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The Anatomy of Constitution Making: From Denmark in 1849 to Iceland in 2017

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Abstract

This paper reviews aspects of the constitution making process in Iceland after the financial collapse of 2008, emphasizing the differences between the provisional constitution of 1944 when Iceland separated unilaterally from Nazi-occupied Denmark and Denmark's 1849 constitution which served, with notable exceptions, as the prototype for Iceland's 1944 constitution. The comparison and contrast between the Icelandic and Danish constitutions invites a comparison also between Iceland's 1944 constitution with the new post-crash constitution from 2011 accepted by two thirds of the voters in a national referendum in 2012 and waiting to be ratified twice by a reluctant Parliament. Against this comparative background, the paper proceeds to discuss political and procedural aspects of Iceland's constitutional reform project, and concludes by proposing lessons to be learned from Iceland's experience thus far.

JEL-Codes: K100.

Keywords: constitution making, democracy, Iceland, Denmark.

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I. Historical background: From Norway to Denmark and Iceland

A. Norway 1814

The common foundation of the constitutions of Denmark and Iceland was laid in 1849, after a spate of European revolutions the year before, spreading from Sicily to France, Germany, and much of the rest of Europe except Russia, Spain, and Scandinavia. The European Spring of 1848, as it became known, was quickly crushed by reactionary forces. In Denmark, however, it led to peaceful reform. The Danish monarch, King Fredrik VII, acceded to liberal demands for seats in the cabinet and for a new constitution to be drawn up by a Constituent Assembly elected in the fall of 1848. The assembly had 158 representatives of whom 114 were elected directly by the people and 44 were appointed by the King (38 from Denmark, five from Iceland, and one from the Faroe Islands both of which were part of the Danish realm). In session from October 1848 until May 1849, the Constituent Assembly passed a new constitution that was signed by the King on 5 June 1849. Effectively ending absolute monarchy and introducing some rudiments of parliamentary democracy, the new constitution outlined a constitutional monarchy in which the King would share power with a bicameral Parliament (d. Rigsdag, later Folketing) where the lower house would be directly elected by the people and the upper house would include directly elected property-owning representatives as well as royal appointees.

Two years later, in 1851, Iceland held its own National Assembly which demanded increased political liberty as well as free external trade. Before it could conclude its proceedings, however, the assembly was abruptly dissolved by the representative of the King. But even if increased political liberty remained out of reach for Iceland, free foreign trade was achieved soon thereafter, in 1855, with the abolition by law of the last vestiges of the old monopoly granted by the King to Danish merchants. At the National Assembly in Reykjavík the Icelanders were led by Mr. Jón Sigurdsson, a Member of Parliament who had penned several path-breaking scholarly essays advocating free trade as well as Iceland's sovereignty within the royal union with Denmark (Gylfason, 2011a, 2011b).

Denmark's 1849 constitution had an important antecedent in Norway's constitution from 1814 as well as the Belgian constitution of 1831, both considered liberal. Norway had belonged to Denmark 1380-1814, but when the French lost the war with England in 1814, a war in which Denmark had sided with France and Sweden with England,

Denmark was forced to cede Norway to Sweden. To underline their opposition to being treated like disposable small fry in backroom deals among their Scandinavian imperialist neighbors and to back up their claim to independence, the Norwegians held a Constitutional Convention at Eidsvoll in Norway, some 70 km north of Oslo, adopting a new constitution on 17 May 1814, inspired by the U.S. Declaration of Independence of 1776 and constitution of 1787 as well as the French revolution that began in 1789. The Eidsvoll constitution was at the time considered to be one of the most democratic constitutions in the world, and remains the world's second oldest constitution still in force without interruption, second only to the U.S. constitution. It granted the right to vote to about a half of all men (farmers owning their land, urban property owners, and civil servants), protected free speech, and severely curtailed the power of the King to be chosen by the constitution makers, a significant novelty. Sweden, however, was not ready to grant Norway independence at the time or, more precisely, to dissolve the royal union between the two countries. It was not until more than 90 years later, in 1905, that the Norwegians, inspired by several decades of fervent nationalism in Europe as well as a national awakening in the arts and literature at home,¹ unilaterally left the royal union with Sweden, declaring full independence. The dissolution of the union was approved by 95.95% of the votes cast in a national referendum. This was the year after Denmark granted Iceland home rule in 1904. Denmark's gracious handling of Iceland in 1904 may have played a role in convincing Sweden that Norway was entitled to full independence in 1905. The most significant change of Norway's constitution since 1814 was made by the Norwegian Parliament in 2015 when new human rights provisions were added to the original text.

Against this historical background, this paper aims to present the constitution bill produced by Iceland's Constituent Assembly of 2011 in the light of its Danish antecedent from 1849 when Denmark managed to do what Tunisia did during the Arab Spring beginning in 2010. The structure of the paper is as follows. The rest of this introductory section briefly describes the development of the constitution of Denmark from 1849 to date, tells the story of Iceland's constitution from 1874 to 1944 when Iceland declared full independence and became a republic, and then describes the semi-

¹ Edvard Grieg's music stirred national fervor as did the literary works of Bjørnstjerne Bjørnson who wrote the lyrics to Norway's National Anthem, and was awarded the Nobel Prize for literature in 1903.

presidential-cum-parliamentary constitution from 1944 and the modest amendments made to it until the financial crash of 2008. Section II describes the constitution making process that was launched in Iceland after the crash and remains stalled in Parliament, comparing and contrasting the 2011 constitution with the provisional constitution from 1944 as well as with Denmark's constitution, revised in 1953, and discusses political aspects of the process. Section III continues the discussion by reviewing procedural aspects of the reform process. Section IV proposes some lessons to be learned from Iceland's experience thus far. Section V concludes the argument.

B. Denmark from 1849 to 1953

When the Icelanders celebrated the 1000th anniversary of the settlement of Iceland in 1874 at Thingvellir, the site of their ancient parliament (Althingi, est. 930), King Christian IX of Denmark brought Iceland its first constitution, essentially an Icelandic translation of the Danish constitution from 1849 which had been revised in 1866 to tighten the rules for election to the upper chamber of Parliament. Like Greenland and the Faroe Islands to this day, Iceland was still part of the Danish realm. The Icelandic Parliament which met every other year had been unable to agree on a constitution and to agree with the Danish government, triggering the King's unilateral initiative to resolve the impasse on his visit to Iceland in 1874. A statue of the stiff and stern-looking King with the 1874 constitution in his outstretched hand still stands outside Government House in the heart of Reykjavík.²

Denmark's 1849 constitution remains essentially unchanged to this day. Following the backward-looking 1866 amendment, the constitution has been amended three times. Formally, on each occasion a new constitution took the place of the preceding one.

First, in 1915, the tightening of the rules for elections to the upper chamber of Parliament from 1866 was reversed and women and men without property were granted the right to vote as was done in Iceland also in 1915 by law rather than by constitutional amendment. Further, it was stipulated that constitutional amendments must be passed by two consecutive Parliaments as well as a referendum where 45% of the electorate must vote yes.

² "Grandma," asked a child when shown the statue: "Who is this guy with the remote?"

Second, in 1920, the Danish constitution was changed to allow for the reunification of Denmark following Germany's defeat in the First World War, establishing the current border between Denmark and Germany.

Third and most important, the constitution was changed in 1953 to abolish the upper chamber of Parliament and to prepare Denmark for possible membership in what is now the European Union by granting the government clear constitutional authority to share Denmark's sovereignty with other countries. Further, the 1953 constitution contained new or revised provisions on civil rights, including *habeas corpus*, protection of private property rights, and freedom of speech. Also, the threshold from 1915 that required 45% of the electorate to approve changes in the constitution was lowered to 40%. With these amendments, the Danish constitution has remained unchanged since 1953. The constitution supersedes other legislation. Denmark does not have a special Constitutional Court. Rather, the Supreme Court ultimately determines whether legislation contravenes the constitution.

The new provision on the sharing of sovereignty in the 1953 constitution merits special mention. At this time, European integration was taking shape. The European Steel and Coal Community, the precursor of the EU, had been established by a treaty ratified in 1952. Denmark wanted to be ready. Specifically, Danish politicians did not want a provision inherited from 1849 to be used to prevent the Danish people from participating in the European integration project if this is what they wanted to do. Article 3 of the 1849 constitution states: "The legislative power shall be vested in the King and the Folketing conjointly. The executive power shall be vested in the King. The judicial power shall be vested in the courts of justice." This provision was generally viewed as entailing a prohibition against the sharing of sovereignty with other nations.

Further, article 19.1 of the Danish constitution states:³ "The King shall act on behalf of the Realm in international affairs. Provided that without the consent of the Folketing the King shall not undertake any act whereby the territory of the Realm will be increased or decreased, nor shall he enter into any obligation which for fulfillment requires the concurrence of the Folketing, or which otherwise is of major importance; nor shall the King, except with the consent of the Folketing, terminate any international

³ The English translations of the constitutions cited in the text are taken from the website of the Comparative Constitutions Project, <http://comparativeconstitutionsproject.org/>, accessed 7 September 2016.

treaty entered into with the consent of the Folketing.” This article has been taken to mean that the Parliament, and only the Parliament, is authorized to enter into agreements “whereby the territory of the Realm will be increased or decreased,” including, by extension, an agreement on EU membership. Some considered this constitutional provision insufficiently clear; others, too permissive. Some saw a conflict between articles 3 and 19.1.

This is why, in 1953, article 20 was added, in two parts. Article 20.1 states: “Powers vested in the authorities of the Realm under this Constitution Act may, to such extent as shall be provided by Statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and co-operation.” This provision aims to clearly authorize shared sovereignty. Further, Article 20.2 states: “For the passing of a Bill dealing with the above a majority of five-sixths of the Members of the Folketing shall be required. If this majority is not obtained, whereas the majority required for the passing of ordinary Bills is obtained, and if the Government maintains it, the Bill shall be submitted to the Electorate for approval or rejection ...” Hence, the sharing of sovereignty is permitted provided that either a vastly increased majority in Parliament or a simple majority of the voters favors the arrangement in question.

