



COUNTRY REPORT: ICELAND Constitutional Provisions for the Environment

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Introduction

Icelandic environmental law has undergone major review in recent years. Two recently published documents highlight the recent changes in Icelandic environmental law and they are the subject of discussion in this report.

The first is the recommendations of the Constitutional Council on amendments of the *Icelandic Constitution*. Among the main changes in the recommendations are new provisions in the 2nd Chapter regarding environmental protection and natural resources. If the recommendations of the Constitutional Council are transposed into the *Constitution* it will have significant effect on the status of environmental law in Iceland.

The second is the *White Paper on Legislation Regarding the Protection of Icelandic Nature*. This *White Paper* was prepared by the Nature Conservation Act Review Commission for the reform of the current nature conservation legislation and provides a detailed analysis of Icelandic environmental law. The document is one of the most detailed writings on environmental law in Icelandic literature.

The aim of this report is to give an overview of these recent developments in Icelandic environmental law and some reflections and critical considerations. The report is divided into three main parts. Part 1 provides a summary of the content of

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the recommendations of the Constitutional Council regarding changes to the *Icelandic Constitution* and the *White Paper on Legislation Regarding the Protection of Icelandic Nature*. Part 2 provides a critical consideration and reflection on the two documents. Part 3 recommend possible new research agendas for the IUCNAEL.

Recommendations of the Constitutional Council

The Constitutional Council was appointed by the Icelandic Parliament (Althingi) with a parliamentary resolution on the 24th of March 2011¹ following controversial elections. Its main task was to discuss the results of the constitutional committee, appointed by the Parliament on 16th of June 2010, and make recommendations regarding amendments to the current *Constitution*. The Council has now finished its task and presented Parliament on the 29th of July 2011, with a Bill to create a new constitution.²

In this Bill there are three articles that directly address the environment and natural resources, namely Articles 33-35. Each of these articles will be discussed separately, starting with an English translation of the article and then a short overview of the Council's rationale for its formulation and inclusion.

Article 33 - Nature and environment of Iceland

Iceland's nature constitutes the basis for life in the country. All shall respect and protect it.

All shall by law be accorded the right to a healthy environment, fresh water, unpolluted air and unspoiled nature. This means that the diversity of life and land must be maintained and nature's objects of value, uninhabited areas, vegetation and soil shall enjoy protection. Earlier damages shall be repaired as possible.

The use of natural resources shall be such that their depletion will be minimised in the long term and that the right of nature and coming generations be respected.

¹ *Parliamentary Resolution on the Appointment of a Constitutional Council, 2010-2011, Doc 930, Subj 549* (available at <http://www.althingi.is/altext/139/s/1120.html>).

² For further information about the Constiutional Council and its work, see: <http://www.stjornlagarad.is/english/>.

The right of the public to travel in the country for lawful purposes with respect for nature and the environment shall be ensured by law.³

The first paragraph is a mission statement for the new articles on the environment. It imposes obligations on the public regarding the protection of nature and reiterates the importance of the nature and natural resources as a basis for the welfare of the country. The focus of the second paragraph is the duty of the Government to ensure a healthy environment by law with references to international obligations arising from the *Convention on Biological Diversity*.⁴ The last sentence of the second paragraph imposes a duty on the Government to repair earlier damages to the extent that is possible. This is an important step in implementing Iceland's international obligations under Article 8 (f) of the *Convention on Biological Diversity* dealing with the rehabilitation and restoration of degraded ecosystems.

The concept of sustainability is the underlying rationale in the Council's argument, particularly relating to the third paragraph. References are made to the *Brundtland Report*, the general principles on sustainability arising from the 1992 United Nations Conference on Environment and Development in Rio de Janeiro and constitutional provisions from other jurisdictions on the protection of nature (the Constitutions of Sweden, Finland, Switzerland and France are used as examples). The right to public access is the essence of the fourth and the final paragraph. The aim is to give this right a constitutional protection and leverage against other constitutionally protected rights, such as the inviolability of private property.

Article 34 - Natural resources

Iceland's natural resources that are not private property shall be the joint and perpetual property of the nation. No one can acquire the natural resources, or rights connected thereto, as property or for permanent use and they may not be sold or pledged.

