The Icelandic Federalist Papers

No. 10: Judicial Independence (continued)

To the People of Iceland:

This essay addresses the improvements the people of Iceland have made to the judicial branch in their stalled draft constitution, specifically those improvements in Articles 96 and 98 through 103. The draft constitution establishes an improved, stable, and flexible form of government in four ways. First, the new process for judicial appointments will avoid potential abuses through unilateral appointment, prevent gridlock in the appointment process, moderate against hyper-partisan judicial appointees, and enhance accountability. Second, the draft ensures that the Supreme Court maintains its proper place as the highest court of the state and maintains a proper structure for appeal, even from specialty courts. Third, the draft ensures the judiciary's independence from the other branches of government and decision making autonomy for individual judges. Fourth, the draft clarifies the courts' substantive role in evaluating whether laws conform to the constitution—the fundamental law of the land. Taken together, these changes substantially benefit the people of Iceland.

I. The New Appointment Process Will Prevent Unilateral Abuse, Avert Gridlock, Moderate Against Hyper-Partisan Judicial Appointees, and Enhance Accountability

Articles 96 and 102 establish a new appointment process for judicial officials. Article 96 provides that "[m]inisters and other administrative bodies shall appoint persons to such posts as provided by law." A minister appointing "a judge or state prosecutor" shall present that appointment "to the President of Iceland for confirmation." If the president refuses to confirm the appointee, "Althingi needs to confirm the appointment with a two-thirds vote for it to take effect." Article 102 specifically provides that "[t]he minister appoints judges and releases them from their duties."

This process provides greater clarity and protections against unilateral abuse than the current constitution, which only provides under Article 20 that the president "appoints public officials as provided by law." Although the current constitution permits legislation to further define a judicial appointment process, the fundamental law in its current state places default power in the hands of a single individual to appoint public officials. In contrast, the draft constitution explicitly provides for involving at least two individuals acting in two stages: an appointment, and a confirmation. Two heads are better than one. This is especially true under the draft constitution's Article 90, where ministers are appointed by the prime minister, who in turn is appointed through a collaborative process between the president and Althingi.

The draft constitution also mitigates the risk of gridlock stemming from disagreement. If the appointing minister and the president disagree, then Althingi may resolve the impasse by appointing the judge through a two-thirds vote. Although some may criticize the draft as creating the possibility of politicizing appointments, this vote by Althingi is merely a back-up option to ensure that a well-qualified candidate does not end up forever stalled by disagreement between the appointing minister and the president.

This new appointing process reduces the risk of overly politicizing that process. Any appointment process for a government official *will* be political to some extent.[1] Independent committees do not spontaneously arise from nowhere. Thus, the task for any constitution is to ensure that the process is not overly political. At first glance, the current constitution might not appear to be all that political—by default, the president appoints alone. But the president is an elected official, elected directly by popular vote. The electorate's will is hardly diffused when judges are appointed by the directly elected president. True, the current constitution affords the option of appointment by other means as dictated in legislation. Still, default rules enshrined in a constitution are important. Fortunately, the default rules under the draft constitution diffuse the political will of the majority electorate (which has the potential to infringe on minority rights) between multiple decision points through a collaborative process. And the safety valve for when collaboration fails—the two-thirds vote in Althingi necessary to confirm the appointee—ensures that judicial appointees do not reflect a single party's political values or bare-majority coalition. Additionally, the lack of appointment by means "as provided by law" for judges appointed under Article 102 in the draft reduces the possibility of Althingi, the most political branch of government, taking over the appointment process to achieve its own political ends.

The draft constitution's provisions also reduce the likelihood of hyper-partisans securing judicial appointments by declaring how such candidates will be evaluated and for how long they will be appointed. Specifically, Article 96 requires that "[q]ualifications and issues of substance shall govern the appointment to office." The focus is not on what political results a judge will achieve for the politicians appointing the judicial candidate. What matters instead is the candidate's qualifications to be a judge. Article 102 further reduces politicizing judges because "[j]udges are either appointed permanently or for a certain term" from which they may only be removed "by a court verdict" based on a finding that the judge can no longer perform in that role. Judges appointed permanently or for a fixed term need not worry about those who appointed them relying on the appointment as leverage for the judge to reach certain political outcomes. Long, relatively secure terms reduce politicization of judicial appointments by giving appointees greater independence once they are confirmed.[2]

Although the new appointment process reduces politicization of judicial appointments through long, relatively secure terms, the process still makes otherwise independent judicial appointees accountable to their appointing authorities; makes the judiciary accountable to the other branches of government; and improves government accountability overall.[3] Under the draft constitution, a judicial candidate must do more than satisfy the president: the candidate must satisfy

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[1] J. Clark Kelso, "A Report on the Independence of the Judiciary," 66 *S. Cal. L. Rev*. 2209, 2214 (1993) ("There is virtually no way to entirely insulate the judiciary from the political process.").

