

# CONSTITUTIONAL REFORM PROCESS IN ICELAND

## - Involving the people into the process -

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### **Abstract**

*Following the collapse of the Icelandic financial system in the autumn of 2008 and the ensuing economic crisis an extensive public debate resurfaced in Iceland on reform of the Constitution of the Republic. In this paper the focus will be set on the reasons for the debate, and the new routes of the reform process that were decided by the enactment of an Act on a Constitutional Assembly in 2010.*

*The Act established a consultative Constitutional Assembly elected by direct personal elections without participation of politicians or political parties. To seek the principal viewpoints of the nation to form the basis of Iceland's new constitution a special National Forum was also convened with approximately one thousand participants. In the whole exercise, a great emphasis has been put on the involvement of the public and seeking the views of the nation to be reflected in the constitution. A great setback in the process was, that due to flaws in the elections to the Constitutional Assembly the election was invalidated by the Supreme Court of Iceland in March 2011. As a respond the parliament, Althingi, decided that the 25 candidates elected should be invited to take a seat on a Constitutional Council, which was given the role of submitting proposals on a review of the Constitution.*

*The idea of a Constitutional Assembly is not a new one. However, the idea to remove the task of drafting a constitution away from the political forum due to deep mistrust of politicians is a novelty. The question arises whether the emphasis on individuals and not political platforms and the demand for direct voter participation in important affairs is likely to increase democracy in Iceland. The Constitutional Council has now submitted their proposals of a new constitution to the Althingi. An assessment will be made whether the process is likely both to bring about necessary changes on the Constitution and strengthen the image of the Constitution as symbol of a national covenant.*



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## 1. Historical background of the Icelandic Constitution

The Republic of Iceland was founded in 1944 following an abrogation of a union with Denmark. The country had at that time been subject to dependency on the Danish crown, since the 14th century. The Constitution of the Republic was ratified on the establishment of the Republic in 1944, the third constitution to take effect in Iceland.<sup>2</sup>

The current Constitution has its roots in the mid-19th century and its origins are closely connected to the Danish Constitution of 1849. When absolute monarchy was discontinued in Denmark in 1848, a constitution was adopted by a Danish Constitutional Convention on 5 June 1849, establishing a constitutional monarchy in which legislative power was handed over to a parliament elected by the people. A dispute arose between Iceland and the Danish Government regarding the definition of Iceland's position in relation to Denmark. Iceland refused to recognise the legitimacy of the Danish constitution for Iceland, as the country could not be considered to be a part of the State of Denmark. Instead, Icelanders demanded their own constitutional assembly for the purpose of drawing up an Icelandic Constitution. After years of dispute regarding these Icelandic demands, Christian IX, the King of Denmark, presented to Iceland a constitution on 5 January 1874, the "Constitution concerning the special affairs of Iceland" which he adopted unilaterally. With the Constitution the Icelandic parliament, Althingi, was granted legislative powers, however limited to the special Icelandic affairs, but in most other respects the Constitution was based on the Danish Constitution of 1849.

In the latter part of the nineteenth century, Iceland's struggle for more self-control in the nation's affairs continued. An important step was taken with the home rule of 1904, when the executive powers were transferred from Denmark to Iceland and an Icelandic cabinet minister was appointed who answered to the Althingi.<sup>3</sup> The most important milestone was passed in 1918, however, when Iceland was granted sovereignty and recognition of its equal status in union with Denmark under the same king through a special agreement the Union treaty and the Danish-Icelandic Union Act adopted in both states.<sup>4</sup> The Union Act was approved in a national referendum in Iceland in the autumn of 1918 and came into force on 1 December 1918.

Subsequently, Icelanders adopted a new constitution in 1920.<sup>5</sup> There they assumed control of foreign affairs, however temporarily still in the hands of the Danish Government on behalf of Iceland, and the supreme judicial powers were transferred to Iceland by the establishment of the Supreme Court of Iceland. The Union Act stipulated that after 1940 the two states would enter into negotiation concerning the future status of the union between Iceland and Denmark and could be terminated by either party if not such agreement was reached.

When Denmark was occupied by Germany in April 1940 the situation was changed and Denmark was under these circumstances not able to fulfil its obligations according to the Union Act. Accordingly the Althingi declared that the Icelandic Government would temporarily take over the power of the King, according to the Constitution, as the head of state and holder of executive power with the Government and as well the holder of

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<sup>2</sup> The translation of the current Constitution of 1944 is accessible on: [www.government.is/constitution/](http://www.government.is/constitution/)

<sup>3</sup> Constitutional Act No. 16 of 3 October 1903.