Denmark’s accession to the EU in 1973 was considered legal on the basis of those two constitutional provisions, 19 and 20, despite article 3, and was approved in a national referendum in 1972. Even so, in 1996, the Danish Prime Minister was sued by a group of individuals opposed to Denmark’s EU membership for violating the constitutional provisions on the sharing of sovereignty, also known as transfer of state powers. The Supreme Court acquitted the Prime Minister, but opined that there are unspecified limits to the extent that such sharing of sovereignty is permissible. In 2011, another Danish Prime Minister was sued by a group of citizens claiming that the Parliament’s adoption of the Lisbon Treaty without a national referendum was unconstitutional. The case was later dismissed. These lawsuits are remarkable in view of Denmark’s NATO membership. Denmark became a founding member of NATO in 1949. Article 5 of the NATO treaty states that an attack on one member is an attack on them all. This means that if Syria were to attack Turkey, Denmark like all other NATO members would be at war. The constitutionality of this type of sharing of sovereignty

through defense agreements as opposed to economic and political agreements has never been a legal or constitutional issue in Denmark or other countries.

Another special feature of the Danish constitution needs to be noted. The text from 1849 describing the role of the King has been retained to this day in revised form to reflect the fact that the monarch's role was, from 1901 onward, reduced to merely symbolic status even if die-hard monarchists continued to argue otherwise until 1920 or thereabouts. Thus, the constitution states that the King executes his power through his ministers. In this light, article 14 which states that "The King shall appoint and dismiss the Prime Minister and the other Ministers" has become a mere formality because, in practice, the voters elect Members of Parliament who in turn select the Prime Minister and other ministers. Also, the text contains several provisions inherited from 1849 with no practical relevance for the King or the country since 1901. For example, the afore-mentioned article 19.1 states: "... nor shall the King, except with the consent of the Folketing, terminate any international treaty entered into with the consent of the Folketing" and article 19.2 says "... the King shall not use military force against any foreign state without the consent of the Folketing." Here, the word "King" is meant to be read "Government" or, more precisely, "King in Council" which, in political terms, means the same thing. This lack of clarity, requiring the reader to unearth a hidden meaning from the text, is a consequence of the textual compromises needed in the gradual transformation from absolute monarchy to a purely parliamentary democracy in Denmark. Likewise, perhaps for a similar reason, while the Danish constitution outlines the separation of power of the three branches of government, its provisions in this regard are not as sharply formulated as, for example, in the U.S. constitution.

Article 22 of Denmark's constitution from 1953 states: "A Bill passed by the Folketing shall become law if it receives the Royal Assent not later than thirty days after it was finally passed." In other words, the King can withhold royal assent from – that is, veto – legislation. Before the change of system in 1901, the King intermittently resorted to the veto, for example, to block the Icelandic Parliament's vote for increased self-rule in 1886 and 1894. Since 1901, the royal veto in Denmark's constitution has been a dead letter by common consent. Article 22 says nothing about what would happen should the royal assent be withheld. The Norwegian constitution contains a similar but more detailed provision permitting the King to veto the same legislation twice but authorizing

the Parliament to override the royal veto by passing the legislation in question by a simple majority for a third time.

Recently, Denmark's Prime Minister at the time suggested that the Danish constitution from 1953 needed revision, a reasonable suggestion in view of the fact that the average life expectancy of constitutions around the world is 19 years (Elkins, Ginsburg, and Melton, 2009), a number actually proposed by Thomas Jefferson in a famously prescient letter to James Madison in 1789. After all, should a Danish monarch suddenly decide to take the constitution at its word by doing some of the things that the constitution says that the King (or Queen, not mentioned) can do – say, withhold royal assent or dismiss the Prime Minister – the monarch could trigger a constitutional crisis. The Prime Minister's suggestion was prompted by plans for a constitution for Greenland which was granted home rule by the Danish Parliament in 1979. In the Faroe Islands, which attained home rule in 1948, a constitutional committee of outside experts drafted a new constitution for the Faroes a few years ago, a well-crafted document declaring, among other things, that natural resources within Faroese jurisdiction belong to the people and ruling out unequal, i.e., discriminatory, access to those resources. The Faroese Parliament (f. Løgting) recently decided to hold a national referendum on the bill in 2018. It is not clear whether politicians intend to change the substance of the committee's bill before the referendum. Meanwhile, the former Danish Prime Minister's suggestion that Denmark's constitution be revised appears to have been put on ice.

C. Iceland from 1874 to 1944

In practical terms, the 1874 constitution brought to Iceland by King Christian IX made no significant difference as it simply confirmed Iceland's position within the Danish constitutional monarchy, a less than crystal-clear arrangement due to the Danish constitution's somewhat murky provisions on the role of and relationship between the Parliament and the monarch. As at Eidsvoll in 1814, there was a desire for a democratic system of government characterized by a clear separation of powers along U.S. and French lines but this was not clearly spelled out in Denmark's 1849 constitution. In those years, Danish politics revolved around the struggle between conservatives who wanted a strong upper chamber of Parliament, comprising members of the property-owning class as well as the King's appointees, and liberals who dreamed of parliamentary democracy with a greatly reduced political role of the hereditary

monarch. This constitutional battle continued until 1901 when the liberals at last emerged victorious and the conservatives and the King accepted parliamentary democracy as we know it as the fundamental principle of government in Denmark even if the constitution from 1849 as amended in 1866 was left unchanged. This guiding principle of purely parliamentary democracy was not confirmed in the Danish constitution until 1953. The 'change of system' (d. Systemskiftet) of 1901 laid the foundation for Denmark's granting home rule to Iceland in 1904 and, it may be surmised, for Sweden's recognition of Norway's unilateral declaration of full independence through the negotiated dissolution of the royal union between the two countries in 1905.

Home rule in 1904, granted Iceland without constitutional change by the liberals who had won a majority in the Danish Parliament in 1901, was arguably the most significant event in Iceland's political history. Home rule meant that, having squandered away their independence in 1262 due to domestic squabbling among competing chieftains, the Icelanders were once again, 642 years later, masters of their own house, with two exceptions. The Danes still took care of Iceland's foreign affairs and the Supreme Court of Denmark remained Iceland's highest court. A new agreement (Act of Union) on a royal union between Denmark and Iceland in 1918 marked the beginning of Iceland as a sovereign state, fully in charge also of its judicial affairs. The 1874 constitution was amended accordingly in 1920 when the Supreme Court of Iceland was established. Foreign affairs remained the responsibility of the King, that is, the Danish government, until Iceland appointed its first foreign minister in 1940.

In 1934, the constitution was amended a second time to increase the number of seats in Parliament to keep up with the population and a third time in 1942 in an effort to reduce the rural bias of the electoral provision of the constitution. The 1874 constitution contained a detailed provision on elections to Parliament, laying out the division of the country into electoral districts in keeping with prevailing conditions. Unlike the Danish constitution from 1849, the Icelandic 1874 constitution did not proscribe an equal apportionment of parliamentary seats to ensure adherence to the principle of 'one person, one vote.' Impressed by the respect shown in Denmark for equal voting rights, one of Iceland's five representatives⁴ at the Danish National

⁴ The representative in question was Mr. Brynjólfur Pétursson (1810-1851), an Icelandic lawyer and public official in Copenhagen.

Assembly 1848-1849 presented a written proposal to the same effect in Iceland immediately thereafter, to no avail (Kristjánsson, 1972). The advance of democracy in Iceland is reflected in the gradual increase in the ratio of the electorate to the population, a ratio that rose from 9% in 1874 to 15% in 1914, then to 32% in 1916, the year after women were granted the right to vote, and then to 60% in 1942, and to 74% in 2016.⁵

In 1845, when Parliament reconvened as an advisory body following a 45-year hiatus, the number of seats in Parliament was 26, one for every 2,200 Icelanders, a figure that had decreased to 1,800 by 1874. The amendment of 1920 increased the number of seats to 42 to keep up with the increase in population. In 1934, again by constitutional amendment, the number of seats was increased further to 49, lifting the population-per-seat ratio slightly to 2,300. Then came the bitterly fought constitutional amendment of 1942, increasing the number of parliamentary seats to 52 (one for every 2,400 Icelanders). At that time there were four parties in Parliament. The largest was the conservative Independence Party. The second largest was the Progressive Party which derived its support mainly from rural areas and was, therefore, overrepresented in Parliament. In 1931, for example, the Progressives had won a majority of seats in the Parliament with only 35% of the votes, a result they had almost achieved in 1927 when they won 45% of the seats with 30% of the votes. There were in the Parliament two smaller parties on the left, Social Democrats and Socialists, previously Communists.

What happened in 1942 was that the Independence Party and the two left-wing parties united against the Progressives by changing the electoral provision in the constitution to make voting rights more equal, albeit far short of equal apportionment of parliamentary seats. Two elections were held in the spring and fall of 1942 as two consecutive Parliaments needed to ratify the constitutional amendment. The Progressives became furious, and were hardly on speaking terms with other parties for several years afterward. This was an important part of the reason why the Governor of Iceland, Mr. Sveinn Björnsson, soon to become Iceland's first President, found it necessary in 1942 to appoint an extra-parliamentary government with non-political cabinet ministers (judges, businessmen, and a scientist), a government in office from

⁵ Source: Statistics Iceland (http://px.hagstofa.is/pxis/pxweb/is/lbuar/lbuar_kosningar_yfirlit/KOS02001.px/table/tableViewLayout1/?rxid=e79236e3-cd8b-4425-abef-5b55ab55c797), accessed 11 March 2017.