[2] *See* David A. Carrillo, "The California Judiciary," in *Governing California: Politics, Government, and Public Policy in the Golden State,* ed. Ethan Rarick (Berkeley: Berkeley Public Policy Press, 2013), 321 ("Appointed judges, particularly those with long or lifetime tenures, have the advantage of greater independence, as after their initial appointment they are more insulated from political pressure . . . .").

[3] *Cf. id.* ("Appointment process design decisions are driven by the competing values of judicial independence and judicial accountability."); Kelso, *supra* note 1, at 2214 (discussing the balance between judicial independence and accountability and observing that "entirely insulating the judiciary from social and political pressures would be contrary to the fundamentally democratic principles that underlie [California] government"); Robert S. Thompson, "Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate," 59 *S. Cal. L. Rev*. 809, 814 (1986) (stating that a judicial "retention election is about judicial independence and judicial accountability, and about accommodating one to the other.").

the appointing minister or even two-thirds of Althingi that this candidate is well-qualified. These requirements also ensure some judicial accountability to the executive and legislative branches. Concerns that the judiciary may overstep its bounds or encroach on the other two branches are mitigated by the executive and legislative branches' involvement in the appointing process. As a whole, the government may not insist that any issues with judicial appointments are solely the president's fault; if an appointing minister cannot present a candidate that satisfies either the president or two-thirds of Althingi, then the minister may face release by the prime minister if political pressure mounts. And if Althingi refuses to confirm a well-qualified candidate, then the voters may respond to this failure come election time.

II. The Draft Constitution Provides an Improved Structure for the Judiciary, with the Supreme Court as the Highest Court in the Land

Unlike the current constitution, the draft is quite clear on the Supreme Court's status as the highest court in the land: "The Supreme Court is the highest court of the state and has the final power to resolve all cases presented to the courts." Article 101. The provision is unambiguous; no doubt remains as to which court has the final word on a legal matter. Ensuring clarity about the highest and final authority on legal matters promotes clarity and uniformity in the law.

The draft constitution also provides the option for at least one specialty court: a court that "may finally resolve disputes on wage agreements and the legality of strikes." Article 101. Providing for courts with specific areas of expertise increases institutional competence and judicial economy. And the Supreme Court still retains ultimate review authority because "a verdict on penalties will be appealed to other courts." *Id*.

For those concerned about creating a special court devoted to wage agreement and strike disputes, Article 101 maintains flexibility by stating that "it *may* be decided by law that a special court" resolve those disputes (emphasis added). If Althingi deems creating this particular specialty court unnecessary, the provision need not be implemented. And if circumstances change or popular pressure from the electorate mounts, then new legislation may establish this special court.

Some may criticize Article 101 for explicitly permitting only one type of special court, suggesting that this provision necessarily excludes other types of special courts. This is precisely the kind of question that the "highest court of the state"—the Supreme Court—can answer. And this provision's permissive nature, that legislation *may* establish such a special court, suggests that this special court is an example. If the Supreme Court were to decide otherwise, the draft constitution's more flexible amendment provision (Article 113) is far more amenable to repairing any concerns that would otherwise remain mired in gridlock under the current constitution's amendment process, as the draft constitution has.

The draft constitution also details further judicial organization while maintaining much-needed flexibility in adjusting to changing needs. Under the current constitution, Article 59 is the sole description of judicial branch organization: "The organization of the judiciary can only be established by law." In contrast, Article 98 in the draft constitution provides for structure of the judiciary beyond the Supreme Court: "The organization of the judiciary," including "the levels of courts and the number of judges," will be defined in legislation. And this is one of seven articles in a chapter devoted to describing the judicial branch, rather than the paltry three brief paragraphs about judges in the existing constitution. The draft also avoids going too far. Instead of providing an inflexibly detailed list of the number of judges and the full structure of courts (a

level of detail inappropriate for a document describing foundational legal principles) the draft constitution delegates authority to Althingi to manage the composition of lower courts and respond to ever-changing societal needs for the initial resolution of disputes. Ultimately, the draft constitution provides a much clearer structure of the judiciary while retaining flexibility.

