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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**OPINION**

**ON THE DRAFT NEW CONSTITUTION**

**OF ICELAND**

**Adopted by the Venice Commission  
at its 94<sup>th</sup> Plenary Session  
(Venice, 8-9 March 2013)**

**on the basis of comments by**

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**TABLE OF CONTENT**

<b>I. Introduction.....</b>	<b>3</b>
<b>II. Preliminary Remarks .....</b>	<b>4</b>
<b>III. Specific remarks .....</b>	<b>5</b>
A. Preamble .....	5
B. Foundations.....	5
C. Human rights and nature .....	6
a) General remarks .....	6
i. Scope of rights guaranteed .....	6
ii. Horizontal effect .....	7
iii. Restrictions (Article 9.2) .....	8
b) Specific remarks.....	9
D. Institutional arrangements.....	12
a) Specific remarks.....	12
i. The Althing (Articles 37-38 and 44-75).....	12
ii. Elections to the Althing (articles 39-43).....	13
iii. The President of Iceland (articles 76-85).....	15
iv. Ministers and Cabinet (articles 86-96).....	18
b) Inter-institutional relations.....	19
E. Direct democracy mechanisms. Referendums (Articles 65-67) .....	21
F. The Judiciary (articles 98-104).....	23
a) Appointment of judges (Articles 96 and 102).....	23
b) Judges' immovability (Article 102).....	25
c) Independence of courts and of adjudicators (Articles 98, 99, 103).....	25
d) Jurisdiction of courts of law (Article 100) .....	26
e) The Supreme Court (Article 101) .....	26
f) Prosecutorial authority and the State Prosecutor (Article 104) .....	26
g) The constitutionality review .....	27
G. Foreign affairs (articles 109-111) .....	27
H. The hierarchy of norms (Article 112) .....	28
I. Amendments to the Constitution (articles 113-114).....	29
<b>IV. Conclusions .....</b>	<b>30</b>

## I. Introduction

1. On 16 November 2012, the Chair of the Constitutional and Supervisory Committee of the Parliament of Iceland asked the Venice Commission to provide an Opinion on the Bill for a new Constitution of Iceland (hereinafter the Bill).

2. A working group of Rapporteurs was set up, composed of Ms Jacqueline de Guillenchmidt and Messrs Jan Helgesen, Wolfgang Hoffmann-Riem, Jean-Claude Scholsem and Jorgen Steen Sørensen.

3. On 17-18 January 2013, the working group travelled to Iceland in order to meet with representatives of the Constitutional Council having prepared the Constitutional Bill, as well as of the Constitutional and Supervisory Committee of the Parliament (the Althing), the political parties represented in the Althing, the executive, the Supreme Court and the civil society. The Venice Commission wishes to thank them all for the discussions which took place on this occasion and the Constitutional and Supervisory Committee for the excellent organisation of the visit.

4. The analysis below is based on the English translation of the Bill provided by the Constitutional and Supervisory Committee. The information contained in a selection of excerpts from the Explanatory Notes to the Constitutional Bill has also been taken into account, as well as information provided by various official and non-official sources. Unfortunately, the Venice Commission has received only excerpts of the Explanatory Notes, and not the entire text, in an English translation. The Commission is thankful for the complement of information (thereinafter, the Additional Memorandum<sup>1</sup>) relating to the Explanatory Notes received from Professor Anardóttir, one of the members the “group of legal experts” having been involved, in Autumn 2012, in the last stages of the elaboration of the Bill. The Additional Memorandum includes complementary information and clarification in relation to the human rights provisions of the Bill, as well as the translation of further relevant excerpts of the Explanatory Notes, not included in the original selection.

5. The excerpts, as well as the Additional Memorandum received, have clarified some of the issues raised by the rapporteurs. Nevertheless, the Venice Commission is not in a position to assess whether the Explanatory Notes as a whole provide sufficient guidance for the interpretation of the Bill’s provisions.

6. The present Opinion is not meant to be an in depth study of the entire Bill. The timeframe was far too short for such a study and the limited availability of English translations of important material made it difficult to examine all aspects thoroughly. Consequently, the opinion is limited to a technical-legal analysis of the Bill submitted to it for examination on the basis of the material provided.

7. The Venice Commission has tried to place the opinion as much as possible in the specific historical, demographical, legal and political context of Iceland - and mainly addresses issues or areas which it has been invited to examine in more detail, namely: the functioning and the interaction between institutions (the Parliament, the Government and the President), the increased possibilities for referendums, the electoral system proposed and its impact on democratic representation. The Opinion furthermore addresses a number of topics raised by the Rapporteurs and discussed in the context of the visit to Iceland: fundamental rights and freedoms, the judiciary, foreign relations, the procedure for amending the Constitution.

8. Since the English version of the above-mentioned documents may not accurately reflect the original version in every point, certain comments and omissions might be affected by problems of the translation.

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<sup>1</sup> See CDL-REF (2013)010.

9. In view of the timeframe of the constitutional process in Iceland, upon authorisation by the Venice Commission at its 93<sup>rd</sup> Plenary Session in December 2012, the Draft Opinion was transmitted to the authorities of on 11 February 2012. The Opinion was subsequently adopted by the Commission, with slight amendments, at its 94<sup>th</sup> Plenary Session (Venice, 8-9 March 2013).

## II. Preliminary Remarks

10. Following a period of drastic economic and financial crisis which, in recent years, profoundly affected the Icelandic society, the parliament of Iceland, the "Althing", voted in 2010 a resolution initiating an important process of review of the current Constitution, adopted in 1944 and amended several times since then.

11. The crisis and its painful consequences had shown the need for a thorough review of the political, institutional and legal system in Iceland, aiming at identifying and addressing the various reasons having made such a crisis possible. The necessity to rethink in depth institutional and other checks and balances, legal and other mechanisms and safeguards to avoid that such crisis may happen again in the future, to strengthen the rule of law and the respect for the people's fundamental rights and freedoms, seems to reflect the expectations of a considerable part of the Icelandic society.

12. As a result of the economic crisis, Iceland has also been facing, in recent years, a crisis of trust of the population vis-à-vis the political class and, by extension, the institutions. The need for more active involvement and more direct participation of citizens in the country's governance and the management of its resources seems to meet a wide consensus today in Iceland.

13. It is in this context that emerged the idea of the drafting of a new Constitution, a unifying project designed to restore confidence and to lay, in a modern and comprehensive way, new foundations for a more just and more democratic Icelandic society.

14. The wide range of - sometimes innovative - consultation mechanisms which have been used throughout the drafting process launched in 2010 - organization of a national forum, selection among the population of the members of the Constitutional Council to prepare the draft new Constitution, extensive informal consultation and involvement of the public by way of modern technology means, consultative referendum in the fall of 2012 - have given this process a broad participatory dimension and have been widely praised at the international level.

15. During its dialogue with the various stakeholders involved, the Venice Commission also witnessed diverging views, including on the question whether it is appropriate to offer Iceland today an entirely new Constitution. The alternative would be, in a perspective of giving greater importance to continuity, to adopt only limited constitutional amendments, indispensable to the country at this moment, in relation to matters that could more easily meet a sufficiently broad consensus.

16. Views seem to differ also in Iceland with regard to the actual extent and quality of the domestic political dialogue, especially between the majority and the opposition, around the constitutional process and the key matters addressed by the constitutional Bill. The perspective of the forthcoming parliamentary elections, scheduled for April 2013, is a non-negligible factor to take into account.

17. It is not the role of the Venice Commission to intervene in such controversies or to take position on political choices inherent in any major constitutional revision. The Commission can only underline, as it already did in the past, that the adoption of a new and good Constitution should be based on the widest consensus possible within society and that *"a wide and substantive debate involving the various political forces, non-government organisations and citizens associations, the academia and the media is an important prerequisite for adopting a sustainable text, acceptable for the whole of the society and in line with democratic standards. Too rigid time constraints should be*

*avoided and the calendar of the adoption of the new Constitution should follow the progress made in its debate.”<sup>2</sup>*

### III. Specific remarks

#### A. Preamble

18. The Venice Commission welcomes the fact that the Preamble of the Bill confirms the commitment of the people of Iceland to building and consolidating, in line with the European values and principles, a constitutional order based on the rule of law and “*resting on the cornerstones of freedom, equality, democracy and human rights*”. It is pleased to note the emphasis put on a “*just society with equal opportunities for everyone*”, where diversity is an asset (“*our different origins enrich the whole*”).

19. The Preamble furthermore recalls the high responsibility which unites the people of Iceland in its effort to preserve and develop its common heritage and work for the welfare of all. The clear reference the commonly shared aims of peace and mutual respect, in relation to other nations, is also to be welcomed.

#### B. Foundations

20. The Foundations Chapter, introduced as novelty, is specifically designed to confirm the option of Iceland for a republican system “*governed by a parliamentary democracy*” (**Article 1**) and to announce the main outlines of the constitutional structure.

##### Article 2

21. It is understandable that, in the specific circumstances prevailing in Iceland, particular emphasis is put, from the outset, on the nation as the source and the ultimate owner of power within the Icelandic State. From this perspective, **the first paragraph of Article 2**, stating that “*All state powers spring from the nation, which wields them either directly, or via those who hold government powers*”, is of key significance for the approach underlying the constitutional order set out by the new Constitution Bill.

22. It is on this basis that the distribution of powers between the State’s main institutions is established in **Article 2.2**:

*“The Althing holds legislative powers. The President of the Republic, Cabinet Ministers and the State government and other government authorities hold executive powers. The Supreme Court of Iceland and other courts of law hold judicial powers.”*

##### Article 5

23. Article 5 devoted to the Scope of the Constitution, also introduced as a novelty, establishes key principles in relation to the people’s rights and duties and the State’s obligations in respect of the rights guaranteed by the new Constitution:

*“The government is required to ensure that everyone has the opportunity to enjoy the rights and freedoms entailed by this Constitution. Everyone shall observe this Constitution in all respects, as well as legislation that derives from the Constitution. Private persons shall, as applicable, respect the rights provided in Chapter II.”*

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<sup>2</sup> See CDL-AD(2011)001, *Opinion on three legal questions arising in the process of drafting the new Constitution of Hungary*, § 19.

24. It is, in principle, to be welcomed that the Bill extends (**Article 5. 2**) the subjects of obligations also to individuals. This might, however, lead to challenges in the application and interpretation of various provisions of the new Constitution, especially since **Chapter II** ("Human rights and nature") also includes socio-economic and "third generation" rights. It will be up to further regulations at the statutory level, and to courts, to give more detailed content to this constitutional principle (see also comments relating to Chapter II, "Human rights and nature") .

25. The Commission notes, in this context that the Bill frequently uses, in the English version, the term "Government" with a more comprehensive meaning than the Cabinet. This might be the source of uncertainty and legal problems. Since the Althing, the Cabinet, the Courts and other State institutions are all responsible for implementing the Constitution, it would be suitable, where appropriate, to use (in English) the broader term of "authorities".

### **C. Human rights and nature**

#### **a) General remarks**

26. **Chapter II** of the Constitutional Bill is devoted to "Human Rights and Nature". Some other provisions in the Constitution are related to human rights, such as **Article 4** (citizenship) or **Article 71** (taxes). Of great importance is **Article 112**, dealing with the obligations of Iceland under international agreements. This article requires that all holders of governmental powers respect rules on human rights, which are binding for the state under international law and ensure these rights' implementation and effectiveness, according to their statutory roles and to the extent of their authority (see also Section H of this Opinion below).