<sup>4</sup> Act No. 39 of 30 November 1918.

<sup>5</sup> Constitution of the Kingdom of Iceland, No. 9 of 18 May 1920.

legislative power with the Althingi. Furthermore, the foreign affairs of Iceland were removed from the Danish authorities to the Icelandic authorities.<sup>6</sup> Foreseeably, the Danish Government was not in the position to enter into negotiations on the union between the countries and it became apparent that there was no political will amongst Icelandic politicians and the general population to renew the union treaty with Denmark.

Accordingly Iceland decided to break the union with the State of Denmark and establish a separate republic. To prepare for a making of a new constitution of the republic a Constitutional Act was adopted by the Althingi in 1942.<sup>7</sup> It added a new procedure to adopt a new Constitution, which would require the approval of one session of Althingi and be subject to approval of the majority of voters in a national referendum.<sup>8</sup>

Because of the special circumstances that prevailed at the peak of the Second World War, the Act from 1942 only allowed that minimal amendments should be made to the Constitution with the purpose of giving effect to the transformation from constitutional monarchy to a republican form of Government Republic with directly elected President. This was particularly through the establishment of the office of a President of Iceland to replace the monarch; The decision was made to postpone any comprehensive revision to a more favourable time. The only real new provisions therefore concerned the position and role of the President of Iceland, including rules on his or her national election and rules on impeachment and, no less importantly, a disputed provision in Article 26, which replaced the King's powers to veto legislative bills. The option was chosen of granting to the President of the Republic personal powers, as one holder of legislative power, to refuse to sign laws passed by the Althingi and refer them instead to a national referendum.<sup>9</sup>

In other respect it can be said the word "king" was replaced with the word "president" in the provisions of the constitution related to the previous functions of the King. According to Article 2, Althingi and the President of Iceland jointly exercise legislative power and the President and other governmental authorities exercise executive power. The role of the President is solely formal, as a holder of an executive power. The President entrusts his authority to Ministers according the Article 13 of the Constitution however, according to Article 19 the signature of the President validates a legislative act or government measure when countersigned by a Minister.

The Constitution of the Republic took effect on 17 June 1944, following a referendum where it was approved with approximately 95% of the vote. In the same referendum the Icelanders decided to discontinue the union with Denmark, also with approximately 97% of the vote. Over 98% of the voters participated in the referendum.

Despite assurances to the contrary by the Althingi, a comprehensive review of the Constitution has never taken place. Since 1944, a number of initiatives have been made to reach that aim. Several constitutional committees have been formed to undertake a thorough

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<sup>6</sup> These decisions of the Althingi made in the form of parliamentary resolutions clearly deviated from the organisation of state power according to the Constitution. They were justified with reference to a state of emergency and that unwritten principles of the Constitution concerning emergency situations were applied. See Ólafur Johannesson: *Stjórnskipun Íslands* [The constitutional system of Iceland], Hladbuð 1960, p. 35.

<sup>7</sup> Constitutional Act No. 97 15 December 1942.

<sup>8</sup> According to Article 76 of the 1920 Constitution the traditional way to change the constitution was to adopt a constitutional bill, immediately dissolve the Althingi and hold a general election, and if a new Althingi passed the bill unchanged, it would come into force as constitutional amendment.

<sup>9</sup> It has been suggested that the idea at that time was sought to Article 73 of the German constitution (Weimar Republic) of 11 August 1919 then in force, according to which, a law passed by Reichstag had to be presented in a plebiscite, if the Reich president decided so, within the period of one month.

review of the Constitution, most recently in 2005 but its work ended in 2007 without results. The work has always stranded owing to the lack of political consensus.

Nevertheless, a number of limited changes have been approved on the Constitution, the most important involve reorganisation of the electoral system, the working procedures of the Althingi in 1991, and a new human rights chapter in 1995.<sup>10</sup>

In recent years an extensive public debate as resurfaced in Iceland on the need to reform the Icelandic Constitution. In the following the focus will be set on new routes that were decided in Iceland in 2009 to revise the Constitution and the objective of such revision.