1942 until 1944 when the Independence Party formed a coalition government with the two smaller left-wing parties, isolating the Progressives in opposition. This episode was living proof that constitution making and consensus rarely go together. In the words of Elster (2012): “Contrary to a traditional view, constitutions are rarely written in calm and reflective moments. Rather, because they tend to be written in periods of social unrest, constituent moments induce strong emotions and, frequently, violence.”

The 1918 Act of Union agreement included a provision stating that the agreement could be revised after 25 years should either country wish to do so. In 1943, at the height of the Second World War and with Icelandic politics in turmoil under an extra-parliamentary government, the Icelandic Parliament decided to prepare a unilateral repeal of the Act of Union with Denmark which, occupied by Nazi Germany, was unable to fend for itself. The following year, 1944, the Icelanders decided in a referendum during 20-23 May to declare full independence and establish a republic. Turnout was 98%. Of the votes cast, 99.5% supported the separation from Denmark and 98.5% supported the new provisional constitution establishing the republic.

As is common when nations rise up to declare independence, a new constitution to replace the one from 1874 was originally intended to be an integral part of the establishment of the Republic of Iceland, or so it was hoped, but this was not to be. Rather than have a new constitution prepared as befitted a new republic, the parties in Parliament settled on modest changes to the 1874 constitution, the bare minimum required. Most importantly, the word King needed to be replaced by the word President. The political parties in Parliament wanted the new President to be selected by Parliament and to be merely a ceremonial figure head, like a King, but Governor Sveinn Björnsson was able to have his way, supported by Iceland’s first scientific opinion poll that showed 70% of respondents in favor of a President elected directly by the people.⁶ This gave Iceland one of the first popularly elected presidents in Europe, after France in 1848 and Germany in 1919.

The replacement of a hereditary monarch by a popularly elected President was crucial as it implied that Iceland’s new republic was fundamentally different from Denmark’s parliamentary democracy under a constitutional monarchy. While there had

⁶ Mr. Björnsson’s private papers which became accessible only recently are an important source on the events surrounding the making of the 1944 constitution as related by Kristjánsson (2012).

been, since 1901, a consensus in Denmark that the royal veto of legislation was a thing of the past there was no presumption that the same would apply to a popularly elected President in Iceland. Article 26 of Iceland's 1944 constitution states clearly: "... If the President rejects a bill, it shall nevertheless become valid but shall, as soon as circumstances permit, be submitted to a vote by secret ballot of all those eligible to vote, for approval or rejection. The law shall become void if rejected, but otherwise retains its force." This article was not intended to be a dead letter even if many politicians and some academics wished that to be the case. On the contrary, the presidential veto by article 26 was designed to grant the popularly elected President a constitutionally protected right to refer legislation to a national referendum to affirm when deemed necessary the people's superiority to Parliament, a right considered inappropriate for a hereditary monarch in Denmark. Herein lies a fundamental difference between the design of Iceland's semi-presidential parliamentary system of government (Duverger, 1980; Kristjánsson, 2012) and Denmark's purely parliamentary system.⁷

Even so, the constitutional authority of the President of Iceland to veto legislation and thus refer it to a national referendum lay dormant for 60 years. It was ultimately applied in 2004 and twice thereafter, in 2010 and 2011, removing any reasonable doubt as to whether the President's constitutional right to veto legislation is real or not. To repeat, this means that Iceland's system of government according to the 1944 constitution is best described as a semi-presidential parliamentary system, that is, a parliamentary system where the President, by design, has a constitutionally protected authority to veto legislation and also to appoint an extra-parliamentary government in keeping with the precedent from 1942, to appoint and dismiss ministers, to present bills in Parliament, and more, authority generally considered unfit for a hereditary monarch. True, article 12 in the Danish constitution states: "Subject to the limitations laid down in this Constitution Act the King shall have the supreme authority in all the affairs of the Realm, and he shall exercise such supreme authority through the Ministers." In Denmark, this has since 1901 been taken to mean that the monarch cannot on his or her own exercise any authority. Parliament reigns supreme, subject to the constitution.

⁷ Today, in Europe, Austria, Bulgaria, Finland, France, Iceland, Ireland, Poland, Portugal, and Romania can be classified as countries with semi-presidential parliamentary systems of government even if the power of the President varies from country to country (Gylfason, 2013).

With its popularly elected President, Iceland is a different matter. Consider the following constitutional provisions from 1944: “The President of Iceland shall be elected by the people.” (Article 3). “The President entrusts his authority to Ministers.” (Article 13). This article is best understood as meaning that ministers help execute presidential decisions, not that the President cannot do anything without ministerial consent or agency because, if so, the articles to follow make scant sense. “The President appoints Ministers and discharges them.” (Article 14). “The signature of the President validates a legislative act or government measure when countersigned by a Minister.” (Article 19). “The President appoints public officials as provided by law. ... The President may remove from office any official whom he has appointed.” (Article 20). “If sessions of Althingi have been adjourned, the President of the Republic may nevertheless convene Althingi as deemed necessary.” (Article 23). “The President of the Republic may dissolve Althingi.” (Article 24.) “The President of the Republic may have bills and draft resolutions submitted to Althingi.” (Article 25).

Some members of the political establishment in Iceland have taken the view of the above articles in Iceland’s 1944 constitution that they are dead letters like the corresponding provisions in the constitution of Denmark. In public debate, but not in courts of law, some contested the authority of the President to veto legislation, but that matter was settled once and for all in 2004. It would apparently be equally misguided to doubt the President’s constitutional authority to appoint ministers and discharge them by article 14, “remove from office any official whom he has appointed” by article 20, “convene Althingi as deemed necessary” by article 23, “dissolve Althingi” by article 24 or “have bills and draft resolutions submitted to Althingi” by article 25. It is immaterial that no President has thus far activated those provisions.

The key here is that a parliamentary republic with a popularly elected President differs fundamentally from a parliamentary constitutional monarchy, especially when the constitution makers are known to have been keen on the separation of power of the three branches of government with suitable checks and balances in place (Kristjánsson, 2012). Iceland differs from Denmark in this regard in a similar way as Finland’s semi-presidential parliamentary system differs from Sweden’s parliamentary monarchy. Those who insist on the powerlessness of the popularly elected President of Iceland usually do so as guardians of Iceland’s political elites keen to preserve their executive as well as legislative powers, disregarding that Iceland’s constitution, drawn up at a time

when Icelandic politics was in turmoil and the world was at war, was designed to empower a popularly elected President to exercise a certain independence vis-à-vis the Parliament to strengthen the foundation of Icelandic democracy. Again, it is immaterial to this conclusion that several of the President's constitutionally protected prerogatives remain to be activated.

Further to the President's right to refer laws passed by Parliament to the nation, the 1944 constitution also states that the removal of the President from office and a change in the relationship between church and state be decided by national referenda.

D. Iceland from 1944 to 2009

A lack of clarity or, put bluntly, the apparent meaninglessness of several clauses concerning the role of the President of the Republic, is one reason why the 1944 constitution was described as "provisional" by representatives of all four political parties in Parliament at the time (Jóhannesson, 2011). At first, they promised an overhaul of the new constitution no later than 1946. This is how they managed to convince 98.5% of the voters to support the new constitution in the 1944 referendum. In an address to the nation in 1949, President Sveinn Björnsson reminded the politicians of their failure to keep their promise of a new constitution: "... we still have a mended garment, originally made for another country, with other concerns, a hundred years ago" (Björnsson, 1949; my translation).

Since 1944, the constitution has been amended on several occasions. First, in 1959, the history from 1942 repeated itself when the Independence Party and the two left-wing parties in Parliament again united against the Progressives by changing the electoral provision in the constitution to make voting rights more equal, increasing the number of seats in Parliament to 60, giving a population-per-seat ratio of 2,800. At the same time, the last vestiges of the first-past-the-post electoral system gave way to proportional representation. A further change was made in 1984, effective 1987, when the number of parliamentary seats was increased to its current level of 63, giving a population-per-seat ratio of 3,900. Since 1987, population growth has increased the population-per-seat ratio to 5,200, a low figure compared with, for example, Denmark's 31,000 and Norway's 29,000. The constitutional changes of 1942, 1959, and 1984 were mainly intended to reduce the inequality of voting rights by moving parliamentary seats from rural areas with dwindling populations to the emerging towns, including

Reykjavík. The last such corrective amendment, in 1999, sufficed temporarily to eliminate the systemic rural bias favoring the Progressive Party. This improvement was no to last, however. The problem reappeared in 2013 when the Progressives won 30% of the seats in Parliament with 24% of the popular vote (Helgason, 2014). Unlike the amendments of 1942 and 1959, the ones in 1984 and 1999 were accomplished without great mayhem in Parliament.

To this day, rural areas remain significantly overrepresented in Parliament. Following the constitutional amendment of 1999, Iceland has six electoral districts, three in and around Reykjavík where two thirds of the population live plus three rural districts. The votes of some rural inhabitants weigh almost twice as heavily as do votes in urban districts, an improvement from earlier times when the ratio was first four and then three, but a ratio of nearly two is still far higher than, for example, in Norway and has in recent years led external election monitors to state repeatedly in their reports on Iceland that unequal voting rights on such a scale constitute a violation of human rights.⁸ By design, the electoral system has produced a disproportionate representation in Parliament of the one third of the electorate living outside the Reykjavík area. The 2013 election granted 45% of the seats in Parliament to the three rural constituencies where 35% of the voters reside while 55% of the seats went to the three urban districts where 65% of the voters live. For another example, the 2016 election gave the Independence Party and the Progressive Party, in government together since 2013, 40% of the vote and 46% of the seats in Parliament, 29 seats out of 63. For more on the history and intricacies of Iceland's electoral laws, see Helgason (2014).

