitations clause in Article 9(2). The explanatory comments to Article 9(2) of the Bill (p. 60) indeed explain that Article 6(1) ECHR, which Article 28(1) is based on, is considered subject to some limitations in the jurisprudence of the European Court of Human Rights, even though no express limitations clause is stipulated therein.

Further, as regards the interpretation of Article 9(2) *i.f.* the explanatory report provides (p. 60): “Even though these rights may not be restricted in a formal manner, their scope of protection always has some outer limits. These outer limits may be expressly defined as exceptions to the protection in the text of the provision itself [...]. The outer limits also derive from how the right in question is interpreted, such as [...] the interpretation of Article 28, Paragraph 2, that the right to be presumed innocent until proved guilty according to law does not prevent the law from stipulating legal presumptions or objective criminal responsibility in certain clearly delimited instances. The principal difference is, therefore, that the outer limits of these rights hinges on how their scope and content is delimited, but if the subject matter falls within that framework, the right unconditionally applies. With respect to other rights, on the other hand, a limitation can be made in certain instances, even though the subject matter at hand falls within the scope and content of the right in question.”

The explanatory report (p. 60) also explains that Article 15 ECHR on non-derogable rights provides a general guidance for the selection of rights that are not to be subject to limitations under Article 9(2) of the Bill. The exception of Article 28(3) (*ne bis in idem*) from the limitations clause is made with reference to Article 4(3) of Protocol no. 7 to the ECHR, which again refers to non-derogability under its Article 15.

**Ad para. 13:**

On the interpretation of the general limitations clause, the explanatory report states (p. 61) that it is to be “interpreted in concert with the international human rights obligations of Iceland”. As these are minimum requirements, it is also stated that “on the basis of the general limitations clause, the Icelandic authorities and courts are free to allow even lesser limitations on rights than the conventions do.”

For the same reasons, the group of experts took care to leave intact any provisions which entail stricter requirements for limitations on rights than the general limitations clause would do. Article 11(2) of the Bill is an example of this as the general limitations clause does not require that limitations are based on court decisions. The provision is unchanged from Article 71(2) of the Constitution and its content has been developed in the jurisprudence of the Supreme Court.

The explanatory comments on Article 11(2) therefore provide (p. 64-65): “This secures the continued validity of the principle of Icelandic law according to which, in addition to a basis in law, a court decision is required before measures such as bodily or other searches, investigation of communications or other comparable limitations on a person’s privacy are

resorted to in the interest of criminal investigations, unless the legislation provides for specific exceptions thereto.”

**Ad para. 14:**

There exists no domestic jurisprudence on the situation referred to in paragraph 14, where the positive obligation of the State to ensure the protection of the right of one individual conflicts with its negative obligation to respect the rights of another. The interpretation of constitutional rights in Icelandic law is heavily influenced by the jurisprudence of the European Court of Human Rights and this is stated explicitly with reference to the interpretation of Article 9(2) in the explanatory report thereto (p. 61). Article 9(2) can therefore be expected to apply to these situations in a similar manner as e.g. paragraphs 2 of Articles 8-11 ECHR do apply to them. A public act that benefits one individual (i.e. ensures “the rights of others”) can therefore in some circumstances simultaneously be conceptualised as a limitation of another person’s right under Article 9(2). The explanatory report does not deal with this issue in detail over and above simply stating at p. 62 in relation to Article 9(2): “Like the Constitutional Council points out, this always implies a certain search for balance [in Icelandic “jafnvægisdans” – which would translate literally as a “balancing-dance”]. The State can for example not go so far in legislation that the protection of one right leads to undue limitations on other rights.”

**Ad para. 15:**

The wording of Article 13(1) of the Bill is exactly the same as the wording of Article 72(1) of the Constitution. It is settled constitutional doctrine that the first sentence is not limited to expropriation, but at the same time it is settled doctrine that private property and the exercise of property rights can be subject to various limitations of other kind (*cf.* “control on the use of property” in Article 1(2) of Protocol 1 to the ECHR). There exists extensive domestic jurisprudence on the interpretation of Article 72(1) in this respect, even though Article 72 does not stipulate a limitations clause of any kind. Article 9(2) of the Bill therefore gives a firmer express basis for limitations than the Constitution does.

Further, the explanatory report to Article 13(1) states (p. 62) that the adoption of Article 9(2): “...does not change the current state of the law as the right to property is accompanied by various general obligations and limitations like the Constitutional Council points out. Such limitations are nevertheless, in accord with the obligations of Iceland under Article 1 of Protocol 1 to the European Convention on Human Rights, subject to the same restrictions as other limitations of rights. All the conditions of Article 9, Paragraph 2, therefore apply to limitations on property rights [...]. However, and in accordance with the jurisprudence under the European Convention on Human Rights and the specific and widely delimited limitations clause in Article 1, Paragraph 2 of Protocol 1 to the Convention, the State should have a relatively wide margin for stipulating various general limitations on the right to property with reference to the rights of others or the public interest as it relates to public policies in economic and social matters.”