27. Protection of human rights is also provided by the Constitution in force (especially under Articles 65-76). Improved guarantees were introduced in 1995 by an amendment especially aimed at the consideration of international obligations of Iceland, in particular of the European Convention on Human Rights (ECHR). As the Explanatory Notes to the Bill show, the human rights provisions in the Bill are partly based on the 1995 amendment, whose wording has been maintained in some cases. The new provisions are aiming both to extend the scope of protection and to better reflect the international human rights obligations (see comments below).

#### **i. Scope of rights guaranteed**

28. New challenges in modern societies have driven the Constitutional Council's approach to human rights. The scope of protection has especially been widened by adding new socio-economic rights (**Articles 22-25** Constitutional Bill), as well as more or less "collective rights" (**Articles 32-36** Constitutional Bill), called by the Explanatory Notes "third generation rights". While the attempt to give answers to the most recent challenges is to be welcomed, specific answers should be given in the Constitutional Bill to different types of rights. It is of the utmost importance that the fundamental differences between (1) traditional (liberal) human rights, (2) socio-economic rights and (3) obligations and guarantees, especially directed at the society as a whole ("third generation rights") be adequately taken into account.

29. The fact that the Constitutional Bill provides for several socio-economic rights (as well as for (new) "third generation rights", is in principle welcomed. Nevertheless, several questions remain open, in particular as to the scope of these new constitutional guarantees.

30. First, the Bill includes all three types of rights in one chapter, without clearly distinguishing them according to their different status. This may lead to misunderstandings as to the scope and meaning of some of the provisions. Clarifications are recommended in this respect.

31. It especially important to clarify to what extent provisions on socio-economic rights and on "third generation rights" are of an objective nature alone or they provide individuals also with a subjective right, connected with the right to apply for protection by a court. **Article 28** of the Bill, dealing with the right to a fair process, does not provide a fully-fledged answer. This norm presupposes that

there are rights enabling an individual to apply for a court decision. No mention is made however of the nature and content of these rights. A clarification in the Constitution itself is advisable.

32. Second, the Venice Commission finds regrettable that most of the provisions concerned are worded in very general terms, not providing sufficient clarity on whether and which concrete rights and obligations can be derived from them, and sees a strong risk that the public takes them as promises to ensure high living conditions. The provisions mainly state a goal, but do not deal with the means to reach it, entailing the risk of disappointing public expectations. The fulfilment of the duty to "ensure" (see **Article 5** of the Bill) the enjoyment of such rights depends on subsequent legal specifications whose implementation may be subject to legal and/or factual restrictions, such as financial, personal or resources which may not be available at present nor in the future.

33. Clarifications on the scope of socio-economic and "third generation rights" and related obligations are also of particular importance when it comes to relations between private parties, (see §§ 35 and 36 below). Since the Constitution provides for such rights and obligations and seems to protect them in an absolute manner, it is essential that their minimum core content be provided by the Bill itself. Mere guidelines dependent on subsequent concretisations of guarantees by the lawmakers are by far insufficient. Some guidance can, however, be found in certain related legislative materials, and in particular in the Explanatory Notes.

34. In the Additional Memorandum, reference is made to several explanations in the Explanatory Notes dealing with the scope of the protection by "third generation rights" (Additional Memorandum, page 5 et seq.). These explanations may prove helpful in clarifying a number of issues, such as the actual nature and content of the "principles of environmental law" referred to in **Article 35.3** of the Bill. The Explanatory Notes refer to five principles of precautionary nature, derived from international obligations, including the Treaty on the European Economic Area and the Rio Declaration. Such an interpretation is in line with **Article 112** of the Bill. The Commission furthermore notes that "*for the principles to have the intended effect it is necessary to define the appropriate rights and duties in specific provisions of ordinary legislation*" (Explanatory Notes, p.134).

## ii. Horizontal effect

35. A way to give answer to modern society challenges also lies in **Article 9**, explicitly stating that the provisions of the Bill are not confined to the protection of human rights against violation by the government ("horizontal effect"). This extension of the protection is to be welcomed in principle since, in modern societies, there are also risks of violations of human rights by private persons, especially private entities. In view of the increasing role of private actors (including powerful companies) in providing services and of the deregulation in many areas where the state used to be the main player, it is important to expand the protection of human rights at least to some fields of private action, too. However, since the scope and modalities of protection of human rights against private actors may be different, it is of key importance that this protection and the corresponding obligations be concretised through law. The obligation of public authorities to protect the public<sup>3</sup> from violations of human rights committed by others than the government is a proven path and supplies the basis for the government to enact laws that further specify this protection.

36. It is not entirely clear however, from the wording of **Article 9**, whether this horizontal effect is a direct or an indirect one. If the Constitutional Bill decides in favour of an indirect horizontal effect, it is up to the lawmakers to concretise the protection and obligations of private persons in statutory law, and up to the courts to interpret the statutory laws in light of the relevant constitutional provisions. According to the "group of experts" having been involved the last steps of the drafting

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<sup>3</sup> According to the information provided to the Commission, the use of the term "public", is meant to reflect a change in the scope of protection from the protection of "citizens" (in Icelandic "borgarana") to the protection of the "public" (in Icelandic "almennning"). This is explained in the Explanatory Notes in the following terms (p. 58): "...according to Article 2 of the Bill its scope of protection is not limited to citizens, as it applies to everyone on the territory or under the effective control of the Icelandic state. The concept of "the public" refers to individuals and private legal persons alike, but obligations and rights under the Bill can in some instances apply to legal persons."

procedure of the present Bill, the new Constitution proposed would itself safeguard a direct horizontal effect<sup>4</sup>. In contrast to this interpretation, the Explanatory notes (p. 2 of the selection of excerpts provided to the Venice Commission) indicate that there is a clear intention of the Constitutional Council that Article 9 safeguard "an indirect horizontal effect". This issue should be clarified, preferably in the Constitution itself.

### iii. Restrictions (Article 9.2)

37. A special problem derives from the choice made, in the Bill, to deal with all restrictions of human rights - irrespective the different kinds of rights - in one single clause (**Article 9.2**). Although the adoption of a single restriction clause is a practice in some national constitutions as well as in the Charter of Fundamental Rights of the EU (thereinafter the EU Charter), those restriction clauses are mainly aimed at traditional human rights provisions and sometimes also at provisions on socio-economic rights.

38. Since **Articles 22-25 and 32-36** are part of Chapter II, one might think that limitations to socio-economic and "third generation" rights and any pre-requirements to their effective enjoyment may be based on **Article 9.2**. However, since a provision like Article **9.2** is traditionally designed with a view to restricting governmental intrusion into individual freedom, this interpretation seems to be inappropriate. Designing the concrete conditions for ensuring socio-economic rights or protecting the nature and environment etc., as well as possible limitations to those rights, cannot be dealt with as an intrusion by the government in a person's individual freedom. The inclusion of "third generation rights" in the Constitutional Bill raises new issues, which are not covered by traditional restriction clauses. Therefore, the Venice Commission sees the risk that, under these circumstances, the general restriction formula be too open and inconclusive from the perspective of such rights.

39. The Additional Memorandum indicates that pages 58-62 of the Explanatory Notes are devoted to explaining the theoretical framework for the single limitations clause of **Article 9.2**. Reference is made in particular to a statement on page 61 of the Explanatory notes, related to the principle of proportionality: "*the extent of allowed limitation shall be evaluated in light of both the nature of the right that is to be subject to a limitation and in light of the importance of the public interest or rights of others that the limitation aims to protect.*", as well as to page 60 stating that Art. 9 (2) "... does not apply in the same manner in relation to all the provisions of the human rights chapter, and some human rights are also not considered a subject to limitations." While these statements are welcomed in principle, there is no guidance as to their application in relation to differences between different human rights provisions. Furthermore, it is doubtful whether the existing jurisprudence of the Icelandic Supreme Court or the Icelandic legal doctrine as a whole can provide for sufficient means to address the different nature of limitations to third generation rights. Since several of the (new) human rights provisions ask for positive actions of the government (several rights "shall be ensured by law"), there may especially arise problems in drawing the line between restricting and / or ensuring a right.

40. The choice made by the Bill's drafters for one single restriction clause appears problematic from the perspective of the human rights' "horizontal effect" introduced by the Bill. A restriction clause such as that of **Article 9.2** is usually related to a model where the government restricts the rights of a person. This is a kind of a bilateral conflict. In modern life, there are increasing possibilities of clashes between different rights of different persons with different interests which may be protected by different provisions of the Constitution. Since the Constitutional Bill (rightly) expands the protection to the field of violations by others than bodies exercising public authority, conflicts of human rights in multipersonal-multilateral conflicts of private parties may arise. The field of "protection of privacy" is only one example of possible conflicts of this type (see **Article 11.2** of

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<sup>4</sup> See *Accompanying letter* to the Bill by the group of legal experts entrusted by the Constitutional and Supervisory Committee of the Parliament with the task of reviewing the Bill from legal perspective before its first reading in Parliament: "The clear text of Art. 5,2 however leads to the conclusion that the human rights clauses have a direct horizontal effect, which would be in accordance with the impact of comparable clauses in foreign law, bearing in mind that such a development is already visible under Icelandic constitutional Law." (p. 8 et seq).



the Bill). The Commission is not in a position to conclude whether the Explanatory Notes give sufficient guidelines to deal with such cases.

41. There is no doubt, in addition to the specifications to be provided by the secondary legislation, several of the issues mentioned above may be addressed via interpretation and the jurisprudence of courts. On the other hand, there are numerous new provisions in the Bill that lack specifications. This may lead to conflicts, as well as to the disappointment of the public, whose particular involvement in the design of the Constitutional Bill may have raised high expectations. In the light of the comments above, the Venice Commission recommends that the chapter on human rights of the Bill be reviewed to ensure that all necessary specifications are added where appropriate. The comments in the Section below illustrate, in relation to a selection of provisions the human rights chapter, some of the observations above.

## **b) Specific remarks**

### *Article 6 (Equality)*

42. Two different but interconnected principles are enshrined in **Article 6**: the right to be equal before the law and the prohibition of discrimination. **Article 6.1**, drawing on Article 65 in the present Constitution, reproduces, basically, the text of Article 7 of the Universal Declaration of Human Rights (UDHR) and Article 26 of the International Covenant on Civil and Political Rights (ICCPR), in the sense that two principles are linked together in one sentence.

43. The Venice Commission recalls that there is, presently, a need to separate the two principles. The first principle lays down the positive, general responsibility of State authorities to treat individuals equally, while the second principle lays down the negative prohibition against discrimination. That is why, in modern legal texts, these two principles are separated in two legal norms, see i. a. the Finnish Constitution and the EU Charter (Articles 20 and 21).

44. The Commission is also of the view that, since other grounds of discrimination are likely to emerge in the future, it is important to maintain the possibility to include them in the list of grounds. Hence, their enumeration in the constitutional provisions (**Article 6.1**) should not be exhaustive.

45. It is unclear for from the wording of **Article 6.1** whether the protection (equality) is restricted to the application of laws ("before the law") or it relates also to the enactment of laws. According to the Additional Memorandum, "*it is settled constitutional doctrine that the equality clause provides a substantive right that is not limited to the application of the law (whatever its content). Numerous Supreme Court judgments confirm this*". The Additional Memorandum adds that comments in the Explanatory Notes "*indicate the substantive conception of the principle of equality stipulated in Article 6.*"

### *Article 7 (Right to life)*

46. This provision states that "*Everyone is born with the right to life*" without any further specification. The Venice Commission understands from this wording that, under the Icelandic Bill, the right to life commences at birth. No guidance is provided in the proposed Constitution with regard to the complex and difficult issue of abortion.<sup>5</sup>

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<sup>5</sup> The Commission recalls that, with regard to Article 2 ECHR, the ECtHR is of the view that, in the absence of common standards in this field, the decision where to set the legal point from which the right to life shall begin lies in the margin of appreciation of the states, in the light of the specific circumstances and needs of their own population (ECtHR judgement of 8. 7. 2004 (GC), VO/ FRA, n°53924/00, § 82). At the same time, according to the ECtHR case law, while the State regulations on abortion relate to the traditional balancing of privacy and the public interest, they must - in case of a therapeutic abortion - also be assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be (ECHR judgement of 7. 2. 2006, Tysiac/POL, n° 5410/03, § 107).