Other amendments to the constitution include a reduction of the minimum voting age to 20 years in 1968 and to 18 years in 1984. Parliament was made unicameral in 1991 to streamline the work of Parliament. New but rather modest provisions on human rights were added in 1995, far short of what some human rights specialists considered advisable at the time to keep up with constitutional developments abroad. In 1995, the National Audit Office was also introduced into the constitution. Since 1944, Parliament has rejected or not acted on 100 proposed constitutional amendments of various kinds.

Along the way, from 1944 onward, Parliament appointed one constitutional committee after another, most of them consisting of Members of Parliament or their

⁸ See OSCE (Organization for Security and Co-operation in Europe), <http://www.osce.org/odihr/elections/iceland>, accessed 11 March 2017.

representatives. The four electoral reforms of 1942, 1959, 1984, and 1999 grew out of such work as did the other less significant changes described above. These committees could never agree on a general overhaul, however, solemn promises from 1944 onward notwithstanding (Jóhannesson, 2011). One such committee threw in the towel after the President invoked his constitutional right to veto legislation for the first time in 2004. The legislation concerned a media bill that outside observers and some members of the opposition saw as an explicit attempt to rein in media seen as insufficiently supportive of the government. This was four years before the crash of 2008. Business moguls were making their presence felt in the media market, some friendly to the government, others less so. The President exercised his veto. The atmosphere was tense. Rather than hold a referendum on the bill as stipulated by the constitution, the governing majority in Parliament (Independence Party and Progressives) decided to withdraw the bill without an explicit constitutional authorization for such a course of action. What happened next was that the governing parties' representatives on the Parliament's constitutional committee tried to induce the committee to agree to the abolition of the President's constitutional right to veto legislation, a proposal that might have been passed in Parliament at the time but would probably not have enjoyed much support among the public. The attempt failed. The episode is instructive because it demonstrates a widespread attitude among Members of Parliament: To many of them, the constitution which they have sworn to uphold is a nuisance (Kristjánsson, 2012). Their concept of parliamentary democracy is that Parliament is king. In what follows, we will encounter further examples of this attitude.

Here is another example of the difference between Denmark and Iceland.

As we have seen, article 25 of Iceland's 1944 constitution states: "The President of the Republic may have bills and draft resolutions submitted to Althingi."

Does this provision mean what it says?

True, inherited structural flaws in the constitution require the reader sometimes to assess separate provisions side by side to get to the point. This need to read different parts of the constitution together seemed to confuse some observers during the 2004 controversy concerning the President's right to appeal, emboldening those who doubted that right by, among other things, stating correctly that the Danish Queen would never withhold royal assent. Axelsson (2004), a mathematician at the University of Iceland, was by many considered to offer the definitive interpretive argument in

support of the President's right of appeal, thus closing the case without its being taken to the Supreme Court which, therefore, did not express its view of the matter.

Those who claim that article 25 does not mean what it says can refer to article 13 which states that "The President entrusts his authority to Ministers." In this spirit, Thorarensen and Óskarsdóttir (2015) express "the view that the creation of a republic involved hardly any changes in the constitutional role of the head of state neither in regard to executive nor legislative powers" and "reject the theory that the creation of a republic introduced a dual authority structure, consisting of Althingi and a powerful president, which characterizes semi-presidentialism." It seems reasonable to conclude, however, that article 13 does not apply here because the right to "have bills and draft resolutions submitted to Althingi" does not constitute "authority." A more natural interpretation of article 13 is that ministers with their ministry officials are expected to assist the President with the implementation of his decisions. Countering those who insist on understanding article 13 literally to mean that the President can do nothing at all without the agency of a minister even if this interpretation contradicts a fundamental aspect of the constitution as exemplified by the President's by now generally accepted right of appeal without ministerial consent, article 15 states: "The President appoints Ministers and discharges them."

Some hold the view that Iceland's constitution like that of Denmark conceals an unwritten rule underwriting unfettered parliamentary democracy, equivalent to a written constitutional provision, and that this unwritten rule limits the scope of the President to appoint ministers on his or her own even if that is exactly what article 15 states clearly. This unwritten rule, if it exists, serves as an excuse for those who reject all restraints on Parliament and was, among other things, used as a cloak by those who resisted the President's the right of appeal in 2004. Others dispute the weight of unwritten laws.

Those who view Iceland's 1944 constitution through the Danish lens adhere to the old Westminster notion of parliamentary supremacy in which the legislative body, unbound by written law or by precedent, is superior to all other government institutions, including the executive and judicial branches of government, thus rejecting any notion of the separation of powers. Against this view it is argued here that, in the light of the semi-presidential setup of the 1944 constitution, the concept of constitutional supremacy as in Germany (Limbach, 2001) as well as in Canada and the

United States, among others, is the relevant one for Iceland. This understanding is reaffirmed by the Constitutional Council's bill from 2011 which clearly states in article 2 that "The Althing holds legislative powers under a mandate from the nation." For further confirmation, the bill states in article 113 that "When the Althing has passed a legislative bill to amend the Constitution, the bill shall be subjected to a vote by all the electorate in the country for approval or rejection." Both articles reflect the understanding that constituent power belongs to the people while Parliament exercises legislative powers that must serve the people.

A new article, 38, was added in 1991 when Parliament was changed from bicameral to unicameral, stating: "Members of Althingi and Ministers are entitled to introduce bills and draft resolutions." Since article 38 guarantees the right of ministers (and of Members of Parliament!) "to introduce bills and draft resolutions," then article 25 authorizing the President to "have bills and draft resolutions submitted to Althingi" must refer to something other than article 38. This means that article 25 cannot be restricted to authorizing ministers to submit bills on behalf of the President. This is why article 25 needs to be understood and interpreted the way it is worded, namely, as granting the President the authority or right to submit bills to Parliament. In this light, we can see that the President has a constitutional authority or right to submit bills to Parliament on his or her own. Should the President nonetheless seek a minister's agency and should a minister not be willing to submit a bill on the President's behalf by article 38, the President can simply appoint a new minister by article 15 (as the Governor did in 1942) who will submit the bill in question on the President's behalf. Should Parliament pass a vote of no confidence in the new minister as the law permits to prevent him from submitting the President's bill to Parliament, the Parliament would by so doing be in violation of article 25 of the constitution authorizing the President to "have bills and draft resolutions submitted to Althingi."

Thus far, no President of Iceland has had bills or draft resolutions submitted to Parliament. At least two candidates in the 2016 presidential election promised the voters to activate article 25 by submitting bills to Parliament. The fact that several candidates described widely different views of the role of the President signals the ambiguity of the 1944 constitution's provisions on the President.

Here is one more example of the difference between Denmark and Iceland.

In keeping with article 19 in the Danish constitution, article 21 of Iceland's 1944 constitution states: "The President of the Republic concludes treaties with other States. Unless approved by Althingi, he may not make such treaties if they entail renouncement of, or servitude on, territory or territorial waters, or if they require changes in the State system." This means that, in effect, Parliament has authority to conclude treaties involving shared sovereignty with other states (subject as always to presidential assent by article 26). This is why Denmark added article 20 in 1953 requiring a 5/6 majority in Parliament in such cases or else a national referendum. Iceland has not made a corresponding amendment to the 1944 constitution and, thus, has erected a lower constitutional barrier than Denmark to EU accession. Instead, Icelandic opponents of EU membership rely on article 2 ("Althingi and the President of Iceland jointly exercise legislative power. The President and other governmental authorities referred to in this Constitution and elsewhere in the law exercise executive power. Judges exercise judicial power."). This article was, in essence, copied from article 3 in Denmark's constitution from 1849 ("The legislative power shall be vested in the King and the Folketing conjointly. The executive power shall be vested in the King. The judicial power shall be vested in the courts of justice.").

Article 3 in Denmark's constitution does not supersede article 19 for, after all, Denmark has been a member of the EU since 1973. By the same logic, article 2 in Iceland's constitution cannot reasonably be seen to supersede article 21. Yet, there are those in Iceland who claim that Iceland's membership in the European Economic Area since 1994 violates the constitution and that accession to the EU would likewise constitute a violation. It is to accommodate their views that many observers think that an explicit provision authorizing the sharing of sovereignty is called for in the Icelandic constitution.

II. Iceland from 2009 to 2017: Political factors⁹

When Iceland's financial system collapsed in the fall of 2008, ordinary people from all walks of life took to the streets, banging their pots and pans and demanding corrective action, including constitutional reform. The government of the Independence Party and

⁹ This period has been covered extensively in my earlier writings and elsewhere. See, for example, Gylfason (2013, 2016a, 2016b, 2016c) and Gylfason and Meuwese (2017). See also Landemore (2014) and Meuwese (2013).

the Social Democrats, in office from 2007, resigned in early 2009. The two left-wing parties in Parliament, the Social Democrats and the Socialists, now named the Left-Green Movement, formed a minority government with the support of the Progressives who promised to defend the government against a vote of no confidence in Parliament. The Progressives offered their support on the condition that the new minority government would launch a constitutional revision process in which directly elected representatives of the people rather than politicians and their lawyers would do the work. The parliamentary election in the spring of 2009 gave the two left-wing parties in the minority government a small majority in Parliament, making the support of the Progressives in Parliament no longer necessary. The new government faced two urgent tasks: to restore the economy to health with assistance from the IMF, the other Nordic countries, the Faroe Islands, and Poland and to move forward with the promised, long overdue constitutional reform. It was considered helpful that the Prime Minister, Jóhanna Sigurðardóttir, had been a long-standing but lonely advocate of constitutional reform.

Having enacted the provisional constitution of 1944, Parliament promised immediate constitutional overhaul thereafter, openly acknowledging the provisional nature of the new charter. As it turned out, however, MPs proved unable to offer but modest improvements of the electoral provision to meet the migration of voters from rural to urban areas as well as a change from a bicameral to a unicameral legislature in addition to some marginal adjustments. There have been no significant disagreements on constitutional issues as such among the political parties, with four exceptions, two long-standing ones and two more recent. All four exceptions reflect political differences rather than jurisprudential ones. The first two are particularly important because they involve human rights.