## **2. Reasons underlying demand for constitutional reform and arguments supporting the need for revision.**

It can be maintained that one of the few positive repercussions of the collapse of the Icelandic financial system in 2008 and the ensuing financial crisis was the awakening it caused in the Icelandic community and the public debate that arose concerning the foundations of Icelandic society and its government. This debate brought to light some pressing questions regarding the meaning of democracy: What difference does it make that powers should ultimately be vested in the nation? What is the right of the people to have a direct influence on decisions that matter? How can it be ensured that people who wield government powers under a mandate from the nation will reflect the nation's actual will? And how can those in power be held accountable if they betray the nation's trust?

Many sought answers to some of the fundamental questions which the Icelandic nation was confronted with, in the Constitution of the Republic, but they were nowhere to be found. This background was an important factor to revive the debate concerning a reform of the Icelandic Constitution in 2009, even though reforms have been on the agenda for decades.

However, the fact is that large parts of the Constitution, especially as regards the executive powers and the judiciary, have remained more or less unchanged from the time that Iceland received its first constitution from the King of Denmark in 1874 with subsequent additions made in the Constitution of 1920. Looking at the original Danish model of the Icelandic Constitution, it is clear that it was subjected to various amendments in 1953. The provisions of the Icelandic Constitution do not reflect either the current reality regarding the executive branch and the work of the State government, nor do they adequately ensure separation of the executive and legislative branches or the role of the Althingi in supervising the executive. It does not mention of key concepts, such as "democracy", "nation", "parliamentary rule" or "State government".

More importantly the Constitution does not provide a clear picture of where the executive powers of the state are in fact vested, or what the division of functions is between the President of the Republic and the State government in exercising executive powers, nor does it clearly stipulate the role of the Prime Minister as the leader of the government and the general the role and powers of the State government.<sup>11</sup> Also, the Constitution makes no

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<sup>10</sup> Constitutional Acts No. 56 31 May 1991 and No. 97 28 June 1995. In the latter amendment a complete revision was made on the human rights chapter of the Constitution. A number of new human rights provisions were added and the older ones were rephrased and modernised. In this, the European Convention on Human Rights and the main human rights treaties of the United Nations to which Iceland is a Party were chiefly used as models.

<sup>11</sup> In a report of a Special Investigation Committee established by Althingi with Act No. 142/2008, to investigate and analyse the processes leading to the collapse of the three main banks in Iceland, it was inter alia pointed out the prime minister, as the leader of government had not fulfilled its duties to inform other ministers about the

reference as to the right to dismiss parliament or the process of forming a government, to mention just a few pertinent issues. The points of debate that came up when the Althingi decided last year, for the first time, according to Article 14 of the Constitution, to indict a cabinet minister before the Court of Impeachment (*Landsdómur*) for negligence in the course of events leading up to the collapse of the financial system put to the test the definition of the constitutional role and position of the Prime Minister.<sup>12</sup>

Finally, it is important to note that the Constitution of the Republic is silent on co-operation with other states, international organisations and foreign affairs notwithstanding the profound impact of international agreements on the Icelandic judicial system and society in general. The provision in Article 21, to the effect that the President of the Republic concludes treaties with other states, is substantively unchanged from the Constitution of 1920. For this reason the State Government has uncontested powers with regard to various important foreign policy decisions without a clear duty to consult the parliament, e.g. decisions on whether the Icelandic State should support acts of war committed by other states. To give an example there was extensive criticism when the Prime Minister and Foreign Minister decided, without consulting parliament, to declare Iceland's support for the invasion of the USA on Iraq in 2003. It was quite clear, however, that there was no assurance in the Constitution of any need for formal consultation with the Althingi.<sup>13</sup> While these issues remain unclear they will be a constant source of dispute and tension, as shown by recent events.

Some are of the opinion that the Constitution can be blamed for playing a role in the collapse of the banks and the economic crisis in Iceland. It is certainly an exaggeration to say that causes of those events can be traced to the flaws of the Constitution. But as mentioned earlier, there are nevertheless direct links between the economic crisis and the public demand for constitutional reform, even if we do not present the Constitution as a scapegoat. The collapse of the banks and the economic crisis have resulted in a call for a certain degree of reassessment of values and a need for some form of reckoning with the past. As a matter of fact, one of the consequences of the crisis was an unprecedented lack of confidence in both the political parties and the elected representatives of the nation in the Althingi to make decisions on important public affairs, and finding a way to restore this confidence is in itself a separate matter for concern.