Publicly owned natural resources include resources such as marine stocks, other resources of the ocean and its bottom within Iceland's economic zone and the sources of water and water-harnessing rights, the rights to

³ Translations of the articles are based on the translations of the Constitutional Council found on http://www.stjornlagarad.is/other_files/stjornlagarad/Frumvarp-enska.pdf.

⁴ *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

geothermal energy and mining. The public ownership of resources below a certain depth under the earth's surface may be determined by law.

In the use of natural resources, sustainable development and public interest shall be used for guidance.

The public authorities, along with those using the natural resources, shall be responsible for their protection. The public authorities may, on the basis of law, issue permits for the use of natural resources or other limited public goods, against full payment and for a modest period of time in each instance.

Such permits shall be issued on an equal-opportunity basis and it shall never lead to a right of ownership or irrevocable control of the natural resources.

Article 34 is an attempt by the Constitutional Council to put an end to a long debate on the use and ownership of Iceland's rich natural resources. The heart of the debate has been around the concept of 'property of the nation' that is used in Article 34 (paragraph 1) and the use of exploitable marine resources (for example pledging of harvest rights). The 'property of the nation' concept is already in use to some extent in Icelandic legislation, notably in Article 1 of the *Fisheries Management Act*,⁵ but does not seem to have an established basis in Icelandic property law.⁶

Paragraphs 3 - 5 of Article 34 imposes some duties on the Government regarding the allocation of rights to natural resources, including: ensuring payment for the use of them (full payment); that allocation will not lead to full ownership; and a prohibition on the long-term alienation of resources. This reflects recent debates on the pricing and long-term leasing of geo-thermal resources.

Article 35 - Information on the environment and the parties concerned

The public authorities shall inform the public on the state of the environment and nature and the impact of construction thereon. The public authorities and others shall provide information on an imminent danger to nature, such as environmental pollution.

⁵ No. 116/2006 (*Lög um stjórn fiskveiða* No. 116/2006).

⁶ K. Haraldsdóttir, 'Property Rights in Water and Social Conflict: An Example from Iceland' (2011) *Special Edition – Water Law: Through the Lens of Conflict* 1 (available at <http://www.rurallawandpolicy.edu.au/journal/index.php/ijrlp/article/view/33/21>).

The law shall secure the right of the public to have the opportunity to participate in the preparation of decisions that have an impact on the environment and nature as well as the possibility to seek independent verdicts thereon.

In taking decisions regarding Iceland's nature and environment, the public authorities shall base their decisions on the main principles of environmental law.

The main aim of paragraphs 1 and 2 of Article 35 is to ensure the implementation of the *Aarhus Convention*⁷ in Icelandic law. There are three main pillars in the Convention but the focus of Article 34 is to ensure the implementation of the third pillar of the Convention (Article 9) regarding public access to courts or tribunals in environmental matters. The third paragraph provides a constitutional status for the main principles of environmental law and the aim is to ensure that they will be used as guidance when public authorities take decisions regarding the environment and nature.

The White Paper on Legislation Regarding the Protection of Icelandic Nature

The Nature Conservation Act Review Committee was appointed by the Minister for the Environment in November 2009. The subject of the Committee was to suggest reforms to the current *Nature Conservation Act*⁸ (NCA) and with special emphasis on the following:⁹

- objectives of the NCA and definitions;
- role of public authorities regarding implementation of the NCA;
- the right to public access;
- protection of landscapes;
- protection of genetic resources;
- the Nature Conservation Plan and the Natural Heritage Registry; and
- ban on off-road driving.

⁷ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001).

⁸ No. 44/1999.

⁹ The Nature Conservation Act No. 44/1999 Review Committee, *White Paper on Legislation for the Protection of Icelandic Nature* (Ministry of the Environment, 2011), 19.

The main outcome of the committee was a *White Paper on Legislation for the Protection of Icelandic Nature (White Paper)* that was handed to the Minister on the Environment on the 31st of August 2011. The Committee's Report is divided into two parts. It contains a detailed analysis on the general foundation of Icelandic legislation on nature conservation (first part) and specific issues relating to reformed legislation on nature conservation (second part).¹⁰ The aim of the following discussion is to give a short overview of the main results of the Report.

