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## The Icelandic Federalist Papers

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No. 21: Althingi Must Act on the New Constitution

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## No. 21: Althingi Must Act on the New Constitution

### To the People of Iceland:

In a national referendum held in October 2012 Icelandic voters overwhelmingly declared their support for a new constitution. According to them it should be based on the draft submitted to the Althingi as a parliamentary bill by the Constitutional Council the year before. The referendum was consultatory: Since the currently valid constitution stipulates that a new constitution must be enacted by the parliament, the Icelandic public can only vote to tell parliamentarians what it wants on constitutional matters. It cannot force them to some specific action. Therefore, it must only guide them, and so it did. With half of the electorate participating in the referendum, more than two-thirds of the voters were in favor of basing a new constitution on the Constitutional Council's bill. Importantly, the voters were not asked to pass or reject the bill but only to determine whether further work on the constitution should use the text provided by the Constitutional Council. The vote was not in favor of simply having the parliament vote on the bill without amendments, and it did not in any specific way pose constraints on changes that could be made to this text in the process. In fact, at the time of the referendum a number of changes were being suggested by a team of legal experts who had been asked by the government to review the document from a technical point of view—making sure that it did not contain legal flaws.

Surprisingly, however, parliamentarians rejected the public's guidance so clearly given in the referendum. Instead of diligently working to promote and execute the public will, the parliament dropped the issue. First it decided not to vote on the constitutional bill, which (until February of 2013) was being modified by a parliamentary committee. Then, after the elections that year, it decided that instead of continuing its work on the Constitutional Council's draft, it should rather have a parliamentary commission continue to discuss piecemeal changes to the constitution. The short-lived parliament elected in 2016 did not take up the issue at all. So, for more than five years, politicians have failed to respond to the clearly stated will of the people. At the same time, numerous surveys and opinion polls have continued to show majority support for a new constitution based on the Constitutional Council's draft. It should not be excluded of course that there might be good reasons for ignoring the outcome, but in that case politicians should also be expected to make their reasons explicit. No compelling reason has been given—or detected—so far, as I will show.

In a democratic society like ours members of parliament enjoy great confidence. Article 48 of the constitution clearly states that once they are in office, they are not obliged to follow any instructions, and that their "conviction" should be their sole guide. This means for example that they are as MPs independent of party discipline and, even though they are elected from party lists, they are not bound to their party once in parliament. They can leave their parties or join another party as their conscience tells them. It also shields them from the demand that they must always act in accordance with the prevailing mood in society, be overly worried about opinion polls, or conclude that general opposition to their views or policies is reason for them to resign.

Yet the freedom of conscience that MPs undeniably have is not without limitations, even if the constitution does not articulate those limitations. The democratic nature of Iceland's political system implies that the will of the public provides the ultimate justification of governmental pol-

icies. This means that a referendum cannot simply be treated as an expression of public mood. It is a formal democratic procedure that delivers a majority opinion, and even if the constitution does not offer a provision on how exactly an elected official should deal with outcomes of referenda, it is reasonable to conclude that he or she is at least morally required to work in the spirit of such outcomes.

It is possible to think of two strong arguments against acting in accordance with the result of the 2012 referendum. First, it might be shown that the referendum was in some way illegitimate. Illegitimacy could be legal (if some laws were violated in the process), technical (if the referendum was not held in accordance with administrative standards and therefore its result could not be trusted), or moral (if some relevant groups were excluded from influencing the process or from full inclusion as citizens or voters). The only argument against legitimacy that surfaced in public and media discussion concerned low participation: Since participation was just below 50%, it was argued, the result was supported not by two-thirds of Icelandic voters, but by only one-third of voters. Second, it could be argued that the result, in spite of majority support, posed such a grave threat to the future of the Icelandic political system and thus to social stability that it would be irresponsible by political leaders to implement it.