*Article 11 (Protection of privacy)*

47. The wording of this provision referring to a “specific permission by law” in relation to “*bodily or personal search, or a search of a person’s premises or possessions*” does not seem clear. Does this clause refer to searches by the police without a court decision? Is the explicit permission by law also required if a court decides on the searches? Besides this: What are the substantive restrictions? Do they differ from those that are derived from **Article 9.2**?

48. As indicated in the Additional Memorandum, The Explanatory Notes provide (p. 64-65) in **Article 11(2)** : “*This secures the continued validity of the principle of Icelandic law according to which, in addition to a basis in law, a court decision is required before measures such as bodily or other searches, investigation of communications or other comparable limitations on a person’s privacy are resorted to in the interest of criminal investigations, unless the legislation provides for specific exceptions thereto.*” While taking note of this clarification, the Venice Commission considers, as in the case of other fundamental rights and freedoms, that the inclusion of such essential safeguards and specifications in the provisions of the Bill is a key importance and invites the authorities to consider this option.

*Article 12 (Children’s rights)*

49. The Venice Commission welcomes the high level of protection of children’s rights proposed by the Bill (“*The best interests of the child shall always take precedence*”). It nonetheless wonders, in view of their future application to very specific and sometimes particularly complex cases, whether the guarantees provided are not too far-reaching. It recalls in this respect the language of the 1990 UN Convention of the Rights of the Child, stating in its **Article 3.1** that the best interest of the child shall be “*a primary consideration*” and invites the authorities to carefully consider this issue.

*Article 13 (Right of ownership)*

50. The “right of ownership” in **Article 13** seems to be formulated as an absolute manner (“*shall be inviolate*”). Moreover, the scope of the right lacks clarity: does this provision only cover the “surrender of property”, without regulating possible limitations, by the authorities, to the use of the property? Does this norm mean that any restriction of private ownership is prohibited?

51. The Venice Commission notes that the wording of **Article 13.1** of the Bill is identical to that of Article 72(1) of the current Constitution. The Commission was furthermore explained that there is “*settled constitutional doctrine that the first sentence is not limited to expropriation, but at the same time it is settled doctrine that private property and the exercise of property rights can be subject to various limitations of other kind (cf. “control on the use of property” in Article 1(2) of Protocol 1 to the ECHR). There exists extensive domestic jurisprudence on the interpretation of Article 72(1) in this respect, even though Article 72 does not stipulate a limitations clause of any kind. Article 9(2) of the Bill therefore gives a firmer express basis for limitations than the Constitution does*” (Additional memorandum). The Commission also understands that the Explanatory Notes make specific reference to the various obligations and the limitation clauses associated to the right to property under the international instruments that are binding for Iceland, including Article 1 of Protocol 1 ECHR and the ECtHR case law. Notwithstanding these commendable clarifications, the Commission considers that the provisions of **Article 13** are too general and should be adequately specified.

*Article 14 (Freedom of expression and information)*

52. The last part of **Article 14.3** imposes an obligation on individuals to “*take responsibility for the expression of their views in accord with the law*”, a wording which may mean that the legislator will subsequently have to elaborate norms on the responsibility of the individual when exercising the freedom of expression, within the limits of the general restriction clause under **Article 9.2**. Nevertheless, there is no indication, in the current provisions of **Article 14**, as to the actual content of the right to freedom of expression. To some extent, clarification is provided by the

Explanatory Notes, which indicate that, for a more comprehensive understanding of the right to freedom of expression as protected by the Bill, **Article 14** should be read in conjunction with several other provisions of the Bill.

*Article 15 (Right to information)*

53. This article is especially detailed. Under the particular circumstances linked to the recent economic crisis in Iceland, the option for such a level of detail, intended to ensure guarantees for increased transparency, is easy to understand. The Venice Commission nevertheless finds regrettable that a Constitution be designed primarily in the light of an unfortunate historical experience. To avoid that the text conveys a wrong message - especially when comparing, within the Bill, the right to access to information to documents of the administration to other fundamental rights - a more future-oriented approach would be desirable. From this perspective, the Constitution may limit itself to protecting the very principle of public access to documents, leaving practical implementation details to norms at the statutory level.

*Article 16 (Free and informed social debate)*

54. Paragraph 1 of this **Article** stating: “*The freedom and autonomy of the media shall be guaranteed by law*” raises several questions: does this provision mean that this freedom is dependent on a special guarantee by a special law, or is it guaranteed by the Constitution itself? Does the “*guarantee by law*” mean that media laws may not contain restrictions (**Art. 9.2**)? Furthermore, does the term “media” include “new media”? Does it refer also to social media in the Internet? The Commission understands from the Additional Memorandum that some guidance is provided in this respect by the Explanatory Notes and welcomes that the latter calls for a wide interpretation of the term “media”, including by courts.

*Article 18 (Freedom of religion and conviction) and Article 19 (Organisation of the Church)*

55. The Commission welcomes the open and comprehensive approach to the right to freedom of religion in **Article 18** of the Bill, reflected by the extension of scope of this freedom to “philosophy” and “conviction”, a substantial improvement compared to the current Constitution, as well as the inclusion the important right to change religion or faith.

56. The Venice Commission wishes to recall at the same time that, under the ECHR, Government authorities should not intervene in the internal organisation of churches. It is therefore of key importance that **Article 19** and its paragraph 3 providing for possible approval by the Althing of changes “*in the church organisation*” be not interpreted as authorising state interference in the churches’ *internal organisation*<sup>6</sup>.

57. The Commission notes with interest that the Bill leaves the door open, subject to confirmation by the voters, for further regulation (“*this provision may be changed by law*”) by the legislator of the relationship between the State and the Evangelical Lutheran Church, recognized as national church. It outlines in a rather unusual way the relationship between a Constitution and the competence of the legislator and touches upon the issue of the role of the electorate and of referendums in arrangements pertaining to key matters (see below comments on direct democracy mechanisms).

58. The status of national church constitutionally guaranteed to the Evangelical Lutheran Church does not in itself raise problems, as long as this is not used as a justification for discrimination.<sup>7</sup> From this perspective, **Article 19** should be read and interpreted in conjunction with **Article 18** of

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<sup>6</sup> See CDL-AD(2012), *Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary*, adopted by the Venice Commission at its 90<sup>th</sup> Plenary Session (Venice, 16-17 March 2012).

<sup>7</sup> CDL-AD(2004), *Guidelines for legislative reviews of laws affecting religion or belief*, adopted by the Venice Commission at its 59<sup>th</sup> Plenary Session (Venice, 18-19 June 2004), (Chapter II.B.3).

the Bill, guaranteeing “the right to freedom of religion and conviction”, and **articles 14** (freedom of expression), **and 20** (freedom of association).

*Article 28 (Fair process)*

59. The Venice Commission notes with interest that, under **Article 28 (1)** of the Bill, “*court proceedings shall be conducted in public*”. It acknowledges the key importance of transparency and finds the liberal approach of the constitutional drafters’ commendable. The Commission nonetheless draws the attention of the authorities to Article 6 ECHR, stipulating that “*Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*” To adequately protect the interests listed above, **Article 28** should be reconsidered and revised as appropriate.

*Article 34 (Natural resources)*

60. The protection and preservation of natural resources as a common heritage of the nation is crucial for the people of Iceland. The Commission welcomes the efforts made by the Constitution drafters to set out effective guarantees and provide guiding principles for the use country’s natural resources and to regulate the government action and responsibilities in this sphere.<sup>8</sup> Undoubtedly, this reflects the popular will expressed during the 2012 consultative referendum and the people’s concern to frame and oversee in the most suitable way the access to natural resources, so as to ensure that their use is in the best interest of all.

61. Nevertheless, the wording of **Article 34** needs to be reconsidered, since some of its provisions (i.e. “*government authorities may grant permits for the use [...] against full consideration*”<sup>9</sup>) open the way to different and sometimes opposite interpretations.

62. The Commission notes that natural resources situated on private property benefit from special protection: “*On privately-owned land, the owners’ rights to resources under the surface of the earth shall be confined to normal utilisation of the property*”. In its view, the approach to private property rights in relation to the country’s natural resources needs to be clarified and made more explicit.

## **D. Institutional arrangements**

### **a) Specific remarks**

#### **i. The Althing (Articles 37-38 and 44-75)**

63. One of the obvious goals of the proposed new Constitution is to strengthen the position of the Parliament (the Althing) within the Icelandic institutional system. In line with the principles set out in the Foundations Chapter, **Article 37** explicitly lays down the principle the supremacy of the Althing and its role among key political institutions, especially in relation to the executive power:

*“The Althing is vested with legislative powers and the fiscal powers of the State and shall monitor the executive branch as further provided in this Constitution and other acts of law”.*

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<sup>8</sup> According to Article 34.1, “*Iceland’s natural resources which are not subject to private property rights are the common and perpetual property of the nation. No one may acquire them or their attached rights for ownership or permanent use, and they may never be sold or mortgaged.*” The Bill also stresses that “[u]tilisation of the resources shall be guided by sustainable development and the public interest” (paragraph 3) and that “[g]overnment authorities, together with those who utilise the resources, are responsible for their protection. On the basis of law, government authorities may grant permits for the use or utilisation of resources, and other limited public assets, 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”(paragraph 4).

<sup>9</sup> Emphases added.

64. On the other hand, the Althing is to some extent weakened due to the introduction of wide possibilities for referendums and to its election system under the Bill (see below).

65. The Bill contains *inter alia* provisions relating to the protection of independence (**Article 48**) and of the immunity (**Article 49**) of the 63 MPs, elected for four years by universal suffrage and proportional representation. It addresses the financing of candidates and their associations, which must meet the requirements of reasonableness and transparency (**Article 51**). One may note that, apparently, public funding of political parties and their candidates is not envisaged.

66. In the Venice Commission's view, **Article 50.1**, dealing with the issues of conflict of interests and qualification/disqualification, needs to be reviewed and clarified. In the current form, these provisions are quite unusual and may open the way for endless arguments before the reading of any draft law of importance. The concept of "qualification" of the members of the Althing should be specified in order to give adequate guidance to the legislator when drafting implementing legislation. In addition, there is no indication as to who within (or outside?) the Althing, will decide on the disqualification of an MP in case of conflict of interest.

67. The parliamentary institutions - standing committees (**Article 54**), not foreseen by the 1944 Constitution, commissions of inquiry (**Article 64**), the Speaker, entrusted with the role of a neutral arbitrator (**Article 52**) - are strengthened. **Article 74** gives constitutional status to the institution of a national General Auditor, and **Article 75** to a parliamentary Ombudsman entrusted with the task to supervise the observance of citizens' rights and to "*scrutinise the administration of the State and municipalities*". Moreover, *[t]he Ombudsman shall endeavour to ensure observance of non-discrimination in public administration and compliance with law and good administrative practices.*" In addition, a constitutional and supervisory committee is established under **Article 63**, a new provision aiming at ensuring more effective monitoring of the Government by the Althing.