This is the main reason that yet another attempt has been made to reform the Constitution of the Republic, this time with a completely different approach. The decision was made to involve the nation directly into the task of the reform. An important factor in that context was that the Icelandic nation has, in fact, never drawn up its own constitution, as was explained in part of this paper. A reference was made to the fact the Icelandic constitution was originally established unilaterally by a Danish king without any substantive

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situation. See further English summaries of the Committee's report in Chapter 2, Executive summary, p. 10 accessible at <http://sic.althingi.is/>.

<sup>12</sup> A case against the former prime minister is now pending before the Court of Impeachment. The indictment is based on the provisions of the Act on responsibility of ministers No. 4, 19 February 1963 and Act on the Court of Impeachment, No. 3, 19 February 1963. The system is based on similar model as stipulated in Articles 14 and 16 of the Constitution of Denmark (*Rigsretten*).

<sup>13</sup> The legality of the Icelandic Government's decision to join the "Coalition of the willing" was subject to a heated debate in Iceland. Particularly the attention was drawn to the vague constitutional role of Althingi to influence directly important decisions of the Government in foreign affairs and in this respect the unclear position of Parliamentary Committee on Foreign Affairs according to Article 24 of Act nr. 55/1991 on Althingi's procedure.

discussion whatsoever as to what sort of constitution the nation wanted or on what fundamental values it should be based. This discussion was also postponed in the special circumstances in which the current Constitution was adopted in 1944. The minimal amendments that were made on the foundation of the Republic at that time therefore had the effect that the Constitution is a fusion, on the one hand, of the constitution of a kingdom resting on a heritage of absolute monarchy, where the crown was the supreme institution and, on the other hand, a republic based on parliamentary rule with a nationally elected president.

Whereas the politicians had failed to prepare the long promised revision, here was an opportunity for the nation to adopt a constitution which would not have the features of a unilateral royal decree, but a covenant on the organisation of the State and the position of its citizens, deriving from the nation itself. A resignation of government and general elections in 2009 paved the way for steps to be taken into a new direction.

### **3. Establishment of new institutions for the reform process**

#### **3.1. The Constitutional Assembly**

A parliamentary election was held in Iceland on 25 April 2009 following strong pressure from the public as a result of the Icelandic financial crisis. The Social Democratic Alliance and the Left-Green Movement, gained overall majority of seats in the Althingi and formed coalition Government which took office on 5 May 2009. The Independent Party, a centre right party, which had been in power for 18 years lost at great deal of its support.

One of the goals stipulated in the new Government's agenda was to establish a special Constitutional Assembly with the task to revise the Constitution. A bill on the issue was introduced in the Parliament in the autumn of 2009. On 16 June 2010 the Althingi passed Act No. 90/2010 on the Constitutional Assembly (ACA) following a heated political debate.<sup>14</sup> The main opponents to the project, including most of the members of the Independent Party, argued that now was not the right time to revise the constitution and the constitution was wrongly blamed for being part of the reasons for the bank collapse. However, the main arguments against the establishment was that it should be the task of the already existing nationally elected representatives, the members of the Althingi, to revise the Constitution, not at new elected forum.

According to Article 1 of the ACA a consultative body, the Constitutional Assembly, was given the role of reviewing the Icelandic Constitution and submitting to the Althingi a draft legislative bill for a new constitution. The Assembly was instructed to address specifically the following (Art. 2):

1. The foundations of the Icelandic constitution and its fundamental concepts;
2. The organisation of the legislative and executive branches and the limits of their powers;
3. The role and position of the President of the Republic;
4. The independence of the judiciary and their supervision of other holders of governmental powers;
5. Provisions on elections and electoral districts;

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<sup>14</sup> The Act is accessible in English at: [thjodfundur2010.is/other\\_files/2010/doc/Act-on-a-Constitutional-Assembly.pdf](http://thjodfundur2010.is/other_files/2010/doc/Act-on-a-Constitutional-Assembly.pdf)

6. Public participation in the democratic process, including the timing and organisation of a referendum, including a referendum on a legislative bill for a constitutional act;
7. Transfer of sovereign powers to international organisations and the conduct of foreign affairs;
8. Environmental matters, including the ownership and utilisation of natural resources.

The Assembly could furthermore address additional matters other than those enlisted

According to the ACA, a separate personal election was to be held to the Constitutional Assembly in order to select 25 delegates; some special rules were enacted designated for the Constitutional Assembly election, in other aspects it was to be governed by general legislation on elections to the Althingi, as applicable. This last part was to prove extremely significant, as will be discussed later.