First, as described before, the disagreement among political parties on the electoral system erupted twice, in 1942 and 1959. The Progressives benefited from the unequal weight of votes in rural and urban areas and thus resisted electoral reform while other parties that would benefit from less inequality favored reform, and the latter, led by the Independence Party, carried the day in both cases. External observers have repeatedly

declared the unequal weight of votes in Iceland to constitute a violation of human rights because of the extent of inequality in the voting system involved.¹⁰

Second, from the 1980s onward, some felt that Iceland's natural resources and their ownership and management merited a provision in the constitution but the political parties and their representatives in one parliamentary committee after another proved unable to agree on a formulation. The Social Democrats wanted a declaration that Iceland's natural resources belong to the people while the rest (Independence Party, Progressives, and the Socialist forerunners of the Left Green Movement) wanted language loose enough to preserve the status quo which to this day grants vessel owners virtually free access to fishing in Icelandic waters. Specifically, in recent years vessel owners have been granted about 90% of the fisheries rent, leaving about 10% for the people, the rightful owner of the resource by law if not yet by the constitution (Thorláksson, 2015). According to the Icelandic National Audit Office, fishing firms recently channeled 95% of their declared financial support for political parties to the Independence Party and the Progressives.¹¹ In 2007, the United Nations Committee on Human Rights issued a binding opinion stating that the discrimination involved in the allocation of fishing rights to vessel owners constituted a violation of human rights, and instructed the Icelandic government to rectify the situation by removing the discriminatory element from the fisheries management system and by paying damages to the two fishermen who brought the case against Iceland before the committee. The government responded by promising a new constitution that would define Iceland's natural resources as the common property of the people, a promise that the government has failed to keep.

Third, the transfer of sovereignty has recently emerged as a bone of contention among politicians. While it has long been understood that Iceland needs to amend the provision on the transfer of sovereignty in the 1944 constitution like Denmark did in 1953 and Norway in 1962 in anticipation of possible future membership in the European Union, it recently came to light that Icelandic MPs representing the Independence Party and the Progressives and some representing the Left Greens do not want such a revision. Rather, they appear to prefer to keep open the possibility of

¹⁰ Source: See footnote 8.

¹¹ Source: Icelandic National Audit Office, <http://rikisendurskodun.is/utgefid-efni/fjarmal-stjornmalasamtaka/>, accessed 11 March 2017.

contesting Icelandic accession to membership in the European Union on constitutional grounds, a situation that would, by denying the voters the right to vote in favor of EU membership in a national referendum, make Iceland unique in Europe.

Fourth, after the President of Iceland exercised for the first time his constitutional right to refer legislation from Parliament to a national referendum in 2004, a right that had lain dormant since 1944, the Parliament's constitutional committee at the time considered removing the provision on the President's veto right from the constitution but, once again, could not agree. At issue was not the principle firmly enshrined in the 1944 constitution anchoring the authority of the nationally elected President to hold Parliament accountable to the people under a semi-presidential form of government but rather the sheer frustration by politicians that they could not always do as they wished.

The new government in 2009 took several steps, initially in close collaboration with the Independence Party and the Progressives, together in opposition in Parliament for the first time in the history of the republic. First, Parliament appointed a seven-member constitutional committee chaired by Dr. Guðrún Pétursdóttir, a physiologist and director of the Institute for Sustainability Studies at the University of Iceland. The committee was to gather background information and offer analysis for the benefit of those who would be tasked with drafting a new constitution or revising the old one from 1944. The committee produced a 700-page dossier offering many ideas and options. Also, the committee organized a National Assembly (or National Forum) comprising 950 individuals drawn at random from the National Register. The National Assembly met for a day in late 2010 under expert supervision well versed in collective intelligence (Page, 2008; Fishkin, 2009; Landemore, 2012), and concluded its proceedings by declaring (a) that a new constitution was needed and (b) that it should include provisions on equal voting rights and national ownership of natural resources, among other things. The random selection of the 950 participants and the methodical application of the principles of collective intelligence aimed to ensure that the conclusions of the National Assembly reflected the popular will because every Icelander 18 years or older had an equal chance of being invited to take a seat in the National Assembly. A year later, in late 2011, 25 Constitutional Assembly representatives were elected from a roster of 522 candidates by the Single Transferable Vote method, an advanced election method used in Australia, Ireland, and Scotland to minimize the number of dead votes (Balinski and Laraki, 2010).

A little later, one of the Icelandic newspapers, *DV*, conducted a detailed poll on key constitutional issues reporting separately the answers of a sample drawn from the general public, a majority of the 522 candidates who put their names forward in the Constitutional Assembly election, and 23 of the 25 who were elected (two could not be reached). The poll demonstrated a remarkably broad consensus across the three groups, showing, for example, that 65% of respondents among the general public wanted to change the constitution while 17% were against (18% passed) and that 72% wanted equal voting rights while 17% did not (11% passed). This poll did not ask about national ownership of natural resources but other polls had shown overwhelming support for national ownership, signalling strong and widespread opposition to Iceland's oligarchic management of its marine resources in particular (Kristjánsson, 2011). When the same newspaper asked 23 of the 25 representatives elected to the Constitutional Assembly, 20 expressed support for equal voting rights while two were against and 22 expressed support for national ownership of natural resources while one was against (Gylfason, 2013).

The Constitutional Council was given four months to do its work, from early April until the end of July 2011.¹² The 2010 Act on a Constitutional Assembly gave the Council practically full autonomy without any restriction concerning, for example, the choice between amending and replacing the constitution. The Council decided during the first week of its work that the best way to reflect the broad consensus in favor of constitutional reform among Council members as well as among the general public as confirmed by opinion polls would be to draft a new constitution *ab initio* rather than propose piecemeal changes to the 1944 constitution. Even so, the 1944 constitution provided the underpinning of the drafting process. Several articles from 1944 appear unchanged in the Council's bill.

III. Iceland from 2009 to 2017: Procedural aspects

In view of the low esteem of political parties, Parliament, and other institutions after the crash of 2008, it was clear that Parliament could not assume the role of drafting a new

¹² The Constitutional Council was so named after Parliament responded to the Supreme Court's invalidation of the Constitutional Assembly election in early 2011 by appointing the 25 individuals who had received the most votes to the Constitutional Council. The Supreme Court had thus enabled the opponents of constitutional reform to question the popular mandate of the elected representatives (Nordal, 2011).

constitution. This is why a special convention was given the task of proposing constitutional reform even if the 1944 constitution authorizes Parliament “to amend or supplement” the constitution (article 79), a stipulation that is not considered to prevent Parliament from drafting a new constitution from scratch and approving it in two parliamentary sessions with a general election in between. Put differently, the words “to amend or supplement” have been taken to subsume radical revision or replacement. It was on this basis that the Constitutional Council felt free to draft a new constitution from scratch. In keeping with the 1944 constitution the 2010 Act on a Constitutional Assembly stipulated that Parliament had the right to accept or reject the bill produced by the Constitutional Council. Despite the low esteem of Parliament after the crash and in view of the conciliatory gestures made by both government and opposition at the outset, no objections to this procedure were raised at the time. Writing Parliament completely out of the manuscript would have required side-stepping the 1944 constitution, a step that was considered unnecessary and impractical at the time but which, in retrospect, might have helped to prevent Parliament from undermining the constitutional reform project that Parliament itself had launched.

Even if it was drafted from scratch the bill combines constitutional continuity with reform as emphasized by Elkins, Ginsburg, and Melton (2012) who conclude their review of the bill thus: “Iceland’s constitution-making process has been tremendously innovative and participatory. Though squarely grounded in Iceland’s constitutional tradition as embodied in the 1944 Constitution, the proposed draft reflects significant input from the public and would mark an important symbolic break with the past. It would also be at the cutting edge of ensuring public participation in ongoing governance, a feature that we argue has contributed to constitutional endurance in other countries.”

The work of the Council went smoothly from beginning to end which was not really hard in view of the broad consensus on the need for reform. The haggling that took place revolved around details. The work was well organized and high-tech to save time and to facilitate the participation of the public in the proceedings as described in Gylfason and Meuwese (2017). Even if the Council did not see itself as being bound by the conclusions of the National Assembly in 2010, the bill proved fully consistent with the will of the National Assembly with the sole exception that the National Assembly had called for a reduction in the number of seats in Parliament whereas the bill

stipulates an unchanged number of seats at 63. This conclusion was reached on the grounds that a reduced number of parliamentary seats might have been seen to undermine the aim of the bill to strengthen Parliament and the courts against executive overreach. In addition to key provisions concerning equal voting rights and national ownership of natural resources, the bill also features important new provisions on environmental protection, electoral reform, increased use of national referenda, the right to share sovereignty with other nations, the appointment of public officials, including judicial appointments, and more. The bill also aims to eliminate the ambiguities inherited from Denmark's 1849 constitution, including those on the role of the President. Further, the bill aims to impose a U.S.-inspired layer of checks and balances on the constitution while preserving its original character inherited from Norway and Denmark. At the end of the four-month long proceedings, the Council adopted its bill with 25 votes against 0, no abstentions. Nearly all individual provisions were passed with an overwhelming majority of votes in the Council. Some members of Parliament, their reputation in tatters and their trust among the public at an all-time low, were not amused. For an external review of the bill, see Elkins, Ginsburg, and Melton (2012).

In late 2011, three years had passed from the financial crash of 2008. Under IMF tutelage, the national economy was growing again. Against the odds, unemployment had been kept from rising to double-digit levels. So, even if three or four foreclosures of people's homes and businesses took place every day, there was a growing feeling that the worst horrors caused by the crash were behind. This feeling of fading gloom gave the opposition parties, the Independence Party and the Progressives, the courage to revert to their old ways. The Progressives turned against the constitutional reform process that they had helped launch. The Independence Party also turned fiercely against reform.

