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Frá ritstjóra

Það er gamall siður ritstjóra að byrja ávarp sitt á lýsa yfir þeirri gleði að nýjasta tölublaðið hafi litið dagsins ljós, en nákvæmlega þannig er því farið. Það er óneitanlega ánægjuleg tilfinning að taka fyrsta eintakið upp úr kassanum eftir að hafa fylgt þróun tölublaðsins allt frá upphafi til þess sem það er nú orðið. Efni útgáfunnar að þessu sinni er ekki afmarkaður þröngur bás heldur fara greinahöfundar víða í umfjöllun fræðanna eins og sjá má á efnisyfirliti tölublaðsins.

Tímaritið Lögfræðingur hefur dafnað frá haustinu 2006 og hefur frá og með þeim tíma verið mikilvægur hluti fræðistarfs lagadeildar Háskólans á Akureyri. Útgáfan er komin í nokkuð fastar skorður þó ávallt sé unnið að því að bæta útgáfuferlið, með þann leiðarvísir að gera tímaritið að öflugu fræðiriti. Stígið hefur verið það mikilvæga skref að formfesta ritrýniferli þar sem sérfræðingar á sínum sviðum leggja lóð á vogarskálarnar við að efla fræðilegan grunn tímaritsins. Af þeim sex greinum sem birtast í tímaritinu, eru fimm ritrýndar. Einnig hefur verið sett upp handhæg vefsíða, sem hefur að geyma helstu upplýsingar um tímaritið, bæði hvað varðar verklags- og ritrýnireglur (http://logfraedingur.unak.is). Með þessu framtaki er það einlæg von ritstjórnar Lögfræðings, að auka gæði tímaritsins og jafnframt gera það aðgengilegra með hjálp vefmiðilsins.

Fyrir hönd ritstjórnar vil ég þakka öllum þeim sem komu að vinnslu útgáfunnar. Sérstakar þakkir hljóta greinahöfundar, styrktaraðilar og ritrýninefnd. Ég vil einnig þakka ritstjórn fyrir farsælt og gott samstarf og óska öllum ofangreindum til hamingju með útkomuna. Vonandi er fjölbreytni tímaritsins slík að flestir lesendur geti fundið í því eitthvað sem vekur áhuga þeirra.

Davíð Birkir Tryggvason

Ávarp formanns Þemis

Á tímum sem þessum, þegar þjóðfélagsumræðan snýst að svo miklu leyti um hrun íslensku bankanna, íslenska efnahagskerfisins, aðildarviðræður við Evrópusambandið og Icesave málið er ekki annað hægt en að líta yfir farinn veg. Við skulum þó ekki leiða hugann að ofangreindum málum, heldur staldra við og líta yfir stutta sögu náms og félagsstarfa í lögfræði við Háskólann á Akureyri. Fyrstu nemendur við lagadeild Háskólans á Akureyri hófu nám árið 2003 og fyrstu meistaranemarnir útskrifuðust árið 2008. Nemendafélagið Þemis var stofnað árið 2004 og nýt ég því þess heiðurs að vera sjötti formaður félagsins. Árið 2006 hóf félagið útgáfu tímaritsins *Lögfræðingur* og sýndi fram á þann metnað sem félagsmönnum var í blóð borinn. Ekki má heldur gleyma að tveimur árum síðar eða 2008 fór af stað nám í heimskautarétti við lagaskor Háskólans á Akureyri og útskrifuðust því fyrstu nemendurnir frá brautinni í vor. Það er óhætt að segja að skólinn sé brautryðjandi á þessu sviði og ég hvet lesendur til verða sér út um árbókina sem var gefin út á þeirra vegum.

Nemendafélagið Þemis var framan af undirfélag Kumpána, sem var þá nemendafélag félagsvísinda- og laganema. Á því var gerð breyting á aðalfundum félaganna um miðjan mars 2009. Félagsmenn Þemis kusu að slíta samstarfinu við Kumpána og reyna fyrir sér sem sjálfstætt félag. Við sem vorum kosin í stjórn félagsins gerðum okkur grein fyrir því frá upphafi að það yrði viss áskorun að koma félaginu af stað frá byrjunarreit. Það var því gert að aðalmarkmiði að tryggja fjárhagslegan stöðugleika félagsins fyrir þær stjórnir sem myndu fylgja í kjölfarið. Því markmiði hefur nú verið náð og stendur félagið traustum fótum fjárhagslega, miðað við umfang þess og fjölda félagsmanna. Það verður spennandi að fylgjast með framgangi félagsins eftir þetta fyrsta ár sitt á eigin fótum, og bendi áhugasömum á heimasíðu félagsins: http://themis.fsha.is.

Að lokum vil ég nota tækifærið og þakka ritstjórninni fyrir störf sín í þágu félagsins, en það hefur verið einstakur heiður að fá að koma að þessum fjórða árgangi tímaritsins. Það er von mín að lesendur hafi gagn og gaman af innihaldi þess.