**Ad. paras. 16, 18-22 and 24:**

It should be noted that there is an undue discrepancy in the translation of Article 16(1) when it uses the term “guarantee”. The Bill itself only uses the Icelandic term “tryggja” in various Articles, which should be consistently translated as “ensure”.

As to the meaning of the phrasing that certain rights shall be “ensured by law”, it should be noted that the different wording of the different provisions of the Constitution is in principle intended to reflect the difference between the first generation and the second and third generations of rights. This is explained in the general comments to the human rights chapter

in the following terms (p. 47): “On the one hand, the provisions of the human rights chapter are phrased in the terms that everyone has a certain right or freedom, or that a certain rights shall be respected, but on the other hand they are phrased in the terms that the right in question shall be ensured, or ensured by law as the case may be. The different wording in this respect signifies that rights of the first category place a greater emphasis on negative state obligations. It is nevertheless not excluded that rights of this category entail some limited positive obligations, *cf.* for example the explanatory comments to Article 7 on the right to life. The latter category that states that certain rights shall be ensured, however, refers to negative and positive obligations alike. These provisions are of two kinds. On the one hand they link the obligation to ensure rights clearly with the Constitution itself, while in other instances this obligation is qualified by the fact that rights shall be ensured in ordinary legislation. The difference between the two reflects a different emphasis in that the former kind of provision entails obligations of immediate effect that the legislature must unconditionally respect, whereas the latter kind of provision refers to the fact that the legislature has a considerable amount of discretion as to how the right in question shall be concretised, but this applies first and foremost to the obligations that are subject to progressive implementation.”

The difference between those elements of rights that are immediately effective based on the Constitution itself, and those elements of rights that obligate the legislature to enact legislation but otherwise leave a considerable amount of discretion for it to concretize the right in question are further explained in the following terms (pp. 47-48): “All economic, social and cultural rights also entail, like mentioned before, certain substantive elements that are immediately effective, despite the general discretion of the State to otherwise implement them progressively, but this understanding was confirmed in Supreme Court Judgment of 19 December 2000, case no. 125/2000. Firstly, the obligation to provide all these rights without discrimination is immediately effective and will be enforced by a court of law. [...] Secondly, all such rights entail a certain minimum core content that will be enforced by a court of law irrespective of economic factors. This minimum core can in fact imply negative and positive obligations alike, although negative obligations possibly are the predominant feature. [...] Thirdly and lastly, it is an immediate obligation of the State to work in an organised fashion towards the execution and protection of these rights as best possible in light of the situation prevailing at any given time. The immediately effective obligation here thus refers to effective policy making and planning, but the level of rights protection that shall be achieved over and above the minimum core content is in a certain way relative and subject to the prevailing conditions at each given time.”

As to the interrelationship between rights that shall be “ensured by law” and the general limitations clause, it is taken as implied in the “considerable amount of discretion” allowed to the State in defining and concretising these rights that it will not be necessary to rely on the general limitations clause. Although this is not stated in precisely those terms in the explanatory report, this is reflected in the excerpts from the explanatory report (pp. 47-48) referred to above. Within the minimum core content and the negative obligations related thereto, however, the general limitations clause is implied.

The situation where there is a need to modify existing legislation on rights that shall be “ensured by law” also comes under the “considerable amount of discretion” the State has in how these rights are defined and concretised. Retrogressive measures with respect to socioeconomic rights are also expressly dealt with on p. 48 in the explanatory report: “In the event that the public authorities must at some point in time resort to retrogressive measures in the field of these rights, such as a regression in the system for social protection due to economic difficulties, they must nevertheless not go below their minimum core content. In addition the principle of proportionality must be respected as any such regression must be justified by a real economic need and be executed in such a manner that it does not go further than necessary after a thorough assessment of the options available. It is also

important to give particular consideration to the protection of vulnerable social groups in situations like these.”

Finally, the explanatory comments to individual rights of the second and third generation endeavour to set out their minimum core content in more detail. A concise example is to be found in the explanatory report on Article 32 (p. 113): “According to the above this provision entails an obligation on the part of the legislature to enact legislation that ensures the protection of valuable national possessions pertaining to the cultural heritage [...] and to make arrangements that guarantee that they are returned intact to future generations. The public authorities are on the other hand generally the guardian of valuable national possessions pertaining to the cultural heritage. The provision directly places them under the defined restrictions pertaining to the concept of national possessions, namely a ban against the destruction of those possessions, their sale or placement in collateral or their surrender for possession or permanent use.” When it comes to the more classical second generation rights the comments in the explanatory report are generally more detailed as to the minimum core content, the obligation to legislate and the discretion of the legislature in promulgating such legislation. Unfortunately it is not possible to provide a full translation of all these comments here.