The Assembly was to be convened on 15 February 2011 and to complete its work on 15 June 2011, at the latest.

### **3.2. The roles of National Forum and Constitutional Committee**

In order to ensure careful preparation of the Constitutional Assembly and still further involvement of the public in the proposed project, the ACA provided that the Althingi should elect 7 members of a Constitutional Committee with an independent status. The Committee was entrusted with three specific tasks.

*Firstly to prepare and organise* a National Forum on constitutional matters. Participation of approximately one thousand people should be assumed for the National Forum, selected by means of random sampling from the National Population Register. The National Forum should endeavour to call for the principal viewpoints and points of emphasis of the public concerning the organisation of the country's government and its constitution; the committee shall process the information collected at the National Gathering and deliver to the Constitutional Assembly when it convened.

*Secondly,* the Committee should undertake the collection and processing of available material and information relating to constitutional matters which could be useful to the Constitutional Assembly.

*And thirdly,* the Committee was entrusted with the task to process information collected at the National Forum and deliver to the Constitutional Assembly as well as to present ideas on amendments to the Constitution for the Assembly

And the process began at full pace. A National Forum was held on 6 November 2010 following extensive preparations and detailed organisation of the Constitutional Committee and was completed in a single day. The Forum was attended by 950 people from all over the country, selected at random from the National Register. The youngest participant was 18 years old, the oldest was 91 years old, and the division of the participants by gender was even. Clearly, careful preparations were needed to collect together the viewpoints of a thousand people concerning the foundations of governmental organisation and State power. The procedure at the Forum was that eight participants were seated at a total of 128 round tables in a meeting hall with a specially trained mediator to guide the discussions at each table. The agenda of the meeting was divided into policy areas, and the first step was to call for views on fundamental values; as the day wore on, the discussions deepened and the principal points of focus were summarised into several main categories. Processing of phrases that the participants noted on cards, together with conclusions, was conducted simultaneously at the meeting, which made it possible to classify and summarise the points of emphasis of the Forum.

The main conclusions from the National Forum 2010 were divided into eight separate but broadly framed themes, grouping together the viewpoints of the participants, reflecting some basic values which they wished to see form the basis of Iceland's new constitution themes. The headings of the main themes were the following: 1) country and nation 2) morality 3) human rights 4) justice, wellbeing and equality 5) the nature of Iceland, conservation and utilisation 6) democracy 7) division of power, responsibility and transparency 8) peace and international co-operation.<sup>15</sup>

There was general and extensive satisfaction among those who participated in the National Forum and the success of the National Forum.

#### **4. The election to the Constitutional Assembly**

The next major stage of the process was the election to the Constitutional Assembly. The Assembly and the whole project became the subject of extensive public discussion. As it turned out, there was great interest in running as candidates for the Assembly, and in point of fact the conditions for running were not strict. The only condition was that each candidate needed a minimum of 30 and maximum of 50 sponsors for his or her candidacy; however, members of parliament were excluded from participation. The result was that 522 candidates put themselves forward. This unexpectedly large number of candidates caused a number of difficulties, both with regard to the promotion and execution of the election, as it became clear that it would be impossible to use traditional ballot papers.

The National Electoral Commission advertised on its website 24 days before the election date, the names of the candidates, their professional titles and the municipalities where they are resident. The provisions of law on the finances of political associations and candidates and on their disclosure obligations applied to contributions and grants to candidates, as applicable. Furthermore the expense of each candidate's election campaign should amount to a maximum of 2 million ISK (approx. 12.500 EUR).

The Ministry of Justice sent a brochure to every home in the country in order to present the candidates, and in addition a special website was set up for the same purpose. Voters were permitted to select up to 25 candidates. In order to facilitate the process of selection for voters, electronic samples of the ballot papers were posted on the Internet, which voters could fill in and take with them to the polling stations for reference. The election to the Constitutional Assembly took place on 27 November 2010, where 25 delegates were elected to the Assembly: 10 women and 15 men.

It was a cause for some disappointment that the participation in the election was much less than expected, with only about 36% of the electorate turning up at the polls. This was considerably short of the normal turnout in elections to the Althingi, where the participation generally exceeds 80%. Among the reasons suggested for the low turnout was that the large number of candidates in the election made it difficult for voters to pick candidates from among the great number of largely unknown people. As candidates had no connections with political parties, only acting in their own personal capacity, it seemed to be difficult for voters to assess which policy they were presenting.