The Committee emphasised the need to implement the principles of environmental law into national legislation. The aim of such implementation would be to ensure that the principles would be used as guidelines in environmental governance. One of the most important recommendations of the Report was the need for a reformed system of protected areas categories to ensure that the aims and objectives of protection are clear. The new system would be based on the IUCN Protected Areas Categories System and contain eight categories that would make assessment of the performance of protection easier.

Other recommendations on reform were:

- strengthening the legal status of the Natural Heritage Registry and the Nature Conservation Plan;
- implementing clear and comprehensive legislation regarding invasive species in accordance to international obligations;
- clarifying the right to public access and dispute resolution relating to that right;
- adding a new chapter to the *NCA* dealing with genetic resources; and
- creating a new simplified structure in the governance of nature conservation.

All of the above-mentioned recommendations of the Committee are based on detailed analysis in the Report. The foundation of many of the recommendations is to comply with international obligations in environmental law and a comparative analysis of other jurisdiction, for example from Norway and Sweden.

¹⁰ Ibid, 22-23.

Reflections and Critical Considerations

There are political considerations that must be kept in mind regarding the implementation of the recommendations of the Constitutional Council and the NCA Review Committee. The parliamentary process consists of mediation and compromises, especially on controversial issues like 'the property of the nation' and the discussion on the recommendations is subject to changes.

The circumstances around the appointment and the authority of the Constitutional Council have been a focal point in recent political and legal debates. The Council was appointed with a parliamentary resolution on the 24th of March 2011 despite the decision of the High Court of Iceland that ruled the elections for the Council invalid on the grounds that there were procedural flaws in the election process. This has raised concerns about the authority and the mandate of the Council, and on the validity of the recommendations and how they will be processed through Parliament. The recommendations of the Council were presented to the Parliament in the form of a Report but it is still unclear what process the recommendations will be subject to in Parliament.

For these reasons it is unclear if the recommendations of the Council will be transposed into a new constitution and how this could be done. The recommendations could easily receive the same fate as many earlier recommendations on the amendment of the *Constitution* that have not passed through the parliamentary process. On the other hand, if the recommendations do serve as a basis for a new constitution with emphasis on the protection of nature it will have significant effects on the status of environmental law. It is important to include provisions on the protection of the environment in the *Constitution* to give leverage against other constitutionally protected rights, mainly the right to private property. The parliamentary process should also add some depth to the Council's arguments and perhaps lead to change in some of the recommendations on the environment.

The purpose of the *White Report on the Protection of Icelandic Nature* was to serve as a foundation for the Ministry of the Environment to create a new bill for a Nature Protection Act. The main results of the Report were a set of general recommendations about nature conservation legislation and proposed reforms. Some

of these recommendations were transposed into a Bill amending the current *NPA*. Other recommendations, mainly regarding the restructure of environmental protection governance, are more difficult to deal with because they span many administrative and governmental levels and require co-operation between ministries and other authorities. Unfortunately such co-operation is rarely reached in Icelandic governance.

Possible New Research Agendas

One of the most interesting questions to look at in the terms of the Council's recommendations is the effect that constitutional provisions on environmental protection will have on the interpretation of other rights, such as the inviolability of property rights. The inviolability of private property is fundamental principle of the *Icelandic Constitution* and the importance of property's constitutional status has been emphasised in numerous cases before the High Court.

It is in the nature of environmental legislation to impose restrictions on private property rights. When regulatory controls imposed on the use of rights are contested, the constitutional status of the inviolability of private property weighs heavily against non-constitutional considerations. It is interesting to consider if, and to what extent, this balance could change with constitutional provisions on environmental protection. This could be especially important in cases regarding exploitation of national resources. A comparative analysis of the balance between constitutional provisions on the protection of the environment and exploitation of natural resources against other fundamental rights, such as private property rights, would therefore be a feasible research agenda for the IUCNAEL.

Conclusion

The *White Report on Legislation Regarding the Protection of Icelandic Nature* and the recommendations of the Constitutional Council are among the most significant proposals to reform Icelandic environmental law. The Constitutional Council's proposal will have great effect in Icelandic environmental law if they form part of a new constitution and will lift environmental law to a higher status in Icelandic law. Political issues are of concern. There is a lack of certainty about the implementation of the recommendations but it is clear from the recent developments in Icelandic law

that awareness of the importance of environmental matters is growing. We will probably see fundamental changes in Icelandic environmental law in the near future.