68. The Venice Commission welcomes the system of preventive constitutional review introduced by the Bill (**Article 62**), through a special advisory body (*Lögrétta*) within the Althing, appointed by the Althing, to assess the constitutionality of legislative bills and their compliance with international commitments. It appears that similar bodies in Finland and Sweden function well. The Bill leaves it to the law to further define this body, its more specific tasks and operation modalities. The Venice Commission notes that pursuant to the Explanatory Notes "*Lögrétta's opinions are advisory, and its findings are not binding. Hence the Althing could decide to pass a Bill previously deemed by Lögrétta to be unconstitutional. By the same token, courts are not bound by the findings of Lögrétta, and could reach a different conclusion on the constitutionality of legislation*".

## ii. Elections to the Althing (articles 39-43)

69. The Explanatory Notes devote extensive comments (pp. 19-25) to the changes to the electoral system, which is presented as a novelty and qualified as a "*national electoral system with safeguards for electoral districts*." The Bill sets out in its Article 39 the principle that "The votes of electors everywhere in the country shall have equal weight". This is welcomed by the Venice Commission.

70. The wish to ensure as much as possible equal voting seems also to explain that **Article 39** has opted for a pure proportional system, organized at the country level, while at the same time maintaining the possibility of establishing electoral districts. "*The country may be divided into electoral districts, to number up to eight*" (**Article 39.3**). Political organizations may submit lists in each local district, but they may also submit a national list. A candidate may be included, for the same political organization, both on a local list and the national list. There is no indication in the Bill whether independent candidacy is allowed.

71. The distribution of seats among political parties will have to reflect the number of votes obtained by the lists or candidates of each party. Also, to ensure local representation of members of the Althing, **Article 39.8** provides that "*Up to thirty parliamentary seats may be tied to electoral districts*". The percentage of the district population within the total population will determine the

number of MPs allocated to the district concerned. It is also provided that the law should promote an equal proportion of men and women in the Althing.

72. It is important to note that, under the proposed system, a prominent role is left to the voter's choice. Voters may choose candidates from the list (both from the electoral district list and the national list) or vote instead for the entire list (in which case they vote for all candidates on the list equally). In other words, the actual choice of the elected officials is left to the voter alone and the "list effect", namely of choosing candidates from the list in the order of their inclusion on the list, will be completely removed. Given the power that political parties generally hold in a proportional system (by making lists), power which is even greater in larger constituencies, this is a decisive choice by the constitutional drafters.

73. The Venice Commission wonders, however, whether such a system takes sufficiently into account the balance needed between party power and the voter's free choice. Such a solution, denying any role to the order of inclusion on the list, except that of "council", may end up in highly personalised electoral campaigns and a less disciplined parliament composed of very individualistic elected representatives. The role of parties in the formation and selection of elites would result as diminished. These are considerations which the Icelandic authorities might wish to consider.

74. The Commission notes in this context that, although the voting system is proportional, there has also been a willingness to promote individual candidates. As a result, a rather complicated system is established, whose rules are to be subsequently developed by the legislator. Further clarity in the relevant provisions of the Bill would be helpful for a better understanding of the system.

75. The lack of any kind of threshold for parliament representation – and **Article 39** even seems to prohibit such a threshold - is for the Venice Commission a potential source of concern. While this option sounds very democratic, it increases the risks of weakening and fragmenting the Althing (MPs being elected to defend very specific interests) and makes it much more difficult to have stable government majorities. Moreover, voters might have the impression that the formation of the Government depends on backroom deals between party leaders and/or MPs rather than on election results. The opportunity of introducing a threshold depends upon the assessment and the willingness of the Icelandic authorities.

76. More generally, the Venice Commission notes that **Article 39** leaves numerous important matters to the competence of the legislator. While some of these issues can only be addressed by laws enacted by a two-thirds majority ("*Electoral district boundaries, methods of allocating parliamentary seats and rules on candidature can be amended only by a two-thirds majority of the Althing*", **Article 39.10**), other items are a matter for the ordinary law. These provisions must be read in conjunction with paragraph 1 of the **Temporary provisions**, which allow, after the entry into force of the Constitution, the revision by simple majority of all election laws, including those covering issues listed in **Article 39.10** and requiring a two thirds majority

77. This seems to lead to a rather problematic situation. **Article 39.3** states that the country may be divided into electoral districts, although this is not an obligation (Explanatory Note, p. 20). Following the entry into force of the Constitution, an ordinary law may decide for one single constituency. However, under **paragraph 1 of the Temporary provisions**, should one at a later stage wish to go back to this choice and establish electoral districts, a two-thirds majority would be required. One might think that **Article 39** reflects a kind of hesitation and indecision on the part of the Constitutional Council, which regulates certain issues, but leaves other, equally or more important issues, to the legislator. Yet, for the first time, it is a simple majority of the Althing that will make these decisions.

78. The Venice Commission finds the proposed electoral system very complicated and with subtleties that are difficult to grasp. It is difficult for it, based on the current provisions of **Article 39**, to ascertain whether the envisaged rules and mechanisms will provide an adequate framework

for translating into practice, in a coherent manner, the main goals underlying the option for such a system (equality of votes, increased focus on the voter's choice and on individual candidates, balanced geographical representation, less space for pressure and corruption), while at the same time taking into account the specific needs of the country's political life in terms of stability and consistency. It is for the authorities of Iceland to make the (political) choice for a particular electoral system for the country. Nevertheless, ensuring clarity and consistency of the proposed system, as well as a careful impact assessment, are essential requirements prior to its adoption.

### iii. The President of Iceland (articles 76-85)

79. The chapter devoted to the President of Iceland contains changes such as a limitation to three of the number of terms that one person may serve (**Article 79**), a simplification of the arrangements for the President's substitution or a legal responsibility for the President's actions (**Article 84**), one of the major changes compared to the present Constitution. Furthermore, the President will enjoy a more formal role during the procedure for the formation of the government after a general election (see comments in §§ 89-90 below).

80. At first glance, within the parliamentary system proposed under **Article 2** of the Bill, very close to the wording of Article 1 of the 1944 Constitution, the presidential powers would seem to have been considerably reduced and those he retains would primarily be of formal nature (either obligatory functions or acts bound by conditions under which the margin of manoeuvre of the President would appear much reduced).

81. The Venice Commission has however been explained that, under the current Constitution, the President's participation in acts of government in those fields where it is no longer foreseen under the Bill refers to acts which mainly are obligatory and/or allowing for limited margin of manoeuvre. In concrete terms, the Commission understands that there will actually be no radical loss of power of the President or material diminution in his margin of manoeuvre or influence.

82. This being said, there are a number of issues that raise questions and even concern for the Commission, especially when it comes to assessing the functionality of the proposed system.

#### *Presidential Election (Article 78)*

83. The scope of the President's powers does not seem correlated with the election by universal suffrage.<sup>10</sup> As under the current Constitution, the President is elected by universal suffrage for a term of four years (**Article 78**). To be a candidate, the support of between 1% and 2% of the electorate is needed. All those having obtained such support may stand and a list of candidates will be established. Voters rank them in order of preference and the person placed best in the overall ranking is elected. A special law shall specify the implementation modalities, while maintaining a single round election. Although one round election will in principle encourage political alliances before the vote and favour the emergence of a majority, the Venice Commission sees the risk that, in the presence of many candidates, the vote may result in a President elected by a minority of voters. More generally, one might legitimately wonder whether, for a presidential function which is rather weak, direct election is appropriate. In the view of the Venice Commission, an election by a larger panel of local and national politicians might be taken into account as a possible option.

84. The Commission understands, in the light of the specific context of Iceland, that there was a wish to retain the tradition of direct election of the President, seen as a key-element in the Icelandic system of checks and balances. The direct election of the President may also be seen as contributing to the legitimacy necessary to the President's veto right and his/her power to trigger a referendum. This being said, the Venice Commission considers that a more adequate balance

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<sup>10</sup> CDL-AD(2008)010, *Opinion on the Constitution of Finland*, adopted by the Venice Commission at its 74<sup>th</sup> plenary session (Venice, 14-15 March 2008), §§ 40-43.

could have been found between the direct election of the President and the scope of the presidential powers.

*President's powers (Article 85, Article 60)*

85. Under the Bill, the President does not have appointment powers typical for a Head of State. The powers of the President other than his/her traditional role in relation to amnesty and pardon (and this, as stipulated by **Article 85**, only "at the proposal of a Cabinet Minister"), are rather weak<sup>11</sup>. The Bill does not even leave him/her symbolic functions, such as appointing ambassadors or signing treaties (see Article 21 of the 1944 Constitution).

86. Second, in the current Constitution, the President used to participate in the legislative power with the Althing. In addition, he was part of the executive alongside the government authorities. This is no longer the case under the Bill, whereby the legislative power is concentrated in the hands of the Althing. This (thus Article 2.2 of the Bill too) is to some extent contradicted by the important role granted to the President when it comes to the confirmation of the adopted bills (the legislative veto right, see §§ 87-88 below). According to the Bill, the President shall participate only in the executive, with the Cabinet of Ministers and other governmental authorities (**Article 2.2** of the Bill). Although it does not seem excessive, the role granted to the President in the formation of the Government may become quite important in an atomized parliament (see below).

Legislative veto right (Article 60)

87. **Article 60** of the Bill maintains the most important power of the President - to refuse his signature to a bill passed by the Althing and thus trigger a referendum. However, the referendum will not be held if the Althing repeals the bill within five days of its rejection by the President. This procedure has already been provided for in the present Constitution.

88. In the opinion of the Venice Commission, it would be understandable to give the President the power to refer a law to a judicial (or quasi-judicial body) or to provide for a veto which could be overridden by the Althing by a majority of its members. It seems most unfortunate that, instead, the procedure is conceived as a confrontation between the main state organs - Althing and Government on one side, President on the other - with the people as arbiter. One or the other organ may result to be severely damaged by the conflict. If the President is of the opposite political colour of the majority in parliament, there is a strong temptation, especially for a directly elected President to whom not many other functions have been entrusted, to use this procedure for unpopular laws and thereby damage or reverse the government. This procedure makes the President very much a political player while otherwise he/she is more designed as a neutral Head of State. It seems also important that the terms of office of Althing and of the President are of 4 years (**Article 79**). The sequencing of the elections will be very important. If both elections are close, the results are likely to be similar. At parliamentary mid-term, it is more likely that a President close to the opposition will be elected.

Appointment and release from office of the Prime Minister (Articles 90 and 91)

89. The other strong presidential power which, depending on the political landscape, may have a real political impact, is linked to his/her participation in the appointment of the Prime Minister (**Article 90**): following consultation with political parties and members of the Althing, the President submits to the latter the name of a future Prime Minister, who must gather the vote of the majority of the Althing to be appointed; if no candidate obtains such a majority, the President makes a new

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<sup>11</sup> The President convenes the Althing following parliamentary elections and inaugurates the regular session each year (Art. 46 ) as well as extraordinary session upon request by the Speaker or one quarter of its members; dissolves the Althing pursuant to its own request (**Article 73**); appoints the Secretary General of the Presidency (**Article 81**); may refer to the Supreme Court in order for this to ascertain whether the suspension of his/her mandate, for example, for health reasons, continues to be justified or he/she may resume his/her duties; confirms the constitutional amendment (since the amendment procedure is particularly heavy, this is only a formal intervention (**Article 113**)).



proposal, and if the second proposal also fails to obtain the required majority, the Althing elects the Prime Minister among candidates proposed by members of the Althing, by the parties represented in Parliament or by the President. As stated by **Article 90**, "*If a new Prime Minister has not been elected within ten weeks of the Prime Minister being released from office, the President shall dissolve the Althing and call a new election in accord with article 73*".