Apart from the economic upturn, there were two main reasons for this development.

First, it was one thing to advocate constitutional reform in the abstract following a financial crash that had humiliated the Independence Party, in particular, and quite another to be confronted by 25 directly elected Constitutional Assembly representatives in broad consensus as the National Assembly of 2010 had been about equal voting rights, national ownership of natural resources, and other democratic reforms. Equal voting rights and electoral reform would make several sitting members of Parliament

unlikely to win re-election. National ownership of natural resources would sever the umbilical cord between Iceland's oligarchs – that is, the vessel owners – and their agents in Parliament. This is because national ownership entails that those who exploit the resources would be required by the constitution to pay full consideration – that is, market price – for their right of access to the resources, access that they have thus far been granted either free or, since 2002 when nominal fishing fees were legislated, practically free of charge.

Immediately after the Constitutional Assembly election, three persons with formal ties to the Independence Party filed technical complaints about the way the election was organized. Six Supreme Court justices, five of them Independence Party appointees, declared the election null and void even if no one had claimed that the alleged technical flaws could have influenced the outcome of the election as required by law for an election result to be invalidated. The relevant part of Article 15 of Act No. 90/2010¹³ establishing the Constitutional Assembly states: “If a voter considers that a member of the Constitutional Assembly lacks eligibility, his candidacy has not fulfilled legal requirements or his election is unlawful for other reasons, he can file a complaint against his election with the Supreme Court which will rule on its validity.” None of these conditions established by the law were met. This decision by the Supreme Court was visibly politically motivated, substantively wrong, and unlawful to boot as argued by Axelsson (2011) and Gylfason (2013, 2016a).¹⁴ The Independence Party and the Progressives that had seen their vote in parliamentary elections decline gradually from 80% of the total in 1931 to less than 40% in 2009 came to regard equal voting rights, the right of the nation to the rents from its natural resources, and other democratic reforms as a threat to their long-held privileges.

The Supreme Court of Iceland has no role to play in constitutional reform, and is not even mentioned in the 1944 constitution. The Constitutional Council bill has a new

¹³ See <http://www.althingi.is/lagas/139a/2010090.html>, accessed September 7, 2016. Further, see the following open letter to the Supreme Court: <https://notendur.hi.is/gylfason/SaNS%20-%20Gu%C3%B0bj%C3%B6rn%20J%C3%B3nsson,%20Ópi%C3%B0%20br%C3%A9%20til%20H%C3%A6star%C3%A9ttar.pdf>, accessed 7 September 2016.

¹⁴ The Supreme Court justice leading the charge against the Constitutional Assembly election subsequently sued this author for libel even without being mentioned by name in the academic working paper in question, and lost his case both in the District Court and the Supreme Court. He resigned from the bench before the expiry of his term and has since leveled serious criticism, perhaps better described as personal attacks, in Icelandic media against the Chief Justice of the Supreme Court as well as his wife, a law professor.

provision stating in article 101: “The Supreme Court of Iceland is the highest court of the State and it has the final power to resolve any cases brought before the courts of law.” The appointment of judges has long been a source of controversy in Iceland because from 1926 to 2016 the Independence Party and the Progressives controlled the Ministry of Justice (now Interior) and thereby all judicial appointments for all but ten years (1944-47, 1956-58, 1979-80, 1987-88, and 2009-13). To restrain ministerial power and increase public confidence in the courts,¹⁵ the Constitutional Council bill stipulates that judicial appointments must be approved by the President or by a 2/3 majority in Parliament.

Second, following the publication in 2010 of the nine-volume report of the Special Investigation Commission of Parliament where seven officials, including four from the Independence Party, were declared guilty of negligence in the sense of the law before the financial crash, Parliament voted to impeach only the pre-crash Prime Minister of the Independence Party as described by Gylfason and Meuwese (2017). This made the Independence Party practically declare war on the government’s weak and wavering majority in Parliament. Bent on thwarting basically all the government’s efforts, including constitutional reform, the Independence Party managed to delay until October 2012 the national referendum on the new constitution that the government had wanted to coincide with the presidential election in June 2012 to secure a good turnout. Even so, turnout in the referendum October 20, 2016 was 49%, a respectable figure compared with earlier referenda except the special one in 1944, not least in view of the fact that the political parties, including the governing parties, did not encourage their supporters to go to the polls. The fierce opposition by the Independence Party and the Progressives in Parliament had sapped the energy and courage of the two government parties. Worse, several MPs representing the governing parties were known to be lukewarm in their support for the new constitution. As it turned out, 67% of the voters said yes to the new constitution as a whole as well as to equal voting rights *per se*, and 83% said yes to national ownership of natural resources (Gylfason, 2016a). Many felt relieved that the people had scored a resounding victory against the political class.

Was this victory the first of its kind in Iceland? No, not quite. Iceland’s first constitution in 1874 was a Danish product, true. Likewise, Iceland’s home rule in 1904

¹⁵ In early 2016, Gallup reported that 32% of its respondents expressed trust in the Icelandic judicial system.

was a Danish initiative that broke a decades-long deadlock in the Icelandic Parliament (Gíslason, 1936). Again, the Act of Union between Denmark and Iceland in 1918 involved no direct popular participation. One might also be tempted to think that the 1944 constitution was a Danish product with minimal changes inserted by politicians without popular participation, but that is not the case. The first scientific opinion poll conducted and published in Iceland in 1943 showed 70% of respondents in favor of a popularly elected President. This poll helped the Governor to reconcile politicians to the injection of a semi-presidential element into the 1944 constitution. Constitutional amendments, before and after 1944, including the fiercely contested ones of 1942 and 1959, were also made without popular participation. Does this mean that the people of Iceland feel unused to direct involvement in constitution making, encouraging political elites to take charge and resist reform? Hardly. The financial crash of 2008, sending shock waves through society, was a decisive moment in Iceland's modern history, equivalent to 'constitution making moments' in other countries. Icelanders took to the streets in 2008-2009, impelling the government to resign and call a new election. They did so again in 2016 when the Prime Minister's name appeared in the Panama Papers,¹⁶ triggering his resignation within days. In the meantime, in large numbers, they contributed significantly to the drafting of the most widely crowd-sourced constitution in the history of constitution making 2010-2011 (Landemore, 2014) in an atmosphere of inclusion and ownership that probably contributed significantly to the overwhelming support for the new constitution in the 2012 referendum.

After the referendum, opposition to the constitutional bill appeared to intensify. Several academics, including lawyers and political scientists, who had remained silent before the referendum held public meetings where they criticized aspects of the bill as if no referendum had taken place. Even the President of Iceland, uncharacteristically ambivalent up to that point, joined the chorus, claiming that constitutional reform required a consensus, thus pretending not to remember the discord produced by the constitutional amendments of 1942 and 1959 and not to understand that a constitution is a political declaration outlining rights and obligations some of which by their very nature provoke opposition (Elster, 1995, 2012). After all, 33% of the voters had voted against the bill.

¹⁶ See Panama Papers, Politicians, Criminals and the Rogue Industry That Hides Their Cash, <https://panamapapers.icij.org/>, accessed 24 September 2016.

Despite these late-coming critical voices, the government, supported by a small opposition party, the Movement, a loyal supporter of the constitution, was not swayed. The Constitutional and Supervisory Committee (CSC) of the Parliament in charge of the bill had a six-to-three majority in favor of it – the same two-to-one ratio as the 67% to 33% ratio that emerged from the referendum. After the referendum, the CSC permitted only technical changes of wording and no substantive changes (Gylfason, 2016b). The bill was ready to be ratified by Parliament before it adjourned in preparation for the parliamentary election in the spring of 2013. However, the Speaker of the Parliament failed to bring the bill to a vote, thus effectively deferring the bill to the next Parliament which produced a new majority government by the Independence Party and the Progressives.¹⁷ With them back in office (they had governed the country 1995-2007), no progress has been made toward respecting the results of the constitutional referendum of 2012, exposing the weakness of Iceland’s credentials as a democratic country.

Before adjourning in the spring of 2013, Parliament passed a temporary constitutional amendment seen by many as an attempt to make the barrier to constitutional reform even higher, and then confirmed the amendment after the 2013 election: “Notwithstanding the provision of Paragraph 1, Article 79 it is permissible, until 30 April 2017, to amend the Constitution in the following manner: If Althing approves a legislative bill on an amendment to the Constitution with at least 2/3 of votes cast it shall be submitted to a vote of all eligible voters in the country for approval or rejection. ... For the bill to be considered approved it needs to have received a majority of valid votes in the national referendum, though no less than 40% of all eligible voters, and it shall be confirmed by the President of the Republic and is then deemed to be valid constitutional law.” Here a simple majority in two consecutive Parliaments, the current arrangement, is replaced by a 67% majority in Parliament plus an implicit minimum required voter turnout of up to 80% in a tight election. With a stake in the outcome, Parliament imposed an effective quorum on a prospective constitutional referendum in an attempt to raise the barrier to constitutional reform even if neither the 1944 constitution nor the Constitutional Council bill from 2011 grants Parliament the authority to impose such a quorum. Further, the 2013 amendment grants the President an outright veto rather than a right of appeal to the

¹⁷ In 2017, the former Speaker was appointed chair of a new parliamentary ethics committee.

nation. By contrast, the Constitutional Council bill stipulates that the constitution can be changed by a simple majority in Parliament followed by a simple majority in a national referendum or, if only technical changes of wording are at issue, by a 5/6 majority in Parliament.