III. The Draft Ensures Judicial Independence from the Other Branches and Independence for Individual Judges

Article 99 in the draft constitution leaves little doubt about the importance of judicial independence, as it contains a new provision (without analogue in the current constitution) with this mandate: "The independence of the courts shall be ensured by law." If the statutory law must ensure independence, then it necessarily cannot interfere with independence. Thus, Article 99 protects the judiciary's ability to serve as a check on the broad powers of the legislative and executive branches. Additionally, Article 102 exempts nonbench officer judicial branch employees from the political process: "Courts can hire or convene others as stipulated by law." By keeping court staff hiring distinct from the political appointment process for judges, the draft constitution prevents judicial branch hiring from becoming overly political, further alleviating concerns about politicizing the judicial branch.

The draft constitution preserves judicial independence by making individual judges autonomous. Specifically, Article 103 states that judges "shall only be guided by the law" in their duties. This requirement makes clear that judges are not to consider political outcomes—including those desired by their appointing agents—when deciding legal issues. Protecting judges from retaliation for failing to reach political outcomes desired by the other branches is paramount to preserving judicial independence. And judges are protected from political terminations, because absent a court verdict a judge will serve a full term. Although "[t]he minister . . . releases" judges "from their duties" under Article 102, "A judge will not be finally removed from his post except by a court verdict and only then if he no longer fulfills the conditions for performing the duties of his post or no longer performs the duties related to his task."[4] Thus, judges can expect little interference in their decision making from external forces, whether serving permanently or for a fixed number of years under Article 102.

Remaining free from political pressure enables judges to focus on using only the law to guide their decision making. This freedom permits the judiciary to serve its intended countermajoritarian function, protecting minority interests and constitutional rights from encroachment by government or a bare electorate majority. Reviewing the other branches' acts by an independent judiciary is necessary, for without this independence the judiciary likely would accept the other branches' opinions about the legality of their acts. Because the executive and legislative branches are unlikely to find their own actions unconstitutional, judicial independence remains a cornerstone of functional constitutional government. This judicial independence is further enhanced by eliminating a possible release from office at "the age of 65," present in Article 61 of the current constitution. Health outcomes have improved over the past several decades, and permitting judg-

[4] One concern is the language in Article 102 of the draft that a judge "will not be *finally* removed . . . except by a court verdict . . . ." (emphasis added). The use of "finally removed" suggests that "[t]he minister," as the one who "releases" judges "from their duties," may be able to release a judge from their duties in a nonfinal fashion. But the court may step forward to provide relief if this nonfinal release is unsound (or ratify the minister's decision through a court verdict). Moreover, release by the minister is far less likely where more than one person has agreed to the judicial appointment at the outset.

es to remain in office beyond the age of 65 preserves the institutional knowledge of experienced judges.

IV. The Draft Clarifies the Power of Judicial Review

A key change from the current constitution in the draft is the explicit statement that "[c]ourts shall decide whether laws are in conformity with the Constitution." Article 100. This new provision clarifies the courts' role in reviewing laws for their constitutionality and ensures that the branch of government best positioned to review the constitutionality of laws is the branch actually responsible for that review. Althingi is unlikely to believe one of its own laws is unconstitutional. Only an independent judiciary can provide the neutral evaluation necessary to protect the constitution and the people.

Granting the judiciary this power secures the benefits provided by the draft constitution. Were another branch to have the authority to decide whether a law ensured judicial independence, that branch could decide to uphold a law that instead *reduced* judicial independence. The commands in Articles 99 and 103 on judicial independence and judges individually would become empty provisions. The judiciary, which exerts no direct influence over the military or the economy, can at least preserve its own structure and independence.

When considered as a whole, the changes to the judiciary in the draft constitution substantially benefit the people of Iceland. The changes raise few true concerns, and subsequent judicial interpretation or statutory law as provided by the draft constitution can fill any gaps. As a last resort, the new amendment process in the draft constitution can resolve any unforeseen consequences. In sum, the new provisions for the judiciary in the draft constitution are wise improvements on the existing design.

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