90. Furthermore, the President accepts the Prime Minister's release from office in specific conditions (in the case of a motion of no confidence or at the request of the Prime Minister), but cannot revoke him/her. These (participation in the appointment of the Prime Minister and his/her release from office) are however bound and not autonomous powers of the President.

#### Appointments to senior positions (Article 96)

91. The President participates in several other appointments and plays in this context a certain political role. He/she appoints the chairman of the independent committee responsible for making proposals to Ministers for appointment to the highest positions, which seems to be his/her only full and complete appointment power. The Venice Commission considers it useful to involve the President as guarantor of the functioning of the institutions in appointments to independent institutions.

92. However, the President is not involved in any way in the appointment and dismissal of ministers. By contrast, he/she is expected to confirm the appointment of judges and of the chief public prosecutor, upon proposal by a Cabinet Minister (**Article 96**). In case of disagreement, the Althing resumes control. It is true however that, in this case, the appointment requires a two thirds majority of the Althing (**Article 96.3**).

#### *President's liability and removal from office (Article 84)*

93. The draft deviates from the current Constitution<sup>12</sup> by providing (**Article 84**) that the President bears *legal responsibility* for misconduct in the exercise of its functions ("misconduct in office"). At the same time, the Bill maintains from the current Constitution a second way for releasing the President from office before the end of the term: the possibility for the Althing to dismiss the President with the support of a majority of votes in a referendum called by the Althing (*political responsibility*). In both cases the procedure leads to a dismissal referendum, to be supported by a majority of three quarters of the Althing members (**Article 84.2**). However, the President cannot be prosecuted without the consent of the Althing.

94. The Venice Commission wonders whether the impeachment procedure under **Article 84** of the Bill is still justified within the proposed parliamentary system. Under the 1944 Constitution, if the dismissal referendum failed, the Althing was dissolved and new elections were to take place. Hence, there was a tension between the Althing and the President, subject to the arbitration of the people. In the proposal contained in the Bill, this balance is broken and the procedure will always go against the President. It is also regrettable that important issues such as the reasons of legal liability and dismissal of the President, as well as the details of this new and complex mechanisms are not specified in the Bill, being left to the implementing legislation.

95. The Commission furthermore notes that **Article 84** allows for the removal of the President from office through referendum, "*provided that the referendum is supported by three quarters of the members of the Althing*". Since the President is elected by universal suffrage, allowing the people to recall him/her from office evidently makes sense. However, placing the call for the referendum solely in the hands of Parliament and excluding the people completely from this stage of the proceeding somewhat spoils the idea of a direct responsibility of the President to the people. Hence, it might be suitable to allow also for the people to call a referendum. Abuse might be prevented by requiring a certain number of signatures to start a referendum, similar to the

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<sup>12</sup> The current Constitution provides on the contrary that "[t]he President of the Republic may not be held accountable for executive acts" (Article 11).

procedure under **Article 65.1, 1<sup>st</sup> sentence**. Parliament could always step in a call for a referendum itself, namely to expedite the proceedings.

#### **iv. Ministers and Cabinet (articles 86-96)**

96. The Venice Commission welcomes the fact that, compared to the current Constitution, the Bill contains a specific Chapter including more detailed provisions with regard to the Government (Cabinet Ministers).

97. The Cabinet seems however conceived in a contradictory manner and the related provisions seem to oscillate between two conceptions: on the one hand, that of an old-style "cabinet" composed of individualities with a Prime Minister confined to the role of "primus inter pares" (see **Article 86**); on the other hand, a collegial "cabinet", welded around its Prime Minister, seen as chancellor-type team leader.<sup>13</sup>

98. The Chapter starts with an unusual statement making each ministry a separate fief independent from the Prime Minister. This emphasis on ministers may also be found in the heading and the structure of the concerned Chapter of the Bill - Ministers first, Cabinet thereafter, Prime Minister later.

99. As part of the first conception, it belongs to the ministers to introduce bills, although these need the Cabinet approval (**Article 56.2**), as well as to appoint officials to high positions (see **Article 96**). One may however wonder whether ministers should not be entitled to appoint people of their confidence to some positions without going through a panel. Also, individual responsibility may be called into question on the political level, by the way of a motion of no confidence of the Parliament (**Article 91.2, first sentence**) while no legal liability may be invoked in case they oppose to a collective decision of the Cabinet (**Article 95.2**).

100. As stated in **Article 87. 2 and 3**, the Cabinet does take collective decisions on all legislative bills and any other important matters. Despite this collegial dimension and the position of strength of the Prime Minister vis-à-vis his ministers, the Prime Minister's role is described in the Bill in terms of "coordination" (**Article 87.1**), which seems very weak. Under this coordination role, the Prime Minister shall convene meetings of the Cabinet members; yet, the matters on which decisions should be taken collectively are to be determined by law. The Prime Minister therefore appears not to hold or exercise any genuine power.

101. The Venice Commission acknowledges that this system does not represent a novelty, as Iceland has traditionally had governments with very independent ministers, individually responsible for the matters covered by their ministries. It nevertheless sees in that the risk of very weak cabinets. Additionally, the question arises, for cases where many parties are represented in the Althing, whether it will be possible for governments to ensure consistent policies and to co-ordinate between Ministries.

102. The second conception stems from the fact that only the Prime Minister is elected by the Althing and appointed by the President (**Article 90**) and that the Prime Minister subsequently appoints his ministers, without even involving the President (**article 90.4**). The Prime Minister is otherwise in charge of designing the organization of ministries and defining their number and allocates responsibilities among them.

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<sup>13</sup>The German Basic Law by contrast starts the respective Chapter in Art. 62 with "The Federal Government consists of the Federal Chancellor and the Federal Ministers." The next article concerns the Chancellor, the Ministers follow. Then, Art. 65 provides: "The Federal Chancellor shall determine and be responsible for the general guidelines of policy. Within these limits each Federal Minister shall conduct the affairs of his department independently and on his own responsibility. The Federal Government shall resolve differences of opinion between Federal Ministers. The Federal Chancellor shall conduct the proceedings of the Federal Government in accordance with rules of procedure adopted by the Government and approved by the Federal President."

103. The constructive vote of no confidence in the Prime Minister in **Article 91.2, 2<sup>nd</sup> sentence**, is in line with the logic of **Article 90** and is favourable to government stability. **Articles 91.1 and 92.2, 1<sup>st</sup> sentence**, by contrast enable the Althing to express no confidence in individual ministers, who seem subject to a double responsibility: on the one hand towards the Prime Minister (**Article 90.4** on dismissal of ministers<sup>14</sup>) and on the other hand vis-à-vis the Althing, by the way of a vote of no confidence (**Article 91.2**). This goes against the collective responsibility of the government and might prove detrimental to stability.

104. A specific and problematic question might arise if the Althing wished to dismiss the Prime Minister and his / her cabinet, without reaching an agreement on the person of a new Prime Minister. Especially since in such a situation, there is the risk that the Althing rejects all Government bills and even the budget of the Government. In the absence of exceptional powers granted to the Government in such cases, the only practical solution would probably be the “voluntary” resignation of the Prime Minister referred to in **Article 90.4** (“at the request of the Prime Minister”). The whole system of constructive vote of no confidence would then be called into question.

105. In view of the foregoing, the Commission Venice believes that the government organization should be carefully reconsidered with a view to achieving a more unified and coherent system.

## **b) Inter-institutional relations**

### *The Althing as the source and master of power*

106. The Explanatory Notes to the Bill repeatedly insist on the approach to the separation of powers that has guided the drafters, an approach which focuses on the leading role of the Althing as the sole holder of legislative power and as the source and the master of the executive power. The Bill highlights and organizes this oversight function.

107. The Venice Commission recalls that, although diverse, parliamentary regimes that exist throughout the world share as a common feature a form of cooperation between Parliament and Government: the Government must at all times enjoy the confidence of the Parliament and its political responsibility towards the Parliament must be associated with the right to dissolve the latter. The Government is at the very heart of the executive power. The other branch of the executive, the President or the monarch, most often have a formal and representation function only. The unity of the executive is thereby safeguarded.

108. The proposed Constitution deviates from this pattern, both in the relations between the Althing and the President and the relationship between the Althing and the Government.

### *The position of the Cabinet*

109. Under the proposed arrangements, the Venice Commission sees the Government as the weakest institution in the system. The Prime Minister seems to act as a sort of moderator of a government team whose activities it coordinates (**Article 87**), but not as the one who gives an impetus to a strong team and establishes a genuine strategy for its action.

110. Moreover, the Bill establishes a strict subordination of the executive to the legislature. The ministers do not initiate appointments in their ministry as they can only follow the recommendation of an independent committee. If they do not intend to proceed with the proposed appointments, the Althing will decide by a two-third majority (**Article 96**). Also, while being under the responsibility of a minister, foreign policy and representing the State abroad are overseen by the Althing. Finally, the newly introduced constitutional and supervisory committee of the Althing is in charge of reviewing the ministers’ actions, at its discretion, at the request of one quarter of the members of the Althing (**Article 63**).

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<sup>14</sup> The Prime Minister may remove a minister from office for any reason related to his inability to fulfil his/her functions.

111. Also, while, as in any parliamentary system, the Althing may pass a motion of no confidence against the Cabinet with a proposal for a successor (**Article 91**), the Althing may only be dissolved at its own request (**Article 73**), except for the very special case of **Article 90** (dealing with the formation of the Government and the election of the Prime Minister). The Bill thereby creates unbalanced conditions for invoking the political responsibility of the Government, which has no means to enable the people to decide, through early elections, on its disagreement with the Althing. This is paradoxical in a system where direct democracy is deemed to be a key element in the functioning of institutions.

112. In the opinion of the Venice Commission, such a strict subordination of the Cabinet and its Ministers to the Althing, coupled with a relative independence of Ministers from the Government, may give rise to problems in the administration of the country and the design of a coherent policy, both at the government level itself, and in its relations with the Althing. Additionally, a parliamentary system such as the one proposed by the Bill carries the obvious risk of political instability (see the Constitution of 1946 in France). In any event, it will only function properly if a coherent majority is elected to Parliament. And even in this case, the unbalanced distribution of powers between the executive and legislative branches will cause problems.

#### *The position of the President*

113. Finally, the position of the President, although beneficiary of democratic legitimacy as the Althing, is rather weak in the new institutional settlement. Leaving aside the appointment of the Chair of the Independent Committee that makes proposals for appointments to senior positions, the President has no power of his / her own, whether to appoint or dismiss ministers or senior officials, to take provisional laws in case of emergency, dissolve the Althing, or enter into treaties. In the case of shared competence (the appointment of judges and the Director of Public Prosecutions in accordance with **Article 96. 3**, the appointment of the Prime Minister), the Althing has the final say.

114. It must be said, however, that the President's legislative veto right (and the subsequent referendum under **Article 60**) is a very remarkable prerogative. In the opinion of the Venice Commission, this may lead to a political crisis whose outcome would be difficult to predict. One may imagine that, in the event that the President would veto a law, the Althing could put forward the political responsibility of the President under **Article 84** of the Bill. This extraordinary veto granted to the President may thus be seen as a source of danger in the democratic game, which does not match the role of a President in a balanced parliamentary system. As already mentioned, under these circumstances, the Venice Commission wonders whether the authorities should not consider the possibility of granting the President a power to refer legislative bills to a judicial body for constitutional review rather than to make use of a veto right (see § 88).

