The Icelandic Federalist Papers

No. 15: Natural Resources as Human Rights

To the People of Iceland:

In December 2007, the United Nations Human Rights Committee (UNHRC) issued a binding opinion on Iceland's fisheries management system, declaring the system discriminatory and hence unconstitutional. On legal grounds, the UNHRC, comprising 18 of the world's foremost human rights lawyers, thus confirmed what many observers in Iceland for 30 years or more had claimed in public debate as well as before courts of law. Many economists and others have from the outset criticized Iceland's fisheries management system on the grounds that it is neither efficient nor fair. The economic aspect of the issue has been examined in detail by economists, mathematicians, and other scientists.[1] The fairness aspect proved more difficult to deal with, but even so, philosophers and lawyers, among others, have contributed to the debate along with economists.[2] The binding opinion of the UNHRC along with other evidence helped clarify the fairness aspect of fisheries management, and of natural resources management in general, and formed an integral part of the basis for the provision on natural resources in the new post-crash constitution bill drafted by the Constitutional Council in 2011.

1. Beyond Compromise

Laws aim to protect the just against the unjust. The chief purpose of the rule of law is to protect right against wrong and to protect the weak against the strong. Laws revolve not only around justice, but also around interests because opinions differ concerning justice. These divisions are somewhat blurred in Iceland because the law, its interpretation by the courts, legal precedents, and implementation of the law have been colored by prevailing political interests. For all but 10 years during the 90-year period 1926–2016, two political parties, the Independence Party and the Progressive Party, controlled the ministry of justice, inaptly named Ministry of Judicial Affairs in Icelandic as if to devalue justice. Between them, those two parties have monopolized judicial appointments, many of which continue to create controversy.

Iceland is unusual in that members of the executive branch have occasionally denounced verdicts issued by the Supreme Court. This occurred, for example, in 1998 when the Supreme Court ruled that the refusal by the Ministry of Fisheries to grant Valdimar Jóhannesson a license to fish constituted a violation of Article 65, a constitutional provision that stipulates that all are equal before the law. The leaders of the Independence Party and the Progressive Party, together in a coalition government, openly criticized the verdict. Shortly thereafter, in 2000, the fisheries management system was reconsidered by the Supreme Court in a similar case involving individuals who had understood the 1998 verdict to give them the right to go out to sea without having been granted a quota. Five justices out of seven suddenly saw no discrimination in play. The other two justices reaffirmed the earlier verdict, arguing that the fisheries management system vio-

[1] See Thórólfur Matthíasson, "The Icelandic Debate on the Case for a Fishing Fee: A Non-Technical Introduction," *Marine Policy* 2001, 303–12.

[2] See Thorsteinn Gylfason, "Fiskur, Eignir og Ranglæti" ("Fish, Assets, and Injustice") in his book *Réttlæti og Ranglæti* (*Justice and Injustice*, 1998), Heimskringla, Reykjavík, 109–30.

lated the equality provision of the constitution and the freedom of employment provision. Together, these two provisions entail that any restriction against freedom of employment must be compatible with equality and human rights. The Supreme Court's sudden change of heart released Althingi from the need to change the law to make it accord with the constitution's provisions on equality and freedom of employment.

In 2007, the UNHRC effectively overruled the Supreme Court's 2000 verdict and reinstated the one from 1998. The UNHRC based its binding opinion on the observation that the allocation of fishing quotas at no cost to those who went out to sea in 1980–1983 violates Article 26 of the International Covenant on Civil and Political Rights (ICCPR), which is virtually synonymous with Article 65 of Iceland's 1944 constitution. The arbitrary rule of quota allocations in the fisheries management law does not satisfy the constitutional requirement that all citizens shall have equal opportunities, be equal before the law, and enjoy human rights without discrimination. The UNHRC granted Althingi 180 days to react to the committee's opinion. The government's first reaction was that the UNHRC had misunderstood the issues at stake. Its second line of defense was to change the wording of the law without changing its substance and to declare that a new constitution was under preparation with a provision on natural resources that would address the issue. The UNHRC took Iceland off the hook in 2012, citing partial fulfillment of the committee's original instructions, but ignoring the government's failure to compensate the two fishermen who had brought the case.

