

# MAKING A NEW CONSTITUTION

## The Case of Iceland



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Presentation at TEPAV, the Economic  
Policy Research Foundation of Turkey,  
Ankara, 24 January 2012.

# OUTLINE

- 1) Crash
- 2) Background
- 3) Process
- 4) Substance
- 5) Method
- 6) Obstacles

# 1. CRASH

- When countries crash, a natural thing to do, *inter alia*, is inspect their legal foundation to look for latent flaws and fix them
  - This was one of the demands of the **pots-and-pans revolution** that shook Iceland after the crash in October 2008
    - Three banks comprising 85% of the banking system collapsed within a week, the rest in quick succession
  - Financial losses incurred amount to **7 times GDP**
    - Local equity market, including uninsured money market funds, was virtually wiped out overnight
  - Useful analogy with civil aviation
    - Around the world, every air crash is investigated in the interest of public safety

# 1. CRASH

- The Iceland crash was a big one, perhaps the biggest financial crash on record
  - Financial losses inflicted on creditors, shareholders, and depositors abroad as well as at home equal about **7 times Iceland's GDP**, a world record
  - The total fiscal cost of the crisis, including the cost of recapitalizing the failed commercial banks plus the technically bankrupt central bank, amounted to 64% of GDP, another world record
    - Fiscal cost is measured by the increase in the public debt to GDP ratio after the fall
  - The three “big” Icelandic banks’ collapse in 2008 would, had they been American, make the list of the ten largest corporate bankruptcies of all time in the US, a remarkable result in view of Iceland’s population of 318,000

## 2. BACKGROUND

- After the collapse of communism in 1989-91, East and Central Europe adopted about 25 new constitutions, all except Hungary
  - Following recent regime changes in North Africa, several countries in the region are about to revise their constitutions
- Most constitutions are written or revised following economic or political upheaval because crises often trigger demands for a fresh start or expose flaws to be fixed
  - In times of quiet, people and politicians most often have more pressing things to think about
    - Exceptions: Sweden (1974), Canada (1982)

## 2. BACKGROUND

- ◉ Yet, financial crises have not in the past given rise to new constitutions
  - The Great Crash of 1929 was followed by changes in laws, erecting firewalls between commercial banking and investment banking
    - Glass-Steagall Act of 1933 in US
- ◉ Iceland is an exception
  - Financial crash of 2008 had deep roots
  - This is why the **pots-and-pans revolution** after the crash demanded, among other things, a new constitution

## 2. BACKGROUND

- Reflecting local circumstances and history, constitutions differ because countries differ
- Constitutions aim to accommodate conflicting objectives
  - Must be clear and firm to avoid legal ambiguity
  - Must be flexible to stand the test of time
- Denmark is disciplined (low inflation) and needs relatively few rules and restrictions
- Iceland is unruly (high inflation) and may, therefore, need more rules and restrictions
  - This may help explain why Denmark's short constitution serves Denmark better than Iceland
    - Hypothesis: High-inflation countries may need more detailed constitutions

## 2. BACKGROUND

- Iceland's key constitutional problem is the absence of effective **checks and balances** that have made it possible for the unruly executive branch to assume too much power at the expense of parliament and the courts
  - On their own, two ministers decided to enlist Iceland in the “Coalition of the willing” invading Iraq in 2003 without any consultation with, or even possible recourse for, the parliament
  - After the Supreme Court in 1998 ruled that the system of fisheries management is discriminatory and unconstitutional, the Court reversed its opinion in 2000 under visible pressure from the same two ministers

## 2. BACKGROUND

- The supremacy of the executive branch over the legislative and judicial branches made it easier for the government to join hands - some would say jump into bed - with the bankers
  - First, by selling their political cronies state banks at modest prices, Russian style
  - Then, by making sure that the banks would not be bothered too much by reserve requirements and inquisitive financial supervision
    - The banks gave and lent money generously to political parties as well as to individual politicians

## 2. BACKGROUND

- Iceland's constitution dates from 1944 when Iceland separated from occupied Denmark
  - Hastily derived from Denmark's constitution, with nationally elected president substituted for hereditary king, the Icelandic constitution was intended to be only **provisional**
  - Parliament promised to revise it, but has failed to do so since 1944
- So, after the crash of 2008 the government decided to convene **Constitutional Assembly** to do the job

### **3. PROCESS**

- Two main reasons for **constitution written by the people** rather than by politicians and their lawyers
  - Parliament's long-standing failure to deliver
  - Constitution is meant to limit the powers of parliament and to lay out the method by which MPs are elected, tasks that would create conflict of interest if assumed by parliament itself
    - Karl Popper (1966, p. 128) put the question well:
      - “How can we organize political institutions so that bad or incompetent rulers can be prevented from doing too much damage?”