As described in Gylfason (2016b), the new government appointed yet another constitutional committee consisting mostly of Members of Parliament. The committee picked out four of the 114 provisions of the bill to dilute enough to forge a consensus within the committee. As it turned out, the committee could not agree on how to water down the provision granting Parliament the right to share sovereignty with other nations to forestall a legal or constitutional challenge to Iceland's application for EU membership pending since 2009 – and presumably still pending despite the Foreign Minister's attempt to withdraw it in 2015 as it remains to be seen whether the European Commission accepts a minister's unilateral retraction of a membership application filed by Parliament. Here we have another example of many Icelandic parliamentarians' attitude toward democracy. They want the constitution to deprive the voters of the right to decide whether Iceland should join the EU or not. Had they been asked, they would presumably have opposed Denmark's 1953 constitutional reform. No other European constitution has ever precluded a nation's right to EU membership.

The formulation offered in the Constitutional Council bill to settle the issue is as follows (article 111): "*Transfer of State powers.* International agreements involving a transfer of State powers to international organizations of which Iceland is a member in the interests of peace and economic co-operation are permitted. The transfer of State powers shall always be revocable. The meaning of transfer of State powers under an international agreement shall be further defined by law. If the Althing approves the ratification of an agreement that involves a transfer of State powers, the decision shall be subjected to a referendum for approval or rejection. The results of such a referendum are binding." This article aims to make it clear that the afore-mentioned article 2 does not preclude shared sovereignty.

As to the other three provisions considered by the parliament's constitutional committee, all three are much weaker than the corresponding articles in the Constitutional Council bill (Gylfason, 2016b). A member of the committee, Ms. Valgerður Bjarnadóttir who chaired the Parliament's Constitutional and Supervisory Committee in charge of the council bill during 2012-2013, stated the obvious: "The outcome [i.e., the

constitutional committee's proposal] is what the reactionaries [i.e., opponents of constitutional reform] can accept."¹⁸

There were plans to hold a referendum on the constitutional committee's proposals but those plans did not materialize as the committee proposal was dead on arrival. Apart from those plans it had been widely considered enough to hold the 2012 referendum and then have a twofold ratification by Parliament in keeping with the 1944 constitution. A second referendum was considered unnecessary because Parliament was supposed to make only changes of wording, not of substance. Loose talk of a second referendum, like the failed proposals of the constitutional committee, came from those who were keen to thwart the results of the 2012 referendum, produce their own bill, and, perhaps, present that to a referendum. The opponents of constitutional reform who lost the 2012 referendum generally oppose restrictions on Parliament in any shape or form, including the President's right refer legislation to the voters. In essence, they do not acknowledge the semi-presidential parliamentary setup of the 1944 constitution. Accordingly, if they thought they could get away with it, they might consider changing the constitution without holding a national referendum.

The Parliament's temporary amendment from April 2013 expired at the end of April 2017 without Parliament having utilized it at all to effect any change of the 1944 constitution. MPs thus exposed the utter failure of their own effort to redraft and pass just three of the 114 provisions of the Constitutional Council draft from 2011.

IV. Lessons from Iceland's experience thus far

How could it happen that, in a country so deeply committed to liberal democracy, the Parliament has permitted itself to refuse to ratify a new constitution accepted by 2/3 of the voters in a national referendum called by Parliament itself?¹⁹ Were there flaws inherent in the process that led to this outcome? No. Besides, the game is not over.

¹⁸ See <http://herdubreid.is/um-stjornarskrartillogurnar/>, accessed 11 March 2017.

¹⁹ More precisely, the voters accepted the Constitutional Council bill as "the basis of a legislative bill for a new constitution," a formulation that the Constitutional and Supervisory Committee of Parliament in charge of the bill 2011-2013 took to mean that Parliament could, after the referendum, adjust only the wording if needed but not the substance of the Constitutional Council bill. Opponents of the bill claim that Parliament can build whatever it pleases on the basis approved by 2/3 of the voters, an unreasonable interpretation because it assumes the right of Parliament to ignore the expressed will of the people.

Some observers have asked: Was it a mistake not to involve politicians directly in the constitutional reform process? This question is often accompanied by a reference to Ireland's constitutional convention of 2012-2014 where 29 of the 100 members were Members of Parliament in Dublin, another four were appointed by political parties in Northern Ireland, and 66 were randomly selected citizens of Ireland in addition to a chairperson (Farrell, 2014). For several reasons, such a formula was out of the question in Iceland. First, the law did not permit MPs to run for seats in the Constituent Assembly election in 2010 nor did the political parties field candidates in the election. Second, in keeping with the spirit of the law, the Constitutional Council avoided open consultation with MPs during its proceedings even if some Council Members had informal private contacts with MPs. For example, a Council Member advised some of her colleagues that the Prime Minister privately thought that a unanimous passage of the constitution bill in the Council would strengthen the hand of the government in getting the bill through Parliament. Third, their trust as measured by Gallup²⁰ having collapsed to 13% by early 2009, the political parties were so seriously discredited after the financial crash of 2008 that there was no interest anywhere, including Parliament itself, in having parliamentary input into the process, not least in view of Parliament's 65-year failure to accomplish a full-scale revision of the constitution as well as the government's declared intention of having a new or revised constitution drawn up by a directly elected Constituent Assembly. Possibly, even if that was not the case in Ireland, parliamentary obstruction would have been imported into the Constitutional Council proceedings rather than being reserved for the reception accorded the bill after it was delivered to Parliament. Further, it appears doubtful that a constitution bill with significant input from MPs would have garnered strong support in a national referendum, especially if the MPs had managed to weaken the key provisions of the bill on equal apportionment of seats in Parliament (one person, one vote) and national ownership of natural resources. Public support for those provisions – unlike, say, voter support for the emancipation of slaves in the United States in 1787 – was known to be strong so that diluting or discarding them was out of the question. Public confidence in the Constitutional Council was known to be high even if pollsters did not bother to report it.

²⁰ See <http://www.gallup.is/nidurstodur/traust-til-stofnana/>, accessed 7 September 2016.

Public confidence in the Parliament, on the other hand, was reported to be at an all-time low (10% in early 2012; see Gallup, 2016).

None of this means that the Constitutional Council adopted a confrontational attitude or tone toward Parliament, far from it. If the Council had had such in mind, it might have decided on a reduction of the number of seats in Parliament as advocated by the National Assembly, but the Council did not do so. This was the sole significant departure of the bill from the conclusions of the National Assembly. Further, based on sound logic and experience, the Council could have written Parliament out of the provision on constitutional revision but it did not do so. Perhaps it was hoped that the requirement that future constitutional amendments be approved by a simple majority in Parliament as well as in a national referendum would expedite the Parliament's ratification of the bill, but that was not to be.

To quote Voltaire, did better prove to be the enemy of good? Would a less ambitious bill have been more likely to become the law of the land without delay? Again, the answer is No, because public opinion was clearly and strongly in favor of equal voting rights, public ownership of natural resources, and so on. A weaker bill might perhaps have stood a better chance of ratification by Parliament but it would have been less likely to be accepted in the 2012 referendum. Any bill proposed by the Constitutional Council would have been resisted by those in Parliament who viewed the Council as encroaching on their turf. Ultimately, perhaps, the key issue was ownership. Too many MPs, especially those who still talk about the "so-called crash" and refuse to admit any political responsibility for it, did not respect the process by which Parliament put the drafting of a new constitution in other hands than theirs.

In retrospect, it is not possible to identify any flaws in the law regulating the revision process that could have reduced the likelihood of judicial or parliamentary sabotage of the project. After all, the National Assembly was convened in 2010 and did its job. The Constituent Assembly was also convened in 2011 despite the Supreme Court's attempt to thwart it and did its job within the time allotted to its work. A national referendum was held in 2012, even if a concerted effort was made by the opposition in Parliament to prevent it from taking place²¹ and it produced an unambiguous result.

²¹ Some opponents of the constitution bill, on editorial pages as well as in Parliament, continue to refer to the referendum as an "irrelevant opinion poll." The President of Iceland, Mr. Ólafur R. Grímsson, did not mention the 2012 referendum in his addresses to the nation in 2013 or later.

Did popular support for the new constitution wane after the referendum, justifying the Parliament's inaction? Once more, the answer is No. According to an opinion poll conducted by the Social Science Institute of the University of Iceland following the parliamentary election in October 2016, 58% of the respondents said they were in favor of a constitution bill based on the Constitutional Council's 2011 proposal being presented to Parliament during its 2016-2017 session while 22% were not in favor and 20% had no opinion. Further, 66% of the respondents who took a position said they considered it important to aim for a new constitution during the 2016-2017 session while 34% said they did not consider it important. Hence, four years after the 2012 referendum, the level of support for the new constitution remained undiminished, with 2/3 of the voters in favor and 1/3 against.

The sole problem with the constitutional reform process was judicial and parliamentary sabotage, poorly disguised as legalistic objections. Iceland is no different from other countries in that it is generally not possible, unless human rights are at stake, to protect the people against legal violations committed by the Supreme Court as occurred when the Court invalidated the Constituent Assembly election to undermine the project. Only if human rights are at stake can verdicts or, as in this case, administrative decisions of the Supreme Court be appealed to the European Court of Human Rights or the United Nations Human Rights Committee. In recent years, in fact, a number of Iceland's Supreme Court verdicts have been reversed by the European Court and, moreover, the Supreme Court's reversal in 2000, under visible political pressure, of its 1998 ruling that Iceland's fisheries management system is discriminatory and hence unconstitutional was declared null and void by the UNHRC which instructed Iceland in 2007 to remove the discriminatory element from the system and award damages to the those whose rights had been violated and who had brought the case before the Court (Gylfason, 2013). The government did not comply. These events help to explain why the Constitutional Council bill includes a provision that aims to strengthen judicial appointments.

