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The Icelandic Federalist Papers

Title

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Publication Date

2017-09-11

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To the People of Iceland:

You have been preparing and voting for a new constitution. But so far Althingi has not taken action. The time has come to discuss whether and to what extent Althingi has a duty to enact a new constitution, according to the project that you, citizen, prepared through the Constitutional Council.

You may have questions about this. First and foremost, has the time of the 2008 crisis (where the idea of developing a new constitution arose) come and gone? Some may say, since the crisis has passed, the need to enact a new constitution faded with it. Not so. We will show that the need still exists for a new constitution, and that Althingi has a duty to approve the constitution you wrote.

Law is required to maintain basic social order and to permit society to attain specific values, which are important for our own existence. When a specific law fails to attain the aims for which it has been designed, that law should be amended, and, in particular cases, changed in its entirety. The same applies to a constitution. The aim of a constitution is to guarantee basic values. Among them, a life in peace, with a sufficient degree of freedom and equality, enjoying at the same time sufficient economic resources and possibilities of development. It is also very important that a constitutional framework does not create problems and burdens in the international sphere; that means a constitution must not endanger the achievement of basic values by other communities.

Whenever a constitution fails to promote those values, the objective conditions that justify the necessity of enacting a completely new constitution are then met. For example, in Iceland's case the financial crisis of 2008 showed that the government and the political parties were unable to ensure economic order. Freedom and security were in danger, and serious repercussions affected countries like the United Kingdom, which has strong ties with the Icelandic economy. The society perceived that this state of affairs was the result of an unequal distribution of power: small elites were controlling the government. Banks could develop uncontrolledly, and the fishing companies could enjoy of the rich natural resources of Icelandic sea, without the need to pay an equitable sum for it. The unequal distribution of power also caused a lack of respect for some basic rights of people: security, freedom, respect for individual property, and the national economic resources.

In this case the objective conditions for a completely new constitution have been met.

Speaking more generally, the existence of objective conditions to enact a new constitution may stem not only from serious shortcomings of the previous constitutional framework. Approving a new constitution may permit a state to enjoy a higher level of internal organization and improved international relations, with a consequent advantage for the entire nation. For example, in the second half of the 1970s Greece, Spain, and Portugal changed their constitutions, not only due to their internal political changes, but to be admitted to the European Economic Community. In the 1990s, following the end of socialist rule the countries of central Europe approved new constitutions to become members of the European Union. This illustrates how an opportunity,

which could affect the achievement of the basic constitutional values, may objectively justify the need for approving a new constitution.

But the existence of an objective need to approve a new constitution is not by itself a sufficient condition. We still must determine whether the society is subjectively ready to apply new principles, which are reasonably better at responding to the requirement of protecting the basic values. Sometimes, the political circumstances require making a new constitution: the nation may be in the aftermath of a war, of a transition, or of an economic default, and there may be compelling reasons to adopt a new constitution. Yet the test for whether the political forces, the society at large, and the cultural leaders are able to imagine, to propose, and thus to share a new conception of the life in common, which is the condition to better deal with the issues that caused the crisis of the former constitution, is not idle. A new constitution should be enacted only where, apart from the *need* for a new constitution, we can justify that the new constitutional order is significantly *better* than the previous alternative. In this case we may say that the subjective conditions to enact a constitution are met: namely that the new constitution may reasonably be considered as significantly better than the previous one.

This is the reason used in *The Federalist* to justify the new union and explain its utility to the citizen's political prosperity: "The insufficiency of the present Confederation to preserve that Union" and the necessity of a government that is "energetic" and conforms to "the true principles of Republican government." And that "The additional security which its adoption will afford to the preservation of [the republican] government, to liberty, and to property." By that standard, the new constitutional frame is significantly better than the previous. "This Convention," it continues, "composed by persons who "possessed the confidence of the people, and many of whom had become highly distinguished for their patriotism, virtue and wisdom" did not, however, impose its will. It only recommended the result of its work to the people for their "sedate and candid consideration," to ponder on the base of the "great and weighty reasons" on which "their universal and uniform attachment to the cause of the Union rests."¹ This is the second part of the test of reasonability, to affirm that the conditions to enact a constitution exist in the people's understanding, so the constitution may properly display its effects. This second part of the test affirms that the constitution can be well understood and shared by the people.

As we said, in Iceland the objective conditions to approve a new constitution have been met. But we must consider the presence of subjective conditions. This is so because while the objective conditions may exist, we may not be able to develop a new conception of life in common, which is reasonable, useful, makes an improvement, and at the same time is understood and shared. Two examples are instructive here.

First, Poland in 1989 started its constitutional transition on the base of the awareness, shared both by government and the opposition, that Poland was in a critical political and economic situation, and that a change was needed. The government and opposition held a round table, which resulted in many reforms and new elections, which government forces lost. Not until 1997 did Poland have a completely new constitution, due to the lack of a shared conception within the political forces. To such a lack we owe the roots of the present constitutional difficulties in Poland.

Next, the European Union. In 2001, the success of the internal market, the introduction of the common currency, and the application by the former socialist countries for membership (as well as some southern European countries) seemed to suggest the need for further integration. The EU convened a convention. But France and Holland failed to ratify the treaty establishing a European constitution. Among other reasons for this failure is the constant lack of a genuine attention to

¹ A. Hamilton, J. Madison, J. Jay, *The Federalist Papers*, (1961, C. Rossiter ed.) at 36, 39–40, 41.

the internal political forces of European member states as they impact European integration. Another is the distinction between the sovereignty interests of the former socialist states, versus the western states and their interest in protecting their standard of life and social achievements. This shows that notwithstanding the importance of the opportunity to have a European constitution, social and political awareness of its importance was clearly absent.