Human rights are universal, beyond compromise. Violations against human rights involve, among others, denial of equal and just treatment. Article 65 of Iceland's constitution states: "Everyone shall be equal before the law and enjoy human rights irrespective of sex, religion, opinion, national origin, race, color, property, birth or other status. Men and women shall enjoy equal rights in all respects."[3] On the basis of this provision, which is virtually identical to Article 26 of the International Bill of Human Rights, in addition to Article 75 of Iceland's constitution on freedom of employment, the Supreme Court ruled in 1998 that the fisheries policy regime violates the constitution, only to reverse course 18 months later under visible pressure from a government that acted as if human rights violations were justifiable in the name of economic expediency. But this is wrong. Had Icelandic fisheries been regulated by price from the outset as was urged by many observers at the time[4]—e.g., in accordance with a ready legislative proposal offered to Althingi—no violation would have occurred, and the matter would not have needed referral to the UNHRC.

2. Binding Opinion, Duplicitous Reaction

According to the ICCPR, the opinions of the UNHRC are binding. Iceland signed the covenant in 1968 and ratified it in 1979. The UNHRC's opinions cannot be appealed. The covenant was adopted in 1966 to fortify the UN Declaration of Human Rights of 1948. The UNHRC receives complaints about alleged human rights violations and aims to ensure that the covenant is honored and that any plaintiff whose rights under the covenant have been violated is granted an "effective remedy" even if no punishment other than shame is available. At present, 169 parties

[3] The English translation is taken from the website of the Comparative Constitutions Project, http://comparativeconstitutionsproject.org/. Accessed November 10, 2017.

[4] Probably the earliest published plea for nondiscriminatory regulation of the fisheries by price in English is that of Per M. Wijkman, "Comments on the Exploitation of Common Property Natural Resources," *Fjármálatíðind*i (*Financial Bulletin*) 22, No. 2, Central Bank of Iceland, 1976.

have signed and ratified the covenant, plus six more signatories that have not yet ratified the covenant (including China and Cuba). None of the countries that remain outside the covenant are democracies. Some democratic states, including Iceland, have registered technical reservations about some provisions in the covenant. Even so, Iceland made no reservation about the provision on which the UNHRC based its opinion about human rights violations in the name of Iceland's fisheries policy regime. After all, the provision in question is virtually identical to Article 65 of Iceland's 1944 constitution.

When fish stocks in Icelandic waters were threatened by extinction in the mid-1980s due mostly to overfishing, the Federation of Icelandic Fishing Vessel Owners (LÍÚ) agreed to help conserve fish stocks by reducing their efforts at sea as long as they were allowed exclusive expropriation of the fishing rent. It is known that LÍÚ drafted the bill passed by Althingi virtually without debate in 1983.[5] That law stipulated no-cost allocation of fishing quotas to vessels based on their fishing experience during 1980–1983, experience that resulted in part from earlier arbitrary allocations. Although Gaukur Jörundsson (a professor of law at the University of Iceland) had advised the government in writing that such allocations needed a basis in law, his memorandum was kept from the public until it was leaked in 2008, after the UNHRC issued its opinion. Thus, it appears that the initial allocation of fishing permits based on catch experience during 1980–1983 was not only unfair but also unlawful.

The quota system was anchored in law in 1990 when vessel owners were granted the right to sell the quotas allocated to them based on their catches during 1980–1983. Thus, with the stroke of a pen, Althingi created a wealthy class of local oligarchs in the fisheries. Althingi has ever since proved subservient to the special interests of the oligarchs, its own creation. The quota system is built on an internal contradiction. It is built on an initial allocation of quotas that was unjust and probably also unlawful and then, to make matters worse, vessel owners were allowed from 1990 onward to profit by selling their quotas. True, free trade in quotas was desirable on efficiency grounds, but unfettered transferability presupposed a just and lawful initial allocation of quotas. This is the root cause of the lawlessness and human rights violations that have inflicted untold harm on a number of individuals around the country while others have profited. Put differently, the problem is not the quotas themselves or their transferability between fishing firms, but rather their unjust initial allocation. Further, the quota system seems to have been conducive to other violations (including discarding and illegal landings) to a larger extent than the authorities have thus far been willing to acknowledge.

The government built its defense before the UNHRC on the argument that Article 72 of the 1944 constitution on property rights justifies the quota system, an argument that the UNHRC rejected on the grounds that the transformation of "original rights to use and exploit a public property into individual property" is discriminatory and unconstitutional. Thereafter, six members of Althingi, including two barristers, moved that Althingi was obliged to honor the UNHRC's opinion and change the law accordingly; but their proposal was not discussed, let alone brought to a vote. Althingi and the government appeared to be looking for ways to disregard the UNHRC.