Another reason which might be relevant was that the nation's interest in the whole exercise task was perhaps not as much as expected and clearly there was not a general political consensus about these new methods of the reform process.

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<sup>15</sup> Further description of the Forum and its conclusions can be seen at: <http://www.thjodfundur2010.is/english/>

Furthermore it turned out, as predicted by many, that the great majority of the elected candidates were particularly those who were previously known faces in society, partly from public debate in relation to the crisis. Accordingly, among the candidates selected there was little representation from the areas outside Reykjavik, and the participation in the election was also considerably lower in these areas.

## **5. The invalidation of the election and the appointment of the Constitutional Council**

It was clear that the election to the Constitutional Assembly differed from other public elections held in Iceland in several respects, including the fact that delegates were elected by direct personal election, there were 522 candidates, and votes were cast by writing down the identification codes of candidates, voters were allowed to select 25 candidates, votes could be tallied electronically and the tallying took place at a single location by the National Electoral Commission. Some special rules were adopted in the ACA to reflect these special voting methods. However, according to the ACA, The provisions of the Act on elections to the Althingi should apply to the Constitutional Assembly elections to the extent that they were applicable. This applied to the general provisions of the Act on elections to the Althingi regarding the principles of a secret ballot.

The election to the Constitutional Assembly was protested on the grounds of various alleged defects in its execution. All voters were entitled to protest and it was clear that number of people were opposing the idea of revising the constitution with these methods. In particular, it was contended that the secret ballot rules of legislation on general elections had been violated, as the specially designed ballot papers had been sequentially numbered, so that it was possible to trace them to voters; in addition, the polling had not taken place in enclosed booths, as required; further defects were also mentioned, which there is no need to describe here in further detail. According to the ACA there was also a special procedure for protest, which provided that any protests of the election should be resolved directly by the Supreme Court.

A group of individuals accordingly brought complaints to the Supreme Court based on these arguments previously mentioned. On 25 January 2011 the Supreme Court handed down its decision that owing to various defects in the conduct of the election, the election was invalid. In its argumentation leading to the conclusion the Court referred to the responsibility of the legislature to lay down clear and detailed rules on the conduct of public elections, taking into account the circumstances resulting from their unique nature. However, in the Court's opinion the public authorities had not been entitled to deviate from clear statutory instructions on the conduct of the election in light of the large number of candidates or new procedures deemed suitable because of the introduction of electronic tallying. The defects in the conduct of the election held on 27 November 2010 to the Constitutional Assembly were as such considered collectively and accordingly the Court found no alternative but to invalidate the election.

As one can expect, this conclusion was a blow to the entire process, and it was now obvious that the Assembly would be unable to start its work on 15 February, as intended.

## **6. Response to the invalidation of the election to the Constitutional Assembly – Establishment of a Constitutional Council**

So, what recourses were available? This became the subject of fierce political dispute, which will not be recounted here. The main options discussed there was whether a new election

should be held to the Constitutional Assembly, which would have incurred significant cost, apart from the risk of an even smaller voter turnout or would other recourses be more feasible.

In brief, the eventual decision was not to repeat the election to the Constitutional Assembly. Instead, the Althingi, by a resolution passed on 24 March 2011, decided that the 25 candidates elected to the Constitutional Assembly should be invited to take a seat on a council appointed by the Althingi, the Constitutional Council, which was given the role of submitting proposals to the Althingi on a review of the Constitution in the same manner as the Constitutional Assembly had been intended to do. The proposals of the Council will be advisory. Concurrently, the Act on the Constitutional Assembly was repealed.

This decision of the Althingi was harshly criticised on the grounds that it constituted a circumvention of the decision of the Supreme Court. Others pointed out that, on the contrary, the decision of the Supreme Court would be observed by admitting the invalidity of the election, but this could not prevent the Althingi from appointing as its advisors the individuals elected to the Assembly.

It was clear however, that there was little consensus on the direction that the matter took and it was likely to weaken the outcome of the whole project that its initial idea underlying the Constitutional Assembly that specially elected representatives of the nations should be given the task to write a new constitution.