### **3. PROCESS**

- Parliament decided to proceed in three steps
- **Convene National Assembly**
  - 1,000 persons selected at random
- **Appoint Constitutional Committee** to gather information, provide analysis, and propose ideas
  - Seven members from different directions (law, literature, science), 700-page report, very useful
- **Hold election of Constitutional Assembly representatives**
  - 25 representatives elected from among 523 candidates by STV (Single Transferable Vote) method to minimize number of ‘dead’ votes

### 3. PROCESS

- Civilized campaign - not a campaign, really
- Candidates viewed themselves not as competitors but rather as **advocates of a common cause**
- The 25 elected were doctors, lawyers, priests, and professors, yes, ...
- ... but also company board members, a farmer, a fighter for the rights of handicapped persons, mathematicians, media people, erstwhile MPs, a nurse, a philosopher, poets and artists, political scientists, a theatre director, and a labor union leader
  - Good cross section of society

### 3. PROCESS

- On basis of technical complaints about voting booths and such from an unsuccessful candidate and two others, Supreme Court declared election null and void
  - Never before has a national election been invalidated in a democracy, on flimsy grounds to boot as is well documented, also in English
- Supreme Court decision was widely seen as an attempt by vested interests to thwart democratic process by killing the constituent assembly in its infancy
  - Welcome to Iceland!
    - Parliament appointed the 25 with the most votes

This is how Constitutional Assembly became Constitutional Council

## 4. SUBSTANCE

Broad consensus in favor  
of significant changes

- ⦿ People wanted change

- Conclusions of National Assembly were cohesive and clear
- Answers given by elected Constitutional Assembly members to media were equally clear
- Overwhelmingly, they favored
  - Changing the constitution
  - Equal voting rights everywhere in the country
  - Public ownership of natural resources
  - More national referenda
  - Strengthening the right of the public to information
  - Checks on the Minister of Justice's ability to appoint judges on his or her own
- Public opinion polls reflected similar sentiments

## 4. SUBSTANCE

- ◉ Council had four months to do its work
  - No big problem
  - US constitution was written in four months in 1787
- ◉ Council decided to
  - Rewrite constitution from scratch rather than revise the provisional one from 1944
    - Even so, 1944 constitution was kept in mind
  - Move chapter on human rights up front to underline their importance
  - Preface document by preamble declaring that
    - “We, the people of Iceland, wish to create a just society with equal opportunities for everyone.”

## 4. SUBSTANCE

- Two key provisions concerning human rights
  - Equal voting rights everywhere
  - Public ownership of natural resources
- Other important provisions concerning
  - Environmental protection
  - Transparency and the right to information
  - Checks and balances, including
    - Appointment of judges and other public officials
    - Independence of state agencies

## 4. SUBSTANCE

### ⦿ Equal voting rights everywhere

- In Iceland's electoral system, the number of votes needed to elect an MP for Reykjavík area where 2/3 of population reside was 2, 3, and up to 4 times as large as the number of votes needed in rural electoral districts
- Unequal voting rights constitute a **violation of human rights** as pointed out by European election supervisors
  - For over 100 years, representatives of rural areas in parliament have blocked equal voting rights
- In upcoming referendum on constitutional bill, we will have **one person, one vote**

## 4. SUBSTANCE

### ○ Human rights and natural resources

- “Iceland’s natural resources which are not in private ownership are the **common and perpetual property of the nation**. No one may acquire the natural resources or their attached rights for ownership or permanent use, and they **may never be sold or mortgaged**. ...
- On the basis of law, government authorities may grant permits for the use or utilization of resources or other limited public goods **against full consideration** and for a reasonable period of time. Such permits shall be **granted on a non-discriminatory basis** and shall never entail ownership or irrevocable control of the resources.”