There were other matters of concern. The two fishermen who brought the case had reasons to doubt the impartiality of the Supreme Court in case it would need to determine fair compensation to them in accordance with the UNHRC's instructions. Of the nine Supreme Court justices at the time, seven would presumably have needed to recuse themselves. One had been general secretary of the Ministry of Fisheries when it issued the quotas. Another had been attorney general

[5] See Halldór Jónsson: "Ákvarðanataka í Sjávarútvegi og Stjórnun Fiskveiða" ("Decision Making in the Fishing Industry and Fisheries Management"), *Samfélagstíðindi* 1990, 99–141.

and had unsuccessfully defended the case before the UNHRC. Two other justices had signed the second quota verdict in 2000, thus reversing the earlier 1998 verdict; one of them had also signed the 1998 verdict. A fifth judge had chaired the Complaints Committee on Information (Úrskurðarnefnd um upplýsingamál), known for its many verdicts protecting the government against the publication of inconvenient information. Two more justices were political appointees whose appointment to the bench had been severely criticized and, in one case, led to litigation that resulted in financial damages being granted to a qualified candidate who had been bypassed in favor of a less qualified but better connected candidate; the other justice was a well-known advocate of the Independence Party and the quota system. That left two justices out of nine that the two fishermen could trust.

The reaction of the Icelandic government to the UNHCR was in two parts. First, the government wrote the committee in 2008: "In the government's view it is not possible to award compensation to the plaintiffs in question because that could result in an avalanche of claims of compensation against the state." This line of defense exposes the weakness of the government's case. The fact that the rights of many others have also been violated has no bearing on the government's obligation to honor the binding opinion of the UNHRC. Having disregarded many warnings for decades, the government now had to face the consequences. Rather than comply in full, the government declared its willingness to consider a long-term plan to revise the fisheries management system to adjust it to the opinion of the UNHRC, adding that such a plan would take more than six months to develop. In a later communication, in 2009, a new post-crash government promised that the concerns of the UNHRC would be addressed in a new constitution under preparation.

From 1984 onward, Althingi allowed select vessel owners to exercise exclusive rights to fish resources in Icelandic waters without consideration to the nation, the rightful owner by Icelandic law since 1990 and also under international law according to the ICCPR. Were the right to fish worthless in markets as it was when access to the fisheries was free, there would be no objection to this arrangement. The crux of the matter is that the adoption of the quota system by law in 1984 to restrict access to the fisheries made the quotas hugely valuable. The problem was exacerbated in 1990 when the quotas were made freely transferable because the fishing fees that should have accrued to the nation or the state coffers by law were instead collected by vessel owners. Althingi finally acknowledged the problem in 2002 by legislating nominal fishing fees equivalent to roughly 10 percent of the fishing rent while the remaining 90 percent continue to accrue to the vessel owners.[6] That is not a fair value return to the nation, and so the problem that Althingi created in 1984 remains an open wound.

3. National Property vs. State Property

The ICCPR deals with natural resources in Article 2: "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence." This means that the expropriation of a nation's property constitutes a violation of human rights.[7] The

[6] See Indriði H. Thorláksson, "Veiðigjöld 2015. Annar Hluti" ("Fishing Fees 2015." Part Two), http://herdubreid.is/veidigjold-2015-annar-hluti/. Accessed November 11, 2017.

[7] See Leif Wenar, "Property Rights and The Resource Curse," *Philosophy and Public Affairs* 3, no. 1 (2007): 1–37.

ICCPR, along with national laws, opens a way to litigation against international traders in loot.[8] Those who purchase, for example, oil from countries whose governments have stolen the oil from the people are clearly buying loot. Blocking such trade would undermine many tyrants, putting a stop to their human rights violations. The point here is that a nation's right to its natural resources is a civil right, a human right, and is as such inalienable according to the UN Declaration of Human Rights, including the ICCPR.

The common property provision in the 1990 Icelandic law on fisheries management is a key provision not only for reasons of justice but also in view of universal human rights that are embedded deep within international law, including the aforementioned ICCPR as well as the International Covenant on Economic, Social, and Cultural Rights (ICESCR) adopted in 1966 and in force since 1976. Iceland is also bound by its signature and ratification of the ICESCR.

Article 1 of the ICCPR states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." In the words of Leif Wenar: "The principle that the resources of a country belong to the people of that country is widely accepted and embedded deep within international law."[9] This means that authoritarian regimes cannot legally bring natural resources under private ownership because nations under authoritarian rule are not in a position to "freely determine their political status." Many authoritarian governments around the world continue to violate the provision that "[i]n no case may a people be deprived of its own means of subsistence." Yet there can be no doubt that a democratic government has the right by law to transfer natural resources from public into private ownership as, for example, the US government has done. This is because US democracy is, in essence, beyond legal doubt. Unlike nations under authoritarian regimes, the Americans are and always were in full control of their ability to "freely determine their political status."