## **7. Work of the Constitutional Council**

The Constitutional Council was finally convened in early April 2011. At its first meeting, the Council took delivery of a detailed report prepared by the Constitutional Committee over the preceding 9 months, acting on the mandate it had been granted, as described earlier. The report was extensive containing material which should be of use for the Council in its work. The report summarised the principal points of focus that had emerged at the National Forum in November 2010. It also included reasoned proposals from the Constitutional Committee regarding amendments to the Constitution that would, among other things, reflect the conclusion of the National Forum. In addition, there was some material prepared by the Committee in consultation with experts in the field of constitutional law and political science, such as reviews of certain delimited matters, explanations of the current provisions of the Constitutions, its history and comparisons with foreign legislation. Furthermore the Constitutional Committee established an electronic database collecting material related to the constitution.

The Constitutional Council therefore had a great deal of material to work with, but the Council faced an extremely difficult task. It was working in an environment of heated political argument, and it was completely different in nature from a lawfully elected assembly. This novel experiment of providing direct public access to the drafting of a constitution and creating a broad consensus on the foundation of the Icelandic constitutional structure had therefore taken a different direction than originally intended.

But in the short space of time accorded to the Council, less than four months, it succeeded in organising its work well. It split itself into three working committees and each committee was entrusted with specific issues.<sup>16</sup> Also, the entire procedure in the Council was very open and transparent. The Council maintained an active website, where consultation was sought with the nation by granting to everyone the opportunity to submit thoughts and

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<sup>16</sup> See rules of procedures adopted by the Council at: [stjornlagarad.is/english/rules-of-procedure/](http://stjornlagarad.is/english/rules-of-procedure/).

questions and comment on the draft proposals that were posted on the website as they took shape. This made it possible to keep track of progress as the proposals developed. The Council emphasised an open communication with the public and its work could also be seen on the major communicative media such as Facebook, Youtube and Flickr. Every day short interviews with delegates were put on Youtube and Facebook and weekly there was live broadcast from the Council meetings on the webpage and on Facebook. Also, the working committees of the Council summoned experts on specific issues and obtained opinions and comments on specific matters.

At the end of July 2011, the Constitutional Council submitted its proposals to the Althingi on a new constitution in the form of a legislative bill. The bill was unanimously approved by all delegates.<sup>17</sup>

### **8. The proposals of the Constitutional Council**

The Constitutional Council's bill assumes a number of changes from the current Constitution without proposing any fundamental changes in the constitutional organisation, which in fact was never the intention.

Among notable aspects of the proposals is the presentation of various fundamental concepts of the constitutional organisation in clear language, making the constitution more understandable and accessible to the general public. The presentation and order of chapters has been changed, with the human rights chapter now at the front instead of last. A preamble describes the common values and certain noble goals that all state governments should attempt to achieve. This strengthens the image of the Constitution as a national covenant.

There are also numerous improvements in the proposal, in particular a proposal on strengthening the position of the Althingi and its supervisory control over the executive, duties of ministers towards the parliament and new provisions to strengthen the independence of the courts and regarding appointment of judges. The proposals include clearer and more detailed rules on the executive branch, the position of the State government and new methods for the formation of Government. The position of the President of the Republic is redefined and his position no longer resembles that of a king in a monarchy, as in the current Constitution. According to the proposals, the president is no longer a holder of legislative power with Althingi but exercises executive power with the ministers, Government and other authorities. Provisions on foreign affairs, international cooperation and international treaties are now included in the Constitution in a separate chapter. They include *inter alia* the authorisation to the Parliament to delegate state power to international institutions established with treaties to which Iceland is a Party. This is not possible under the current Constitution but would be a necessary to enable Iceland to become member of the European Union.

As might have been anticipated, opinion is divided on the proposals of the Constitutional Council. They bear the marks of having been prepared in a very short time, and some of the proposals do not appear to have been carefully considered, lack harmonisation in some aspects and may be difficult to apply as legal text. There is an impression that the reason that a consensus could be reached was that many proposals entered the eventual draft without

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<sup>17</sup> English version of the bill of the Constitutional Council can be seen at Council's homepage at: [http://stjornlagathing.is/other\\_files/stjornlagarad/Frumvarp-enska.pdf](http://stjornlagathing.is/other_files/stjornlagarad/Frumvarp-enska.pdf).

objective discussion or challenge and without careful scrutiny of their possible consequences. The phrasing of some provisions is unclear and padded with ambiguous concepts, however likely to gain popular support for declaring noble objectives. This applies in particular to some of the new provisions in the human rights chapter, where it is particularly important for the rules of law to be phrased carefully as guidance for the courts of law, which apply these rules and interpret them in individual legal cases. This is accompanied by imprecise wording and a use of concepts which, for instance departs from the traditional meaning of the same concepts in international agreements. Other provisions are too specific and precise instead of laying down general principles, and they are doomed to early obsolescence. It is also possible to discern certain fashionable trends in the proposals on human rights, taking too much account of a present day debate, with their heavy emphasis on the environment, nature and natural resources, dissemination of information and the media. When borne in mind that the revision of the human rights chapter was not included in the list of issues which the ACA instructed to address specifically, it seems that the emphasis put into that part of the work is not proportionate in relation to other issues. However, it is not surprising that human rights are likely to gain more attention and interest than organisational issues related to institutions of the three branches of government.