115. As to the role of the President in the appointment of the Prime Minister, under **Article 90**, one may note that, under **Article 90.2, last sentence**, at the third round, the person having received the most votes is elected Prime Minister, which theoretically ensures the election of a (although potentially weak) Prime Minister in all cases. This is somewhat in contradiction with **Article 90.3**, stating that, if after three attempts of the Althing to elect the Prime Minister, there is no elected Prime Minister within ten weeks after the resignation of former Prime Minister, the President must dissolve the Parliament and call for new elections. One may conclude that the process is designed in such a way that the President cannot affect the final result in a way which would be contrary to the wishes of the Althing. The entire procedure of government formation under **Article 90** seems intended to clarify the parliamentary principle, asserting the Althing's role in the process.

## **E. Direct democracy mechanisms. Referendums (Articles 65-67)**

116. One of the most salient features of the Icelandic Constitutional Bill is its open approach to the direct participation of citizens, through referendums, in government business and legislation. The role given to citizens in this way can be regarded as the real power against parliament's omnipotence, as well as a means to address mistrust towards political parties. The omnipotence of the Althing is thus limited in two ways: by the President's veto to be confirmed by a referendum and the popular referendum.

117. There is on-going debate in many European countries, and within the Venice Commission, on the benefits and disadvantages of referendums. That said, since it has already been decided in favour of referendums as a means of democratic participation, the Venice Commission will not go into this controversy in general, but will restrict itself to some general observations and some technical remarks on the concerned provisions of the Bill.

### *Scope of referendums*

118. To directly involve people in the decision-making, extensive use of referendums is provided by the Bill. This is not limited to matters of local government (**Article 107.2**), but extends to the state level, where it relates to matters of legislation (**Articles 60, 65-67**), the President's removal from office (**Article 84**), transfer of state powers to international organisations (**Article 111**) as well as amendments to the Constitution itself (**Article 113**).

#### People's confirmation of legislative bills (Article 60.2)

119. As previously noted, **Article 60.2** grants the people a decisive role when, in parliamentary legislation proceedings, there is disagreement between the majority in the Althing and the President. Since both organs are elected by universal suffrage, referring disputes between them back to the electorate at first sight seems to be a wise solution. However, this may easily lead to conflicting situations and does not seem to be in line with the role of the President as outlined in the Bill (see § 88 above). Whereas one might discuss whether the act should or not enter into force in the meantime, the short time limit of three months strives to ensure that this would not result in adverse consequences. Though this hope may be justified in many cases, there remains a risk of uncertainty in other cases, which may lead to new unpredictable legal problems.

#### People's right to annul an adopted law (Article 65)

120. Negative people's legislation (i.e. the right of the electorate to annul an act of the Althing) is supplied by **Article 65**, according to which ten percent of the electorate can petition for a referendum on an act of parliament within three months from its adoption. The option offered to the Althing (**Article 65.1, 4<sup>th</sup> sentence**) to repeal the legislation at issue is to be welcomed. However, to ensure that the Althing does not re-enact the same legislation after the referendum has taken place or after the act has been repealed under **Article 65.1**, it would be advisable for the Bill to clearly state that the Althing may not adopt - for the running election period at least - an essentially identical piece of legislation. More generally, the Icelandic authorities might wish to consider whether the envisaged mechanism is actually workable and, if not, leave to the secondary legislation the definition of practical arrangements.

#### People's legislative initiative (Article 66)

121. Positive people's legislation is provided in **Article 66**. According to **Article 66.1**, two percent of the electorate may submit a bill or a draft resolution to the Althing without an obligation for the latter to react on it. Nothing demands a referendum in this case. The purpose, usefulness and scope of these provisions, which carry the risk of people's disappointment in

case the Althing does not give any follow-up to their proposal, remain unclear for the Venice Commission. Since the Bill already provides for citizens' legislative initiative under **Article 66.2**, an additional opportunity, for a more limited number of voters, to bring issues and proposals to the attention of the Althing, may take, for instance, the form of a right to petition.

122. **Article 66.2** provides a stronger path for the citizens' initiative. If ten per cent of the electorate submit a bill to the Althing, the Althing can either submit a counter-proposal in the form of another legislative bill, or the bill shall be submitted to a referendum, as well as the bill of the Althing, if introduced. As it results from **Article 66.2, 4<sup>th</sup> sentence**, the referendum is consultative only, unless the Althing decides otherwise. Obviously, the Althing must decide before the referendum takes place. **Article 66** does not supply further criteria to guide a parliamentary decision. This choice to leave it to the Althing, while all other referendums are "binding", including that of **Article 65**, may seem surprising. At the same time, the Commission finds regrettable that details that may be seen as technical but which are essential for ensuring genuine popular participation in lawmaking, are left to the secondary legislation. These include the conditions linked to the actual modalities for submitting a "popular" legislative proposal, the form in which it must be presented, its subsequent development before it takes the form of a draft law, the safeguards foreseen in order to ensure that the draft will properly reflect the will of its initiators.

#### *Thresholds and criteria for referendums (Articles 65, 66 and 67)*

123. It is difficult to comment on the appropriateness of the 10% threshold in the absence of sufficient knowledge of the specific political context of the country. This threshold may be satisfactory or on the contrary cause great instability. What might be important, especially in a country like Iceland, where the Internet has played a decisive role in political life, is the way of collecting signatures (to be organized under **Article 67.2**).

124. The criteria pertaining to people's legislation are specified in **Article 67**. Article 67.1 requires for any proposal to be both in the public interest and comply with the Constitution and excludes proposals dealing with budgetary, tax and citizenship issues, as well as laws resulting from commitments under international law from people's legislation. These conditions are, in principle, to be commended, since they seize suggestions of the Code of Good Practice in Referendums and will help filtering out undesirable populist proposals<sup>15</sup>. However, since the vast majority of laws have a certain degree of budgetary relevance, the exclusion of proposals relating to the State Budget must be interpreted narrowly so as to avoid its use a means for obstructing the referendum as such. Thus, only proposals aiming at the Law on the State Budget (and accompanying legislation) as such should be excluded. More generally, these restrictions entail the risk of litigation and legal uncertainty as well as a great responsibility for the bills' drafters when it comes to ensuring that the bills of popular initiative are consistent with the Constitution.

125. It may be noted that the President, when refusing to confirm laws, is not subject to such limitations which affect only people. At the same time, the Commission sees a certain degree of coherence in the system, especially between the President's legislative veto (**Article 60**) and the abrogative referendum (**Article 65**). While the scope of the concerned laws is not the same (for example, the President might oppose a tax law, which is not possible for the people under **Article 65**), popular pressure could be exerted on the President to veto and trigger a referendum in areas *a priori* excepted from the popular referendums under **Articles 65 and 66**.

#### *Procedural issues and appeal rights*

126. It must be welcomed that **Article 67.1, 4<sup>th</sup> sentence**, allows for an appeal to the courts of law in case of a dispute on the criteria of **Art. 67.1**. As **Article 43** stipulates, the National Election Commission shall generally rule on national referenda. Since political frontiers in

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<sup>15</sup> CDL-AD(2007)008, para. 32 *et seq.*

referendums do not always run along party lines but may involve other political players, consideration could be given to forming a separate Commission for each referendum in order to provide for a balanced representation of supporters and opponents of the proposal submitted.<sup>16</sup> Decisions of such a Commission will gain more legitimacy on both sides. However, the Venice Commission is of the view that a final appeal to a court of law must always be possible.<sup>17</sup> A direct appeal to the Supreme Court might also be deemed suitable.

127. Procedural issues of people's legislation, including the procedure of referrals, the form of petitions and the procedure for withdrawing a provision under **Article 66.2, 3rd sentence**, are subject to regulation by an act of Parliament as envisaged in **Article 67.2**. The Bill does not provide for any criteria with respect to the substance of the envisaged regulation. The Venice Commission would like to draw attention to its Code of Good Practice in Referendums which could serve as a source of inspiration when drafting the law.

### *Impact*

128. The Venice Commission welcomes the clear intention that underlines the above-mentioned provisions, namely to enhance citizens' opportunities to influence legislation and more generally the decision-taking on issues of key interest for the public. It finds this aim entirely legitimate and understandable in the specific socio-economic and political context of Iceland and recalls that, this is also part of a certain tradition of direct participation that exists in Iceland.<sup>18</sup>

129. The rules under discussion seem, at least to some extent, to be inspired by Swiss practice. Nevertheless, Switzerland has a specific system of government. In a more classical parliamentary system - as that in Iceland - with alternation of government and opposition, direct democracy mechanisms may considerably influence politics and the political equilibrium within the country and have a significant impact in terms of political stability and the actual capability of the institutions to govern efficiently. The impact of new technologies will no doubt play an important role in this context.

130. A more cautious approach towards such mechanisms and a thorough review of the relevant provisions, based on a careful impact assessment, both from a legal and political perspective, would therefore be highly recommended. It is especially important, in the Commission's view, to provide for rules that minimize the risk of tensions concerning the scope and modalities for referendums.

## **F. The Judiciary (articles 98-104)**

131. Generally, **Chapter VI** of the Bill on the judiciary is in line with Venice Commission standards. There are no indications of general intentions to depart from traditional Scandinavian principles in this area of law. Nevertheless, some of the provisions relating to the judiciary (although not all are part of Chapter VI) would require further consideration and clarification. This applies in particular to **Article 96** on the appointment of judges and of the Director of Public Prosecutions, but also to **Article 104** on the independence of the Prosecution Service.

### **a) Appointment of judges (Articles 96 and 102)**

132. As stated in **Article 102** of the Bill, "*Judges are appointed and released from their office by a Cabinet Minister. A judge cannot be discharged permanently from office except by a legal verdict, and only if the judge no longer fulfils the conditions to hold the office or does not perform the duties attached to the position.*"

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<sup>16</sup> CDL-AD(2007)008, para. 21.

<sup>17</sup> CDL-AD(2007)008, para. 22.

<sup>18</sup> The circumstances under which a referendum shall be held under the current Constitution are stipulated by its Articles 11, 26 and 79.

133. Rules and criteria for the appointment are provided by **Article 96**, which concerns in general the procedure of appointments to certain public offices (see above paragraphs, 100 and 101 of the present document). Such appointments shall be made by Cabinet Ministers and “*determined by competence and objectivity*” (**Article 96.2**). This principle appears to apply also to appointments to the judiciary and is to be welcomed, since it is in line with the Venice Commission recommendations in its recent report on the independence of the judiciary.<sup>19</sup>

134. **Article 96.3** specifically concerns appointments to the post of judge (presumably any judge) and the Director of Public Prosecutions (DPP). The provision is silent as to the basis/criteria of the decision of appointment. **Article 96.4** refers to “an independent committee”, but both the context and the Explanatory Notes seem to suggest that this committee is not competent in relation to judges (or the DPP). According to the information provided to the Venice Commission, such an independent committee for appointments within the judiciary has been operating in Iceland. Since there is no reference to it in the Bill, it is not clear whether such a body will continue to exist under the new Constitution. In any event, the Venice Commission is of the view that it would not be appropriate to have the same independent committee to deal with both with the judiciary and other appointments.

135. Under Venice Commission standards, there is no requirement as such that the procedure for appointments to the judiciary be described in detail in the Constitution itself. Moreover, in view of the relative briefness of the Bill, it does not seem unnatural that no specific provision for this is made. The Commission furthermore acknowledges<sup>20</sup> that “*[i]n Europe, a variety of different systems for judicial appointments exist and that there is not a single model that would apply to all countries.*” Nevertheless, it is of key importance that effective guarantees be provided - by the constitutional and/or relevant legislative provisions - to ensure transparent and independent procedures to appoint judges and to prevent political abuse. This could primarily be achieved by setting up an independent judicial council to have decisive influence on decisions of appointment.<sup>21</sup>

136. Under **Article 96.3**, the appointment of judges and the DPP shall be submitted to the President for confirmation. If the President withholds his/her confirmation, the Althing must approve the appointment by a two-thirds majority vote for the appointment to take effect.