The first argument is easily answered: First, since there were no legal requirements for minimal participation or minimal support it makes no sense to argue post facto that participation was too low for the referendum to provide a valid result. If the parliament feels that it is necessary for the legitimacy of an election or a referendum to constrain its validity by demanding minimal participation or minimal support for the winning option, this can easily be done in advance. But most often this is not necessary, since it can be assumed that even without full participation of the electorate, the result of a referendum will still be largely in accord with the public view. Even though a minority was opposed to the Constitutional Council and did not want the referendum to take place, this minority neither made a genuine appeal to the public to boycott the referendum, nor was it in any way not allowed full inclusion in the democratic process that preceded the referendum.

The second argument is more complicated. In fact, many legal scholars in Iceland maintained that the Constitutional Council's bill was deeply flawed. Some specialists even went so far as to argue that its adoption could lead to a constitutional crisis because of inconsistencies in the text of the proposed new constitution. It was also argued that the new constitution would not improve Iceland's constitutional order (except in the sense that some of its innovations could be considered improvements) but simply create a temporary confusion until Icelandic courts could rule on its main articles, thereby creating the legal precedent necessary for predictability about the interpretation of the constitution.

The quality of a constitution can be debated on different levels and it is certainly neither realistic nor desirable to aim at consensus on such a document. But broad support is important, and it seems that one of the main attractions of the new constitution had to do with the way it was written: By ordinary citizens without interference of political parties. The value of having thus made a break with the original 19th century Danish constitution, on which the current constitution is based, should not be underestimated and for that reason some confusion about how courts would interpret a new constitution is acceptable and to be expected. Revisions of the document to ensure that it would be free of internal inconsistencies were clearly meant to be a part of the process anyway. It remains then to claim that some or all of the innovations in the new constitution are flawed. Such an argument, however, has not been clearly made, although of course there are politicians who are opposed to these innovations or some of them. The new (draft) constitution

on the other hand does renew the archaic constitutional language characteristic of the Icelandic republican constitution from 1944, which awkwardly contains whole sentences and paragraphs that stem directly from the 1849 Danish constitution.

All things considered a compelling reason to ignore the referendum results concerning the constitutional bill is nowhere to be seen. In the referendum voters also expressed their views on several general questions about constitutional issues, such as whether the constitution should contain articles about the national ownership of national resources, about conditions under which the public could demand a national referendum on legislation passed by parliament and more. In all but one question, the overwhelming majority shared views already held by the Constitutional Council and reflected in its bill. There should be no question therefore that the Constitutional Council's effort found broad support in Icelandic society.

The Icelandic parliament made no particular decision following the national referendum of 2012. It first continued the discussion on the constitutional draft and when a decision was made to indefinitely postpone further discussion of it, no reference was made to the referendum. It was as if it had never taken place, and some comments made by politicians even suggest that the consultative nature of the referendum means that its results need not be taken seriously. When individual MPs are asked to comment on the constitutional debate, many will offer their views on whether they think that the document that evolved out of the draft submitted by the Constitutional Council should become the new constitution, or whether a new constitution should be based on this draft, or whether changes to the constitution should be based on other considerations, etc. These MPs seem to think that they can treat the outcome of the 2012 referendum as a nonissue, as a temporary public mood, as something that does not pose any obligation on them, and that they can continue to express their views on the constitution as if this referendum had never happened. Some will argue that an entirely new process is necessary to change the constitution. Others will say that it is not a good idea to change the constitution quickly or all at once. There are those who do not think that there is anything in our current constitution that needs change, and so on.

The fact that a nonbinding referendum does not necessitate any specific action by parliament or government should not be understood as a license to ignore its outcome. If a referendum shows two-thirds of voters in favor of a new constitution based on the draft created by the Constitutional Council it is nonbinding in the sense that it does not force the parliament to some particular action, but clearly it should be seen as forcing parliament to act in a certain way: namely, it should force parliamentarians to accept that they must work on a new constitution (rather than just keep revising the old one) and that this document must in a clear substantive sense be consistent with the document submitted by the Constitutional Council to the Speaker of the Althingi in July 2011.