#### **Ad paras 16 and 17:**

Article 16(1) is a new provision in the Constitution so the complex interplay between its minimum core content and the elements that are reserved for the discretion of the legislature will to a certain extent have to be worked out by the courts in future application. The explanatory report (p. 48) states that: “The change involved in a clearer provision on the freedom and autonomy of the media is made in light of the obligations of Iceland under Article 10 of the European Convention on Human Rights”. As Article 16(1) is therefore supposed to reflect the State’s obligations under Article 10 ECHR as they relate to the functioning of the media, the minimum core content must in any event reach the same minimum level of protection as provided therein. Otherwise, the explanatory report is fairly focused on providing substantive guidance to the legislature in the exercise of its discretion under the Article. It includes, for example, the following comments (p. 78): “Paragraph 1 contains guidance for the legislature and public bodies in general that the media shall to the extent possible function freely and not be subject to interference.”

Some guidance as to the definition of the term “media” is provided in the explanatory report to Article 16 of the Bill. In this respect, it simply quotes the original explanations given by the Constitutional Council. Thus, the explanatory report (p. 79) refers to the current definition in Icelandic law that the concept of media requires both an element of public access and editorship, as basis to the Article. At the same time, however, it states that: “Discussions in the Constitutional Council had the tone that the Article should not be limited to media as defined in the above legislation, as the dividing line between these and other kinds of media continually becomes more eroded. As this Article is intended to stand the test of time it is important that it will be interpreted widely in light of the interests it is supposed to protect. An open and informed discourse is a basic premise for democracy and it must therefore be ensured.” The courts will have to interpret the term “media” on basis of this guidance.

#### **Ad. para. 23:**

Article 33 is a new third generation provision in the Constitution. The interplay between its minimum core content and the elements that are reserved for the discretion of the legislature will to a certain extent have to be worked out by the courts in future application. The explanatory report, however, emphasises the link with already recognised “environmental” human rights which indicates the focus of the minimum core content.

More specifically, the explanatory report begins by stating (p. 116) that "...the provision clearly connects environmental law and human rights." It, then, emphasises the link with specific human rights protected in the other provisions of the human rights chapter and states (p. 116): "Thus it is considered part of the minimum core content of Article 22(1) that the State ensures that water, which provides the basis to life, is accessible to all and of sufficient quality to satisfy human needs. The minimum core content of Article 23 on the right to health also entails that the State is under the obligation not to cause environmental pollution that affects the health of the public and to protect the public from such pollution that may be caused by private parties. Article 23 further entails the obligation of the State to work towards conditions of human health, such as with respect to environmental factors, which are as good as can be at any given time. The nature and the environment are on the other hand also related to the right to protection of private life, home and the family [...] and possibly also the right to life [...]. Significant negative environmental impact that can be proved to have an effect on the health or life of a person can, thus, entail a violation of these rights, or in the case of the protection of private life an interference that must be justified in the same manner as other limitations on rights, *cf.* Article 9(2). [...] Finally, the European Court on Human Rights has confirmed that the protection of the environment is a public interest that can justify limitations on other rights, *cf.* Article 9(2). In this connection the Constitutional Council affirms that the Constitutional Committee's report stated that there is reason to provide a stronger protection for the nature and the environment to obtain a better balance between the demand for "healthy living conditions for the public" on one hand and the protection of the right to property and the right to work on the other, *cf.* Articles 13 and 25 of the Bill. [...]". In conclusion it is stated (p. 116) that: "The provision in Article 33(2) thus reflects the development that the protection of nature and the environment is seen as a precondition of life and of human rights of all generations."

**Ad para. 25:**

The term "principles of environmental law" in Article 35(3) refers to the 5 principles mentioned in the explanatory report (pp. 133-134). These are the precautionary principle, the "polluter pays" principle, the principle of mainstreaming environmental protection when taking decisions that have an environmental effect, the principle of prevention and the "user pays" principle.

The explanatory report (p. 134) further adds: "The five principles mentioned above derive from international obligations, including the Treaty on the European Economic Area which has been incorporated into domestic law, and declarations, including the Rio Declaration, and have to a certain extent in one way or another been concretised in Icelandic legislation. [...] Under this provision the public authorities are obliged to base their decisions concerning the nature and the environment on these five principles. The provision also provides the legislature with guidance for policymaking that requires that these principles are taken into account when formulating legislation. For the principles to have the intended effect it is necessary to define the appropriate rights and duties in specific provisions of ordinary legislation."