The ICCPR does not go as far as stipulating that natural resources must be under perpetual national ownership but only that the description of natural resources as national property restrains the right of authoritarian regimes to bring common property natural resources under private control without asking the people. Because the ICCPR is binding, national legal provisions on common property resources ought to reflect the covenant. Several laws and constitutions contain provisions on natural resources in accordance with the ICCPR. For example, Article 111 of the Iraqi constitution from 2005 states: "Oil and gas are the property of the Iraqi people. . . ."[10] By contrast, Article 16 of the Angolan constitution declares: "The solid, liquid, and gaseous natural resources existing in . . . Angola shall be the property of the state. . . ."[11]

This comparison underlines the crucial distinction between assets owned by the state and those owned by the government. State-owned assets—e.g., office buildings—can be sold or pledged at will by the government. Assets owned by the nation—e.g., national relics—may, on the other hand, never be sold or mortgaged. This distinction between state property and national property is exemplified by the Icelandic law from 1928 about the national park at Thingvellir (the original site of Iceland's ancient parliament), which states: "The protected land shall be under the protection of parliament and the perpetual property of the nation. It may never be sold or mortgaged." This means that the present generation must share with future generations the national treasures as well as natural resources belonging to the nation by law, and does not have the

[8] See Thorvaldur Gylfason and Per M. Wijkman, "Trade in Loot," *VoxEU,* November 13, 2010.
[9] Leif Wenar, "Property Rights and the Resource Curse," *Philosophy and Public Affairs* 3, no. 1 (2007): 9.
[10] See https://www.constituteproject.org/constitution/Iraq_2005?lang=en. Accessed November 14, 2017.
[11] See https://www.constituteproject.org/constitution/Angola_2010?lang=en. Accessed November 14, 2017.

right to dispose of the resources for its own myopic benefit. The legal strictures on the management of such resources are meant to apply to the natural resources themselves as well as to the rights attached to the resources. This distinction lies at the heart of the provision declaring Iceland's natural resources to be the "perpetual property of the nation" in the new post-crash constitution approved by an overwhelming majority of Icelandic voters in a national referendum called by Althingi in 2012. That new constitution still awaits ratification by an Althingi that appears reluctant to respect the will of the people for fear of arousing the wrath of the oligarchs in the fishing industry who prefer to persist in regarding fish resources in Icelandic waters as their private property.

4. Natural Resources in the New Constitution

The key features of Article 34 in the Constitutional Council's constitution bill from 2011 are as follows:

> 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. . . . The utilization of the resources shall be guided by sustainable development and the public interest. 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.[12]

By "full consideration" is meant full market price for the right to exploit the resource in question—i.e., the highest price that anyone is willing to pay in a market, at auction, or in an agreement with the state as agent for the resource's rightful owner, the nation. This marks a clear departure from current practice in which vessel owners have been granted access to valuable common property fishing quotas, first free of charge since 1984 and then against nominal fees since 2002. The Constitutional Council discussed the possibility of replacing "full consideration" with "fair consideration," but the idea was rejected on the grounds that "fair consideration" might be perceived as a constitutionally protected offer of a discount to those granted permits for the use of resources. Further, the wording "fair consideration" would have introduced an element of discrimination into the bill in violation of the equality clause (Article 6) because the clause on the right of ownership (Article 13) states that "full compensation shall be paid" for measures that make anyone "obliged to surrender his property." Like the 1944 constitution, the constitution bill prescribes "full compensation" for private owners, and must treat all owners the same way.

To underline the human rights aspect of natural resource management, the provisions on natural resources together with environmental protection are located in a chapter titled "Human Rights and Nature." Further, the bill makes an explicit conceptual distinction between the "property of the nation" and "property of the state." In part to clarify the meaning of the nation's (as opposed to the state's) ownership rights to its natural resources, the natural resources provision is preceded by a corresponding provision on cultural assets: "Valuable national possessions per-

[12] For the official English translation of the bill, see http://www.thjodaratkvaedi.is/2012/en/proposals.html. Accessed November 14, 2017.

taining to the Icelandic cultural heritage, such as national relics and ancient manuscripts, may neither be destroyed nor surrendered for permanent possession or use, sold or pledged." National ownership of cultural assets as well as of (renewable) natural resources is intended to oblige the current generation to preserve such assets for unborn generations. State ownership involves no such duty.

—CIVIS