It follows that it is important to show that in Iceland the subjective conditions necessary to approve a new constitution are actually met. Indeed, only when the objective and subjective conditions to approve a new constitution are present is it appropriate to consider the question of the political duty to give a definitive vote of assent. The people of Iceland responded to the 2008 crisis in phases. First they went to the streets, banging pots and pans in front of Althingi—as if they were drums. This is a form of protest, especially known in Latin America, where it is called “cazerolazo.” In the next phase Icelandic society organized itself and demanded that a new constitution be approved. Althingi, notwithstanding internal conflict, recognized the fundamental role of the society, and put at work “the constituent power of the people.” Indeed, according to the Act on Constitutional Assembly,² that organ has been called to consider the essential aspects of the life in common, namely: the foundations of the Icelandic constitution and its fundamental concepts; the organization of the legislative and executive branches and the limits of their powers; the role and position of the president of the Republic; the independence of the judiciary and their supervision of other holders of governmental powers; questions on the elections and the electoral districts; public participation in the democratic process, including the timing and organization of a referendum; transfer of sovereign powers to international organizations and the conduct of foreign affairs; environmental matters, including the ownership and utilization of natural resources. Such duties given to the Constitutional Assembly have been not a conferral of competences, but the recognition of the Icelandic citizen’s original constituent power.³ This recognition is performed by means of the description of a reasonable ambit of use of such power, with respect to your objective needs.

There is no significant contrast in the fact that the constitution of Iceland corresponds to the extent of the constituent power recognized by Althingi. We therefore may say that the constituent power of Icelandic people has been reasonably used and therefore fulfils the subjective condition to enact a constitution. Now we shall apply the second part of the test to show that the subjective conditions to enact the constitution have been met, and namely that the Icelandic constitution approved by the people includes a project of life in common, which is reasonable, useful, constitutes improvement over the former charter, and is understood and shared. Here we may consider the question of method, and namely that in the process of making a new constitution the use of a “collective intelligence” approach has been adopted.⁴ Also the declarations of the citizen are worth taking into account. The documentary film “Blueberry Soup”⁵ and other film-based

² For a description of the constituent process see Á. Th. Árnason, “Review of the Icelandic Constitution—Popular Sovereignty or Political Confusion,” *Tijdschrift voor Constitutioneel Recht*, 2011, p. 342–351.

³ See E. J. Sieyès, *Qu’est-ce que le tiers État?*, Paris 1888 (1st ed. 1789), p. 67.

⁴ T. Gylfason, “Democracy on Ice: A Post-Mortem of the Icelandic Constitution,” https://www.opendemocracy.net/can-europe-make-it/thorvaldur-gylfason/democracy-on-ice-post-mortem-of-icelandic-constitution#_ftn1 19/06/2013, retrieved 31/07/2017, p. 1–2.

⁵ “Blueberry Soup. How Iceland Changed the Way We Think about the World,” a documentary film directed by Eileen Jerrett, by Wilma’s Wish Productions, 2013; <http://www.wilmaswishes.com/>, retrieved 31/07/2017.

documentation show how, in the aftermath of the crisis, Icelandic citizens developed first a moral reflection, which evolved into a political reflection. They appear well aware of the difficulty of getting involved directly in the process of figuring out what is best for the community, underlining in any case the importance of participating in public life and contributing to the common good. Such voices are proposing something new and are sometimes critical. As one citizen complains in the film, there are still people who say that they do not have time for the ambiguities of politics. And therefore that they need a strong leader, since they do not wish to be bothered by all the issues concerning politics, the opinions they are supposed to have, and the discussion. This citizen poses the question whether such people are ready for democracy. In his view democracy means not having strong leaders, but having strong people who are not thinking by themselves and are ready to change their opinion.⁶

The citizens of Iceland seem to make an effort to join traditional habits with new political proposals. For example, Icelandic sewing clubs began as a way for women to come together within the community and learn how to survive the harsh environmental challenges. Today Icelandic sewing clubs are used as social gatherings and a support network. The political meaningfulness of these activities is enhanced by the fact they are not an alternative to representative government, but they are the manifestation of a civil society, which aims to grow, taking up its own responsibilities, completing and integrating the process of government. Together with participation, this approach is a manifestation of “subsidiarity,” a principle that has an important significance for many today’s constitutions both of national states, and is a fundamental principle of European Union treaties.

As you can see, citizens have not only produced a new constitution, making a correct and reasonable use of constituent power. The whole society has been participating in the reflection that led to the development of a new constitution, and so the constitution includes values and approaches that the society shares and understands. The importance of the arguments presented by civil society shows that the subjective conditions necessary to enact a constitution do exist and that your constituent power has been correctly used. Althingi therefore has the duty to give force to the constitution you approved. To refuse to fulfil such a duty, claiming for example that in the Icelandic constitutional tradition Althingi must be at the center of political life does not appear, at the present state of affairs, acceptable. Althingi recognized the constituent power of the people. Once the people made use of that power, Althingi must act accordingly. In the United Kingdom, where traditionally Parliament is at the center of political life, it respected the people’s will after the vote to withdraw from the European Union. Unlike Britain’s Parliament, Althingi has another fundamental reason to respect its duty to enact the constitution voted by the people: the use of the constituent power has been the shortcoming of Icelandic institutions to grant transparency in governance, a fair distribution of common economic resources, protecting at the same time citizens and the international financial community from the moral hazard of the few.

—CIVIS

⁶“Blueberry Soup” interview with S. Knuttur from 8:28 to 8:47.