There is an important difference between ignoring and opposing the result of a consultative referendum. Reservations about the constitutional project are understandable, but even well-reasoned doubts cannot legitimately translate into a justification for ignoring or rejecting a majority view. Reservations and doubts may on the other hand serve to improve the way such an important project is carried out. This is one of the strengths of democracy: Although decisions must be based on majority opinion, since democratic choice is based on a discussion where a plurality of views and opinions are expressed, explained, argued, and debated, everyone must be aware that the final decision is just one option among many, it just happens to be the option selected to be implemented. A belief in a majoritarian democratic system entails the view that a majority is on the whole more likely to be right than a minority. Yet intellectual humility re-

quires that the democratic majority also recognize that not only has the minority certain rights, such as to be listened to and taken seriously, but also to influence how policies are implemented. When a constitution is at stake this is very important: Those opposed to a project that a majority is pursuing may have a wealth of insights and views that can help improve the final outcome to everyone's benefit. One should therefore expect, first, the majority to make an effort to involve the minority in the implementation of a decision to which the minority was opposed and one should also expect, second, that the minority, having lost its battle, instead of simply ignoring or staying passive to what the majority then does, will remain an active participant in the implementation of policies that have gained majority approval.

MPs may personally believe that piecemeal changes to the constitution are better than a full renewal, or that constitutional changes must take years or even decades. These reasonable views, however, must be seen as minority views: they are opposed to a clearly stated and measured majority view. What MPs should do, rather than continue to express their personal preferences, is to find ways to avoid the pitfalls they fear, and fight for the constitutional amendments they believe in, while abiding by the public will to adopt a new constitution based on the draft created by the Constitutional Council.

It is interesting that the clear support for the constitution expressed in the referendum and various surveys over the years, has not led to politicians' fearing that they might be punished by voters for their negligence. It amounts to an additional argument against acting in accordance with the public will when the public seems not upset about it at all. It evokes an important question: To what extent can politicians be excused for ignoring public opinion if the public doesn't care—i.e., if there is a clear majority view in a given case, but the case seems not to rank high enough on the list of public priorities for strong protest to emerge when this majority view is ignored?

The best way to answer that question might be to look at short-term and long-term consequences of inaction. The distinction between the important and the urgent is a recurring public policy dynamic: a complex, important issue like a new constitution frequently is shelved while a less important but more urgent issue (the subway is broken) is dealt with. While people in general care more about pressing issues such as their salaries, the health-care system, education, taxation, etc. than about more abstract questions such as the constitution, it does not mean that deeper and more demanding questions about the structure of society itself can simply be ignored. Deeper conflicts and unsolved problems with a divisive potential can have devastating long-term effects on political culture, allowing distrust and cynicism to replace integrity in public affairs. Politicians may tend to dismiss activist groups and NGOs with specific political agendas when they seem not to enjoy mass support, but that is a mistake: Nongovernmental organizations may represent small groups of activists, but these activists are enough to keep issues that enjoy public support alive. A government or party that fails to respond to publicly endorsed views cannot expect that the issue will simply disappear. The Icelandic constitutional saga is a good example: It keeps coming up. It does not disappear, and it will not.

There are many ways to make a revision of the constitution an orderly, balanced, and slow affair without betraying the public will. The 2017 elections created an opportunity for a new parliament to respect the result of the 2012 referendum. The new parliament should revive the process that has been stalled since 2013 and make it a priority to enact a new constitution before its term ends in 2021. If a fresh referendum adopts this constitution and a new parliament ratifies it, a decade-long process will finally be brought to a democratic conclusion. Should a new constitution be rejected by the public, that also will be a democratically acceptable conclusion of the

process. The government owes it to the Icelandic people to bring the constitutional debates to an end. It also owes it to itself.

—CIVIS