In view of the 1944 constitution that requires two consecutive parliaments to ratify constitutional amendments, Parliament's sabotage of its own offspring could arguably only be averted by extra-constitutional means which are rarely resorted to in

Instead, he repeated the arguments of the opponents, adding new ones that no one had raised before and Parliament, correctly, had not seen reason to ask the voters about in the referendum.

democracies but not unheard of in Europe – the establishment of France’s 5th republic in 1958 is a case in point (Elster, 2015). In Iceland, for the new constitution to take effect, the 1944 constitution requires Parliament to ratify the new constitution, adjourn immediately thereafter, then hold a parliamentary election, and ratify the constitution a second time thereafter. In practice, this means holding one short parliamentary session solely to ratify the constitution in the first round as was done in 1942 and 1959. If, however, MPs prove unwilling to hold a short session as some of them have declared because they are eager to serve a full term even if that means jeopardizing the passage of the new constitution, they might instead consider passing a law to the effect that the constitution can be changed by Parliament’s ratification followed by a national referendum and the President’s signature (as stipulated by the Constitutional Council bill) and have the new constitution adopted that way. In this case, the MPs’ eagerness not to risk losing their seats would require them to circumvent the 1944 constitution to ratify the new one. Indeed, this was the way the 1944 constitution was adopted extra-constitutionally. Other scenarios involving extra-constitutional passage of the new constitution can be envisaged.

An opportunity to salvage the constitution bill from the Parliament presented itself to the President of Iceland in April 2013 when Parliament adjourned without having held a vote on the bill, in violation of parliamentary procedure. When this happened President Ólafur R. Grímsson could, by the 1944 constitution as described before, have reconvened Parliament, submitted the bill himself, and thus compelled Parliament to take a vote. A majority of MPs had declared in writing that they supported ratification so it would have been difficult for them to reverse course. Therefore, the bill would most likely have been passed. This course of action would have been extra-constitutional only in the sense that the President would, to secure ratification of the bill, have exercised authority granted him by the outgoing constitution but not by the incoming one. Thus, the President could have protected the people against the Parliament in this case as the semi-presidential character of the 1944 constitution authorizes him or her to do, but he chose not to. If Parliament persists in its refusal to ratify the will of the people, other forms of extra-constitutional ratification may have to be considered.

In view of all this, it is not fruitful to look for flaws in the constitutional reform process as an explanation for the current stalemate. A more plausible explanation is purely political. The constitution bill aims to reorganize rights and obligations by

restricting the privileges of those who have long benefited from unequal voting rights, preferential access to Iceland's natural resources, and more. Those who are being asked to sit at the same table as everyone else persist in resisting those reforms even if 2/3 of the voters have accepted them. Their main instrument of obstruction is the 1944 constitution's requirement that two consecutive Parliaments must ratify the new constitution, an almost impossibly high barrier that makes constitutional reform conditional on the cooperation of those whom the reform aims to rein in. Parliament's impotence as regards constitutional reform underscores the inherent impossibility of having self-dealing politicians taking it upon themselves to act as constitution makers. Elster (2016) makes the same point.

Iceland's political culture that Parliament itself has declared wanting²² lies at the heart of the problem. Consider the following three comparisons.

- Whereas 51 Danish names surfaced in the Panama Papers in 2016,²³ about 600 names of Icelanders came to light, including those of the Prime Minister, Finance Minister, Minister of the Interior, and the wife of the President of Iceland. Denmark's population is 15 times as large as that of Iceland.
- Whereas 15% of Danish respondents consider corruption to be widespread in government in Denmark, the corresponding figure for Iceland is 67% (Gallup, 2013).
- Whereas 88% of Danish respondents express confidence in the independence of Denmark's judicial system (Eurobarometer, 2016), the proportion of Icelandic respondents declaring confidence in Iceland's court system is 32% (Gallup, 2016).

In short, the evidence seems to suggest that the reason for the current constitutional impasse in Iceland can be found in Iceland's deficient political culture rather than in possible design flaws illuminated by constitutional theory and international experience. The new constitution aims in various ways to sanitize the country's political culture.

If Iceland's constitutional impasse continues it may have serious consequences for democracy in Iceland, at a time when democracy is under stress in Europe and the Americas to the point where Freedom House has recently demoted the United States

²² Parliament resolved unanimously with all 63 votes cast in 2010 that "criticism of Iceland's political culture must be taken seriously and [Parliament] stresses the need for lessons to be learned from it."

²³ See footnote 16.

from its long-held top rank.²⁴ The United States was practically the world's sole democracy until 1850 when Europe was swept by revolutions that led to the gradual emergence of democracy. Even so, in 1943, there were only five democracies in Europe: the United Kingdom, Ireland, Iceland, Sweden, and Switzerland. From 1945 to 2000 the number of democracies around the world rose to 90, almost a half of all states, but thereafter the spread of democracy was halted again (Diamond, 2015). Like Russia and Turkey, even Hungary and Poland, fully fledged members of the European Union, show new signs of dwindling respect for democracy and human rights.

Against this international background, the Icelandic Parliament's failure to ratify the new constitution comes at a particularly ill-chosen time, permitting politicians to hide behind political disarray abroad and to use the challenges confronting democracy elsewhere as an unspoken excuse for disrespecting democracy in Iceland. In view of their democratic tradition, the people of Iceland should be especially alert that now is not a good time to digress from the path of democracy. With democracy under stress, Parliament has a special responsibility to do the right thing by showing the rest of the world that when, after the crash of 2008, the people of Iceland produced perhaps the most democratic, most inclusive constitution ever made anywhere, they really meant what they did. Iceland needs to send the rest of the world an uplifting signal about democracy, a signal that would be welcomed by advocates of democracy and human rights everywhere. Parliament has neglected to send that message for almost four years now, thus inviting the rest of the world to wonder why. Democracy under stress is only as strong as those who defend it.

Those who compile indices of democracy such as the one from Freedom House as well as the Polity2 index from the Polity IV Project²⁵ have not yet lowered Iceland's democracy scores, but they may do so if the impasse persists. Or how would they have reacted if the British Parliament had decided to ignore the results of the Brexit referendum in 2016 on the grounds that it was only advisory? – a comparable case.

While democracy indicators have thus far held up, measures of other aspects of social capital such as trust and the absence of corruption have not. According to the World Values Survey (Medrano, 2015), Iceland's interpersonal trust scores are much lower

²⁴ Source: Freedom House, <https://freedomhouse.org/report/freedom-world/freedom-world-2016>, accessed 11 March 2017.

²⁵ See <http://www.systemicpeace.org/polityproject.html>, accessed 11 March 2017.

than in other Nordic countries and were lower already before 2008, suggesting that low trust may have been a contributor to as well as a consequence of the crash (Gylfason, 2015). Iceland's scores of trust in institutions (Parliament, judicial system, banks, etc.) are also lower than in the rest of the Nordic region and fell sharply after 2008. For example, according to Gallup, trust in Parliament fell from 42% in 2008 to 10% in 2012 and 17% in 2016 just before the outbreak of the Panama Papers scandal.²⁶ Gallup also reports that 67% of its Icelandic respondents in 2012 considered political corruption to be widespread in their government compared with 14% in Sweden and 15% in Denmark. There is a danger that the erosion of trust, amplified by the perception of political corruption, may further undermine democracy in Iceland. The Parliament's failure to enact the new constitution exacerbates such concerns. This failure was almost surely instrumental in reducing the number of parliamentary seats of the Social Democrats, who launched the constitutional reform project in 2009 only to leave it in a state of suspension in 2013, from 20 out of 63 in 2009 to three seats in 2016. This also helps to explain the increase in the number of seats won by the Pirates, a new party which advocates the enactment of the new constitution, from three in 2013 to ten in 2016.

V. Concluding remarks

In many ways, for reasons of history, Iceland stands on the shoulders of Norway and Denmark and, arguably to a slightly lesser extent, Sweden. Yet, for reasons that have a lot to do with the ways in which Iceland differs from the other three countries, notably deep political dissent and dysfunction (but not necessarily small size; see Gylfason, 2009), Iceland's declaration of independence in 1944 and the consequent adoption of a revised constitution set Iceland on a new path.

Norway, Denmark, and Sweden are constitutional hereditary monarchies under purely parliamentary democracy where the monarchs almost exclusively perform ceremonial roles. Iceland, on the other hand, like Finland, by deciding to become "a Republic with a parliamentary government" (article 1) as well as to have a popularly elected President, adopted a semi-presidential form of parliamentary democracy. Iceland's President performs more than a merely ceremonial role. Iceland's first

²⁶ Source: Gallup, <https://www.gallup.is/nidurstodur/traust-til-stofnana/>, accessed 11 March 2017.

President, Mr. Sveinn Björnsson, in his preceding role as Governor, appointed an extra-parliamentary government in 1942 against the opposition of a dysfunctional Parliament. Iceland's fifth President, Mr. Ólafur R. Grímsson, invoked his right to withhold presidential assent on three occasions, in 2004, 2010, and 2011, triggering national referenda in 2010 and 2011. Iceland's popularly elected President can also be seen to have constitutional authority to do the other things that the constitution from 1944 states that he or she can do without being bound by the accepted interpretation of corresponding clauses in Denmark's constitution. The difference is twofold. First, Iceland's President is elected by the people and is, therefore, unconstrained by the standard interpretation of the Danish constitution fit for a hereditary monarch. Second, the President of Iceland has already invoked some of the rights granted him in Iceland's 1944 constitution. Even so, the lack of clarity in this regard, inherited from Denmark, is a demonstrable flaw in Iceland's 1944 constitution, a flaw that has not created any difficulties in Denmark to date and that the Constitutional Council bill from 2011, accepted in the national referendum of 2012, aims to fix among many others.

Will these flaws be fixed in due course? No democracy has ever before seen its Supreme Court nullify a national election, let alone illegally, or its Parliament disrespect the results of a constitutional referendum. If Parliament does not reverse course, Iceland will be in trouble, deep trouble, with its standing among democratic Nordic nations thrown into doubt.

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