Þökkum eftirtöldum aðilum
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Lundur rekstrarfélag

**Héraðsdómur
Norðurlands eystra**

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Resolving Iceland's Debt Crisis: Causes, Sovereign Debt and Future Prospects

Introduction

2008 will enter the annals of financial history alongside the Great Depression, Black Monday of 1987 and the dotcom bubble of the early 2000s as one of the most significant market collapses in the history of modern finance. The fall of Lehman Brothers, one of the major participants in the international money market, was the largest insolvent liquidation to date: it amounted to roughly $615bn and dwarfed the combined insolvencies of Enron, Worldcom and General Motors.[1] The global nature of its business had a far-reaching impact on the financial markets and institutional investors worldwide. The result was felt acutely in Iceland. The country had enjoyed a booming investment and commercial banking industry which grew rapidly through a series of aggressive mergers and acquisitions throughout the 1990s and 2000s. The ensuing financial and economic crisis made it clear that their business model, founded on the premise of constant and easy availability of credit from the international money markets, was flawed. Three major Icelandic banks, Landsbanki, Kaupþing and Glitnir, were amongst the Lehman Brothers' clients. When its liquidation effectively froze the world's financial markets, two of them, Glitnir and Landsbanki, were

* *Greinin hefur verið yfirfarin og samþykkt af ritrýninefnd Lögfræðings – This article has been peer-reviewed and approved by the editorial committee of Lögfræðingur.*

1 20 Largest Public Company Bankruptcy Filings 1980 – Present chart, BankruptcyData.com, http://www.bankruptcydata.com/Research/Largest_Overall_All-Time.pdf (accessed on 20 January 2010). See also the House of Commons Treasury Committee, *Banking Crisis: The Impact of the Failure of the Icelandic Banks*, Fifth Report of Session 2008-2009 (The Stationery Office Limited, London, 4 April 2009) [hereinafter House of Commons report] at 17.

unable to meet their immediate liabilities and were forced into receivership[2] pursuant to the Act on Authorisation for Treasury Disbursements due to Unusual Financial Market Circumstances, no 125/2008, commonly known as the Emergency Act. Kaupþing "fell" a few days later, after a controversial statement made by the UK Prime Minister, Gordon Brown. It however remains unclear whether this statement was truly fatal, or if the bank was doomed anyway.

This short paper pursues three aims. First, it provides an overview of the causes which forced the Icelandic government to nationalise the banks and face the consequences in the form of colossal debt obligations. The causes of the crisis will be discussed from the perspective of international finance. Secondly, it will look at some of the implications with regards to the country's current debt and draw parallels with the South Korean banking crisis. The author suggests that on balance the nationalisation of banks was probably the right decision at a time of immense economic and social distress as it effectively prevented the potential collapse of the Icelandic housing market and preserved a viable domestic banking industry. Finally, it presents three options to resolve the crisis at the time when Iceland finds itself at crossroads: to pay the debt; to liquidate the banks' domestic operations and wipe out the debt; or to securitise the debt either publicly or privately. The author will make a case for the third option and explain why it would be preferential for Iceland at this point in crisis.

The Icelandic Banking Crisis: Causes

Iceland has long boasted its financial stability, social security and unrivalled economic development, consistently scoring at the top of the UN Human Development Index since early 1990s.[3] The collapse of the country's banking industry was dramatic and resulted in a rapid contraction of Iceland's economy. It was not however entirely unpredictable. One of the early concerns about the aggressive acquisitions strategy was raised in 2004 by Tony Shearer, the then CEO of Singer & Friedlander, a British investment bank taken over by Kaupþing. In particular, Mr Shearer raised his concerns over the state of Kaupþing's public accounts and professional experience of its executives, communicating his doubts to the UK Financial Services Authority (FSA).[4] The takeover nonetheless went ahead, and in 2008 the bank was put into receivership as a result of the liquidity crisis.

Another good example is the *Icelandic banking crisis and what to do about it* report prepared in April 2008 (with an updated version followed in July) for Lands-

2 Seðlabanki Íslands, Financial Stability Report, [hereinafter Financial Stability Report] at 15.

3 Human Development Reports, http://hdr.undp.org/en/statistics/ (accessed 21 January 2010).

4 House of Commons report at 14-16.

banki: a joint collaboration of Willem Buiter, a former member of the Monetary Policy Committee of the Bank of England and Professor of Political Economy at the London School of Economics, and Anne Sibert of Birkbeck College, University of London. The authors identified the major weaknesses of the Icelandic banking system which, they said, could lead to "a potential, and possibly unnecessary, financial and economic crisis:"[5]

- The authors considered Icelandic banks as "highly leveraged institutions,"[6] with long-term illiquid assets as opposed to short-term liabilities (maturity mismatch).[7] To be able to address rapidly maturing liabilities, such institutions constantly have to tap into the international capital markets for extra finance effectively bringing more debt onto their balance sheets. Once the availability of credit dried up as a result of the failure of the US subprime mortgage market, such institutions defaulted on their liabilities and required a bailout.