137. As such, the requirement for Presidential confirmation is not problematical if this is for formal and ceremonial purposes (under Article 20 of the present Constitution, public officials are appointed by the President as provided by law). However, since such appointments will, as a rule, be made by Cabinet ministers, the question arises as to why a different arrangement is provided for the judiciary. This question becomes crucial when considering the requirement for a two-thirds majority in the Althing to overrule the President’s veto. Regardless of the procedure to be established for the appointment made by the relevant Minister, this means that: a) it is conceived as foreseeable that the President will disagree with the appointment made by the Minister; and b) in such cases it is left to Parliament to decide on the matter.

138. According to the Explanatory Note, the aim was to provide safeguards against unjustified appointments and to ensure that appointments are governed by competence and objectivity. However, under Article 96 the final decision on the appointment of judges and the DPP is in the end laid entirely in the hands of politicians. The Venice Commission wishes to point out that, under the Danish model, invoked as source of inspiration for the Bill, the Parliament can never vote on appointment of judges. Instead, particular weight is given to the Judicial Council by prescribing that the Council may only recommend one candidate for appointment and that the Minister of Justice must inform Parliament if he does not intend to follow the recommendation of the Council (which has so far never happened).

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<sup>19</sup> See Venice Commission, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, CDL-AD(2010)004, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), paragraphs 23-27.

<sup>20</sup> CDL-AD(2007)028, paragraph 44.

<sup>21</sup> CDL-AD(2010)004, paragraphs 28-32.



139. The Venice Commission thus stresses that the mechanism proposed by the Bill contains a clear potential of politicizing appointments. This raises very serious concerns under the European standards and cannot be considered acceptable. In the Commission's opinion, judicial appointments could rather be made by the President on the proposal of an independent body. As recommended before, priority should be given to securing a strong judicial council model.

#### **b) Judges' immovability (Article 102)**

140. **Article 102.1** seems to state, although somewhat indirectly, that judges must be appointed permanently, that is until retirement. Such an approach, in line with the with Venice Commission standards<sup>22</sup> is to be welcomed.

141. According to the Explanatory Notes, this provision is meant to be "more detailed" than Article 61 of the present Constitution. Unfortunately, this approach is not followed in all respects by the Bill. For example, the current constitutional provisions protect judges against transfer. This is in line the principle of immovability in constitutions, which the Venice Commission has consistently supported.<sup>23</sup> There is no equivalent provision in the draft.

142. Also, current Article 61 of the present Constitution states that judges cannot be "discharged from office except by a judicial decision." This principle seems to be narrowed down in the Bill so that judges cannot be "permanently" discharged except by a legal verdict. No explanation for this change is given in the Explanatory Notes; however the new wording would at first glance seem to indicate that non-permanent discharges (whatever that would be) would not need a legal verdict.

#### **c) Independence of courts and of adjudicators (Articles 98, 99, 103)**

143. Under Article 59 of the present Constitution, the "*organization of the judiciary can only be established by law*"; this means that such issues may only be regulated by statutory law and not by administrative or other regulations. No changes to this principle seem to be intended. The new provision merely (**Article 98** of the Bill) specifies what is meant by the term "organization of the judiciary" (levels of jurisdiction and number of judges) and does not seem to raise issues under Venice Commission standards.

144. **Article 99** of the Bill, stipulating that "*[t]he independence of the courts of law shall be ensured by law*", should be seen in context with **Article 103**, according to which "*in the performance of their official duties, judges and other adjudicators shall be guided by the law alone.*" Since the Explanatory Notes refer to "autonomy" rather than "independence", Article 99 seems to concern the independence of the judiciary ("courts of law") as such, their organisational autonomy, whereas Article 103 would guarantee the independence of the individual judge. These provisions relate closely to **Article 28** of the Bill (fair process before a fair and impartial court of law). To avoid confusion, it is recommended that the purpose and meaning of **Article 99** be clarified and its wording revised accordingly.

145. As indicated in the Explanatory Notes, **Article 103** of the Bill echoes Article 61, paragraph 1 of the current Constitution. It is to be welcomed that such a fundamental principled is explicitly stated also in the new Constitution (see CDL-AD(2010)004, paragraphs 20-22).

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<sup>22</sup> See CDL-AD(2010)004, paragraphs 33-38.

<sup>23</sup> See CDL-AD(2010)004, paragraphs 39-43; see also *Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities*, and the *European Charter on the Statute of Judges* (approved at a multilateral meeting organised by the Directorate of Legal Affairs of the Council of Europe in Strasbourg in July 1998), at 3.4.

**d) Jurisdiction of courts of law (Article 100)**

146. While noting that the Bill (its **Article 100**) does not seem to indicate any substantial changes to the jurisdiction of the courts, the Venice Commission finds commendable that, as proposed by the Bill, it now follows specifically from the Constitution that the courts may rule on the constitutionality of legislation. The reservation “*in so far as it may be an issue in court proceedings*” is presumably meant to indicate that constitutional complaints may only be raised before the courts in connection with cases which otherwise fall within their jurisdiction, and that the courts will not issue general opinions on constitutional matters.

**e) The Supreme Court (Article 101)**

147. The Venice Commission welcomes that, unlike the current Constitution, the Bill clearly guarantees in **Article 101**, the position of the Supreme Court as the highest court in the system. The Commission also notes that the Supreme Court will in principle be omnipotent, thereby ensuring uniformity of law in Iceland.

148. The Commission nevertheless notes that, under **Article 101.2**, “*it may be decided by law that a specialised court should make final rulings on disputes on wage agreements and the lawfulness of work stoppages, but in such a manner that any decisions of such a court on sanctions may be appealed to other courts of law.*” In the opinion of the Commission, although it may be understandable that the Constitution provides for certain exceptions to the position of the Supreme Court as the highest court of law, it would be more prudent to introduce such exceptions by subsequent legislation rather than through specific exceptions in constitutional provisions (which may be interpreted as prohibiting all other exceptions that might be deemed appropriate in the future).

**f) Prosecutorial authority and the State Prosecutor (Article 104)**

149. As stated in the Explanatory Notes, the independence of the Prosecution Service has not so far been regulated in the Constitution. Furthermore, the Prosecution Service has hitherto not enjoyed at any regulatory level the independence which is now apparently intended. As such, granting further independence to the Prosecution Service is to be welcomed. Although European standards allow a number of models when it comes to the Prosecution Service, the proposed provisions are clearly in line with current trends supported by the Commission.

150. This being said, a number of issues arise from the new Constitution Bill. While they need not (and should not) all be solved in the Constitution, they will need to be carefully considered before establishing a new Constitutional order.

151. First, clarification is required as to the language used by the constitutional provisions to designate who should be the formal subject of the independence granted by the Bill, which refers in **Article 104** to the “State Prosecutor” whereas **Article 96** speaks of the “Director of Public Prosecutions” (most probably, both terms are meant to cover the DPP). While being aware that this choice depends on the political intentions, the Commission suggests that the Bill refers in this context to “prosecutors” or the “Prosecution Service”, more comprehensive terms which reflect more closely the actual subjects and scope of the newly introduced independence guarantee.

152. Second, and more importantly, the principle of independence is established by using a wording (“*guided by the law alone*”) identical to that in **Article 103** in relation to the independence to be guaranteed to judges. **Article 104.3** confirms that it is indeed intended to grant the State Prosecutor (or perhaps prosecutors as such) the same independence and protection as judges.

153. However, under European standards, the issue of independence is not the same for prosecutors as for judges, as clearly demonstrated in the Venice Commission 2010 report on the independence of the prosecution service.<sup>24</sup> It is commonly accepted that different approaches and specific standards of independence are applicable to the two professions, such as in addressing issues of internal hierarchy, external instructions and directives, transfer and discharge. Thus, to lay down a constitutional principle of independence of the Prosecution Service, a more careful drafting would be needed than simply apply to prosecutors regulations and standards that are relevant to the judges.

#### **g) The constitutionality review**

154. The Bill does not affect the current system of constitutionality review of adopted laws. All courts are entitled to examine the conformity of a law with the Constitution, in the context of a pending case. The Supreme Court acts as a last resort. It seems however that this happens very rarely. In addition, there is no abstract constitutional review of laws in Iceland (see also § 114).

155. The Commission wishes to point out that the adoption of a new Constitution will lead to a large number of implementing laws and it seems, at this stage, that there will not be a constitutional review either *a priori* or *a posteriori*. The laws implementing the Constitution do not in general intervene in private litigation where a question of constitutionality may be raised. The Lögrétta might assess the draft laws, once established, upon request by the Althing under to Article 62.2. It is recommended that this issue be examined and addressed during the constitutional process (**see also comments in § 114**).

#### **G. Foreign affairs (articles 109-111)**

156. The fact that the Bill devotes a special chapter (**Chapter VIII**) to foreign affairs is to be welcomed. This emphasizes the importance of this matter for Iceland, at various levels, including political, economic and legal levels.

157. The President is deprived of any role, even formal, in this area, which may seem strange for a "Head of State." International jurisdiction is administered by a Cabinet Minister, under the supervision of the Althing (**Articles 109 and 110**). These provisions thus reflect a highly individualistic and atomistic conception of the Government, although, as it may be implied from **Article 87.2 and 3** of the Bill, foreign policy decisions do entail fundamental choices and should be subject to a cabinet joint decision.

158. The competent Minister may commit the State without the consent of the Althing. Consent is required, however, one the one hand for territorial treaties (broadly defined) and for treaties requiring a change of legislation, and on the other hand for treaties that "*are important for other reasons*" (**Article 110**). This provision seems to have been influenced by the rules of other Nordic countries on treaty ratification. The determination of whether or not a treaty is sufficiently "important" to require parliamentary approval before ratification is made under political and/or legal accountability.

159. **Article 111** concerning treaties involving the transfer of sovereignty seems to be aimed at the WEA, the EFTA, as well as the EU, but its scope is not necessarily restricted to that. One must assume that all treaties within the scope of this article are subject to parliamentary approval *ex officio*.

160. The provision on the transfer of state powers to international organisations in **Article 111.2, 1<sup>st</sup> sentence**, indicates, that the term "*transfer of state powers*" shall be specified by law. This might be due to a translation error. Arguably, the provision requires an act of parliament for every

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<sup>24</sup> CDL-AD(2010)004, Venice Commission, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, adopted by the Venice Commission at its 82<sup>nd</sup> Plenary Session (Venice, 12-13 March 2010).

transfer of state powers to an international organisation, instead. The following comments are based on the latter understanding.

161. Since any transfer of power touches upon the sensitive matters of state sovereignty, many European states have adopted constitutional provisions that explicitly allow for such transfers but usually require an act of parliament.<sup>25</sup> Hence, the provision is in this respect in line with European Standards.

162. However, for the case of a “*significant transfer of powers*”, **Article 111.2** requires that the act be submitted to the people for a binding referendum. Certain transfers of power due to their more substantial impact on state sovereignty may indeed call for additional procedural safeguards (as is the case regarding international agreements under Article 110). The decision as to whether a transfer is “significant” or not, is one made under political and/or legal accountability (cf. § 158). In this context, it should also be taken into consideration that it would be very impractical for the Constitution to require a referendum in any situation where there may, technically speaking, be a “transfer of State powers”. Thus, there may be situations where such a transfer is uncontroversial and would not merit complicated procedures such referendums. There are no clear European standards in this regard.<sup>26</sup> An alternative is to provide for additional criteria to determine the significance of a transfer of state powers to an international organisation. One way might be to entrust the Supreme Court, according to a special procedure, with the task of deciding the issue.