## 4. SUBSTANCE

- Key distinction between ‘property of the nation’ and ‘property of the state’
  - **State property** - office buildings, for example - can be sold or pledged at will by the state
    - Several countries define natural resources as state property - e.g., China, Kuwait, Russia
  - The **property of the nation** is different in that it “may never be sold or mortgaged”
    - Present generation shares natural resources belonging to the nation with future generations, and does not have the right to dispose of the resources for its own benefit in the spirit of **sustainable development**

## 4. SUBSTANCE

### ○ Human rights connection

- Supreme Court ruled in 1998 that Icelandic system of fisheries management is **discriminatory** and thereby **unconstitutional**
  - In 2000, Supreme Court reversed its opinion in 2000 under visible pressure from ministers
- In 2007, UN Committee on Human Rights expressed agreement with 1998 verdict in a binding opinion declaring the inequitable nature of the fisheries management system to constitute a **violation of human rights** and instructing Iceland to rectify the situation
  - Government has not yet responded except perfunctorily

## 5. METHOD

- Council decided to invite public to participate

- There was interest: 523 persons ran for 25 assembly seats
- This was a way to invite them and others to participate

- Three overlapping rounds

- Each week, Council posted on its website some new provisional articles for perusal by the public
- Two to three weeks later, after receiving comments and suggestions from the public as well as from experts, Council posted revised versions of those articles on the website
- In a final round, proposals for changes in the document as a whole were debated and voted upon article by article, and the final version of the bill was prepared
- At the end of the last round, each article was approved by an overwhelming majority of votes

## 5. METHOD

You need to multiply these figures by 250 to find comparable ones for Turkey

### ● Invitation was well received

- Council received 323 formal proposals
  - All were discussed and answered by one of three committees
- Over 3,600 comments were posted on website by visitors
  - Council representatives answered many if not most of them
- Direct webcasts, also aired on TV, were regularly watched by about 150-450 viewers
- Over 50 interviews with Council members and others concerned were posted on YouTube
  - They had, by late 2011, been viewed 5,000 times

## 5. METHOD

- At the same time, many experts advised the Council every step of the way
  - Lawyers and others
  - In meetings as well as in writing
- Council could not seek the advice of all available and eligible experts
  - However, like everyone else, those who had points to make were welcome to do so
- Council did not invite representatives of interest organizations to special meetings
  - These organizations had same access as everyone else to Council

Treat people with respect  
and they will respond in kind

## 5. METHOD

### ● Lessons for other countries

- With the world's largest per capita number of internet users, or 95%, compared with 78% in US and 35% in Turkey, Iceland's constitutional crowdsourcing may raise concerns about unequal access
  - Unconnected 5% are disproportionately old people
- Democratic gains seem to easily outweigh losses from slightly unequal access
- Applicability to Turkey and North Africa is debatable
  - Could argue that the well-connected minority is in good position to sway new constitutions in the public interest

# 6. OBSTACLES

- ⦿ Two main obstacles

- Parliament, as always

- Existing constitution requires consent by simple majorities in two parliaments, with an election in between
    - Special interest groups, not least vessel owners with lots of public money in their pockets, have strong influence on MPs

- The people

- ⦿ Prime Minister has promised to hold national referendum on bill

- Parliament has to go along

- Current plan is to hold referendum in mid-2012

## 6. OBSTACLES

- Some MPs have two strong reasons for not wanting to see the bill accepted
  - Equal voting rights article will make some MPs unelectable because they are the products of an electoral system allowing political parties to allocate 'safe seats' to candidates with limited following
    - Some MPs are being asked to vote against their own interest
  - Natural resources article will not please some MPs either because, to quote a former newspaper editor, a keen observer, "it means political suicide to rise against the quota holders in rural areas."
- Hence, we have to say to MPs:
  - Now is the time to the right thing
  - It is better to give than to receive
- According to late 2011 poll, 75% of electorate want to vote on bill

These slides can be viewed on my website: [www.hi.is/~gylfason](http://www.hi.is/~gylfason)

## 6. OBSTACLES

- Bill is available in English
  - <http://stjornarskrarfelagid.is/english/constitutional-bill/>
- It is hard to think of rational arguments against accepting the bill and for retaining the provisional constitution from 1944
  - Bill has been in public domain for six months
  - No significant, concrete criticisms have been voiced against it
  - Critical voices seem to echo special interests (boat owners, politicians) keen to preserve the status quo for their own benefit
  - Classic contest between special vs. public interest

THE END