The proposals attach great weight to means to enhance direct democracy and new recourses available to force a referendum, including referendums on controversial legislation passed by the Althingi. Furthermore the status of local authorities is strengthened as well as residential democracy. This is in line with the development in most other European states. The reasons underlying the increased pressure to hold referendums are however possibly attached to the present and vast distrust towards politics and political parties in Iceland.

It can however be argued that the proposals regarding direct participation of voters in referendums also suffer from the lack of an objective assessment of potential consequences in the political arena, for instance on the general progress of parliamentary business in the legislature. Instead of offering options, there are simply additions of new means. This means that the strongly debated and now the active powers of the President of the Republic to submit acts of law to the public in a referendum remain in place without any restrictions. To this is added a provision to the effect that 10% of all voters can force a referendum on acts of law passed by the Althingi. The former recourse seems to be superfluous since the reasons why the President referred a bill to a referendum (in 2010 and 2011) were exactly those, that number of voters had requested him to do so.

In light of the heavy emphasis on expanding direct democracy it comes as a surprise that the proposals for a new constitution do not assume that its entry into force should be subject to approval in a national referendum. This represents a certain contradiction of the fundamental principle that the nation itself should be the source of the constitution and a regression from the previous order, where the current Constitution of the Republic could only enter into force if approved by a majority of the electorate, as was done in 1944.

As recounted earlier, the Constitutional Council submitted its proposals for a new Constitution to the Althingi at the end of July. As the next step, the Althingi will submit the proposals to deliberation, as the conclusion of the Council is merely advisory; the Althingi will have the last word.

Deliberations on the bill will soon begin in the Althingi at the time of the writing of this paper. It will be interesting to observe the progress of events; it is clear that the proposals in the bill will need to be improved to some extent, but the big question is whether the main substance of the bill will remain unaltered by the Althingi.

## 9. Conclusions

The approach used in the constitutional reform in Iceland is unique and has no direct precedents in other countries in recent decades. It is based on an old foundation, the concept of a constituent convention, which can be traced back to the 18<sup>th</sup> and the 19<sup>th</sup> century, where it is clearly reflected that all power derives ultimately from the nation and the nation itself is the holder of power to adopt the constitution. It is therefore extremely interesting to see this idea being implemented in the twenty-first century at a time of revolution in information technology, where the opportunities for voters to express their opinions and participate in an open and extensive public debate are greater than ever before and where great emphasis has been put on the involvement of the public into the reform process.

It is particularly interesting to observe the emphasis on removing the task of drafting a constitution away from the political forum on the grounds that the politically elected representatives of the people in the country could not be trusted to complete the task. It was certainly true that they had failed to achieve that objective for six decades in spite of numerous attempts. However it is worth contemplating whether such a deep mistrust of politicians, and in particular of political parties, the emphasis on individuals and not political platforms and the demand for direct voter participation in important affairs is in actual fact likely to increase democracy in Iceland. The lack of public interest in participating in the election to the Constitutional Assembly is also worthy of remark.

Finally, it is a matter of concern that it does not appear to be assumed that the nation should vote on the constitution in its final form before it enters into force.

It is too early to make any predictions regarding the fate of this undertaking. It would be a great disappointment though if the undertaking did not result in significant changes designed to improve the Constitution, although it is unlikely that the proposals will be approved without change by the Althingi.

But whatever the outcome, it is safe to assert that the experiment was an important one, from which a number of lessons can be learned. Never before has there been such extensive public discussion of what the Constitution means; this has increased both understanding and sensibility of its value, and it has also encouraged people to take a position on the important matters that the Constitution concerns. The undertaking itself will always have returned the benefit that public is now better informed than before and more aware of the meaning of a constitution, as their views and opinions have a real impact on the formulation of the constitutional law of the country.