#### **H. The hierarchy of norms (Article 112)**

163. **Article 112** regulates, at least to a certain extent, the relationship between domestic law and international law, under the dualist approach governing the Icelandic legal system. All holders of a public authority must comply with the human rights as protected in international instruments binding Iceland. These human rights treaties (as well as environmental treaties) take precedence over the law (**Article 112. 2**).

164. The care taken to ensure respect of international obligations and the attempt to include them in the wording of the Constitution is to be welcomed. The legal status of international conventions, covenants and declarations on human rights differs and the Constitutional Bill is inspired by all of them. This entails the risk of controversies on the impact of international obligations on the interpretation and application of the Bill if adopted.

165. On the one hand, all treaties other than human rights ones would have a lower status than the statutory law and any subsequent legislation would prevail over them. Should Iceland one day join the European Union, this rule should be modified to ensure recognition of the precedence of all (primary and secondary) EU law on any source of domestic law. Such a rule could be included in the Bill under **Article 111.2**.

166. On the other hand, controversies may arise in relation to **Article 112. 2**, according to which ratified human rights conventions “*shall take precedence over statutory law*”. The terms “statutory law” do not seem to include constitutional law; hence the precedence seems to be restricted to acts below the Constitution (unless these terms are interpreted in a very broad sense, to include the Constitution itself).

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<sup>25</sup> Cf. Christoph Grabenwarter, ‘National Constitutional Law Relating to the European Union’ in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European constitutional law* (2<sup>nd</sup> ed. Hart 2010) 95 et seq.

<sup>26</sup> Article 94 (2) of the Constitution of Finland calls for a special quorum of two thirds of the votes cast, “*if the proposal concerns the Constitution or an alteration of the national borders, or such transfer of authority to the European Union, an international organisation or an international body that is of significance with regard to Finland’s sovereignty*”. Thus, certain criteria for specification of the significance of a transfer of powers are supplied, namely if an amendment to the constitution is needed. This latter criterion lies also at the heart of Article 23 (1), 3<sup>rd</sup> sentence, of the German Basic Law, which refers to the procedure of constitutional amendment, if a transfer of powers to the EU would in fact amount to an alteration of or an amendment to the Basic Law. However, Article 90 (3) of the Constitution of Poland does not provide for any criteria as to when a referendum will be necessary.

167. It should also be stressed that international treaties binding on Iceland will have to be used by courts when they are to interpret and apply the Constitution (see decision of the German Constitutional Court in the *Görgülü* case<sup>27</sup>). The interpretation of the Constitution will have to be in conformity with the international law. The authorities are invited to consider explicitly stating this in the text of **Article 112**.

### I. Amendments to the Constitution (articles 113-114)

168. The current procedure for amending the Constitution (see article 79 of the current Constitution)<sup>28</sup> requires the adoption of the constitutional amendments by the Althing. This leads to the dissolution of the Althing and new elections. If the Althing resulting from these elections ratifies the same text, once approved by the President, the amendment takes constitutional force. Obviously, this procedure must be followed to allow adoption of a new constitution.

169. The Venice Commission notes that this procedure does not rely on special majorities, as is the case for the vast majority of European countries, but on the division of operations in time, implying the politically important break of new elections. Everything suggests that the intervention of the President has only a formal scope.

170. **Article 113** of the Bill aims to change this procedure and envisages two hypotheses, both requiring a mandatory and binding referendum: amendments to any other provisions of the Constitution than those of Chapter II ("Human rights and nature") and amendments to Chapter II ("Human rights and nature"):

*"When the Althing has passed a bill to amend the Constitution, it shall be submitted to a vote by all the electorate in the country for approval or rejection. The referendum shall take place at the earliest one month and at the latest three months after the passing of the bill in the Althing. Should the Bill be approved by the referendum it shall be confirmed by the President of Iceland within two weeks, and shall then be deemed valid constitutional law.*

*Should the Althing approve a Bill to amend the provisions of Chapter II of the Constitution, the Althing shall immediately be dissolved, and new elections held. Should the Althing approve the Bill without amendments, it shall be submitted to a vote by all the electors in the country for approval or rejection as provided in para. 1. Should the Bill be approved by the Referendum, it shall be confirmed by the President of Iceland within two weeks, and shall then be deemed valid constitutional law."*

171. The Commission notes that **Article 113** does not provide for either a qualified majority in Parliament or a turn-out quorum, i. e. a threshold or an approval quorum, in referendum.<sup>29</sup>

172. The special procedure provided for amendments to **Chapter II** combines the constraints of the existing system, while introducing a referendum as an additional requirement. One may note however that this procedure is intended to apply to any revision of Chapter II, including the establishment of new rights or the extension or reinforcement of existing rights, and not only to revisions which have the effect of limiting the rights or restrict their scope. In the Venice Commission view, this would be a disproportionate and excessively rigid procedure.

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<sup>27</sup> Decision of October 14, 2004 (2 BvR 1481/04), Entscheidungen des Bundesverfassungsgerichts Bd. 111, Se. 307 ff.

Comments on this decision by Gertrude Lübbecke-Wolff:

<http://www.humboldt-forum-recht.de/druckansicht/druckansicht.php?artikelid=135> . In this decision, which may serve as a source of inspiration for the Icelandic authorities in dealing with such a complex issue, the German court has developed principles for ensuring the impact of the ECHR on German law, where this convention does not enjoy the status of constitutional law.

<sup>28</sup> See *Constitution of Iceland*, article 79.

<sup>29</sup> The Venice Commission has taken a general stand against both forms of quorums in referendum: a turn-out quorum tends to foster abstention, whereas in case of an approval quorum the majority might feel that they have been deprived of victory without an adequate reason. Nevertheless, the Commission has not tried to distinguish between different types of referendum. In particular, it did not address situations, like that in the Bill under discussion, where neither a special majority nor quorum is required for the adoption of constitutional amendments by the parliament.

173. More generally, the current procedure for constitutional amendment seems to be both tightened and softened under the new mechanism proposed by the Bill for changes in the Constitution other than those relating to Chapter II. On the one hand, by abolishing the time-related guarantee of the division of the task between two successive parliaments, increased flexibility is introduced. On the other hand, the procedure becomes harder since any amendment to the Constitution shall, after having been adopted by the Althing, be submitted to a popular referendum.

174. The Commission recalls in this respect that, in its 2010 *Report on Constitutional Amendment*,<sup>30</sup> while acknowledging that referendums can contribute to strengthening the democratic legitimacy of the constitutional process, it expressed reluctance to such a general requirement:

*“At the same time, the requirement that all constitutional amendments be submitted to referendum risks making the Constitution excessively rigid, and the expansion of direct democracy at the national level may create additional risks for political stability.”*<sup>31</sup> (§ 187)

175. In the view of the Venice Commission, amendment procedures under Article 113 of the Bill are overly cumbersome and would deserve further consideration. The introduction of a qualified majority requirement in the Althing, a solution followed by almost all European countries in which the constitutional revision does not require a referendum,<sup>32</sup> should be taken into account, while limiting to some specific cases the referendum option or that of spreading the operations over time. Exceptionally, in the absence of such a requirement in the parliament, an approval quorum in referendum might be justified. In any case, if the approach chosen for the Bill were to be adopted, it is almost certain that it would be politically impossible to amend it, as voters will never be ready to give up to the new power that has been assigned to them.

#### **IV. Conclusions**

176. The Venice Commission welcomes the efforts currently being made in Iceland to consolidate and improve the country's constitutional order, based on the principles of democracy, the rule of law and the protection of fundamental rights and in line the international instruments that are binding for Iceland, as well as the country's historical cultural, legal and constitutional traditions.

177. The authorities' firm willingness to provide Iceland, following the recent economic and financial crisis, with sound, modern and democratic legal and institutional foundations for the Icelandic people to build a more just society and more adequately benefit from the common heritage, is to be commended. The Commission also welcomes the effort to provide increased transparency and clarity as to the functioning of institutions in the provisions of the Bill for a new Constitution. The special attention paid to the active involvement of citizens in the constitutional process, including by using the modern communication technologies, has attracted much interest and enthusiasm domestically and internationally.

178. In spite of these commendable developments, there are different views in Iceland as to the actual need and appropriateness for a new Constitution. The manner in which the constitutional process was conducted has also been the subject of debate. It is not the task of the Venice Commission to formulate conclusions on such aspects. The Commission has however noted that there is a risk that, if adopted, the Bill does not reach the consensus needed for it to be confirmed by the next parliament.

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<sup>30</sup> See Venice Commission, *Report on Constitutional Amendment*, CDL-AD(2010)001.

<sup>31</sup> See CDL-AD(2009)024 §136; CDL-AD(2004)044, *Interim Opinion on Constitutional reforms in the Republic of Armenia*, §§ 69-70.

<sup>32</sup> CDL-AD(2010)001, §38.

179. The Constitutional order established by the Bill maintains the country's form of government – a parliamentary republic - associated with a complex set of mechanisms aimed at enabling increased direct participation of citizens in decision-making. While drawing on the existing system, it introduces also a series of changes and novelties, most of which intended to concretise the option for a strong parliamentary regime that underlines the proposed system.

180. While in itself such a model might be deemed suitable to the specific context in Iceland, its translation in legal and constitutional terms raises a number of issues of concern, which are presented in detail in the Specific Remarks section of this Opinion.

181. The Venice Commission notes in particular that numerous provisions of the Bill have been formulated in too vague and broad terms, which, despite the clarifications that might be provided by the Explanatory Notes, may lead to serious difficulties of interpretation and application, including in the context of the adoption of the implementing laws.

182. The proposed institutional system is rather complex and marked by lack of consistency. This concerns both the powers granted to each of the main constitutional actors - parliament, government and President -, the balance between them and their inter-institutional relations, often too complicated, as well as the mechanisms of direct participation introduced by the Bill.

183. The many possibilities for the people's intervention, through referendums, in decision-making, may in principle be welcomed. This being said, like other decision-making mechanisms provided by the Bill, these appear too complicated in the constitutional provisions, which would need a careful review, both from legal and political perspective. Overall, there are reasons for the Venice Commission to see the risk of political blockage and instability, which may seriously undermine the country's good governance. Similar considerations have been raised by the proposed electoral system, which would also need more careful consideration.

184. The human rights provisions, while introducing guarantees for a wide range of fundamental rights and freedoms, including socio-economic rights and "third generation" rights, would need increased precision and substantiation as to the scope and nature of the protected rights and related obligations, extended by the Bill to both public authorities and private stakeholders, as well as to possible limitations to these rights.

185. Provisions dealing with the judiciary, while generally in line with the relevant standards, would also benefit from increased clarity, especially on issues such as the immovability of judges and the independence of prosecutors. Similarly, clarifications should be provided as to several key aspects pertaining to the transfer of state powers and the place of international norms in the domestic legal system.

186. It is not for the Venice Commission to decide on the way to proceed to address the concerns raised in the present document. This is a political decision for the parliament of Iceland to adopt, taking into account the specific circumstances prevailing in Iceland at present.

187. If it were too difficult to come up with a solution in the present parliament, it might be considered appropriate to focus the current process on amending, at this stage, the procedure in force for revising the Constitution - rather complicated under the current Constitution - and leave to the future parliament the task of continuing the work of constitutional revision under the new procedure, taking the time needed to consider the comments and questions raised by the various stakeholders, including the Venice Commission, and improve the Bill accordingly. Other points - priority issues for the country or matters that are of wider acceptance and/or less controversial - might also be included.

188. The Venice Commission remains at the disposal of the authorities of Iceland for further assistance.