- The government bailout was unfortunately not an option for the Icelandic banks: the Central Bank of Iceland was inadequate as a lender of last resort (LOLR), the authors argued.[8] Most of the banks' business was carried out in foreign currency, and the Central Bank did not have adequate foreign exchange reserves on its books, nor was it able to quickly acquire additional reserves to act as a foreign currency LOLR.

- The Icelandic banks were also vulnerable to a bank run: a hectic withdrawal of deposits when customers are served on a first-come, first-served basis and those at the end of the queue are usually left with very little.[9] The equivalent of the bank run in financial markets would be triggering the event of default clause in a loan agreement as a result of a failure to make the next scheduled repayment or the outright insolvency of the borrower, which results in the acceleration of the defaulted loan facility. This acts as an incentive for other creditors to trigger cross-default clauses in other loan agreements and accelerate their respective facilities, which may result in catastrophic consequences for the borrower. Credi-

5 WH Buiter and A Sibert, The Icelandic Banking Crisis and What To Do About It: The Lender of Last Resort Theory of Optimal Currency Areas Policy Insight No 26, Centre for Economic Policy Research, October 2008, [hereinafter Buiter] at 1.

6 Ibid at 3.

7 M Chui and P Gai, Private Sector Involvement and International Financial Crises: An Analytical Perspective (OUP, Oxford 2005) [hereinafter Chui & Gai] at 16-17.

8 Buiter at 8.

9 Chui & Gai at 16-17.

tors may also refuse to extend the existing line of credit even when the terms stipulated in the conditions precedent clause[10] are met. They may also refuse to purchase the debt instruments issued by the borrower, thus further exacerbating a dire financial state of the institution in question.[11] This was effectively the event which brought Glitnir down: the bank expected to finance the next repayment with the sale of assets which did not take place as planned due to the bankruptcy of Lehman Brothers.

The authors maintained that "Iceland's business model, operating internationally in the financial markets with high leverage, [was] not compatible with its currency regime."[12] The problem was not so much in exposure to subprime debt (the assets of Icelandic banks were of higher quality[13]), as in the inability to refinance quickly maturing liabilities due to the liquidity crisis which, in turn, resulted in a loss of investor confidence and subsequent panic. The latter can be particularly demoralising and destructive for a country or institution already struggling to meet their liabilities: it increases the costs of arranging new financing and can cross-contaminate from one entity to the other, even crossing national borders to affect allied nations. For example, Ukraine struggled to refinance its dollar borrowing when faced with costs of up to 30% after the Russian default in 1998.[14]

In some respects, Iceland's current financial position is unique: it is the first developed country to seek IMF relief since the 1976,[15] whereas the vast amount of the literature on sovereign insolvency concerns the financial troubles of developing countries. It means that conventional debt restructuring and relief solutions may not be suitable or palatable for Iceland as a developed country with a strong human rights record and functional legislative mechanisms for creditor protection. This peculiar position may have two major implications for Iceland: first, that the creditors will expect the country to pay in full and its attempts to impose caps on debt repayment are likely to be significantly limited; secondly, that Iceland could potentially have access to additional lines of credit from private lenders if necessary, provided that it

10 Conditions precedent clauses are incorporated in a loan agreement to ensure that all legal and financial matters related to the loan are in order before the bank grants access to the loan facility to the borrower. It may be argued that they protect the lending bank which is not obliged to lend if the borrower will default shortly after the funds have been drawn. See further Hal S Scott, International Finance: Law and Regulation 2nd ed. (Sweet & Maxwell, London 2007) [hereinafter Scott] at 100-101.

11 Buiter at 4-5.

12 Ibid at 18.

13 Ibid at 2.

14 M Miller and L Zhang, 'Sovereign Liquidity Crises: The Strategic Case for a Payments Standstill' in V Aggarwal and B Granville (eds), Sovereign Debt: Origins, Crises and Restructuring (The Royal Institute of International Affairs, London 2003) [hereinafter Sovereign Liquidity Crises] at 165.

15 BBC News, Iceland set for $2.1bn IMF help, 24 October 2008.

abides by its current liabilities and adheres to the plan of repayment. Both factors have a direct bearing on the possible solutions that are considered in the conclusion.

Sovereign debt issues

Currently the three Icelandic banks are operating only their domestic branches; their foreign subsidiaries have been either liquidated, or put into receivership. The fact that Icelandic Financial Supervisory Authority, Fjármálaeftirlitið (FME), took control of their domestic operations in October 2008 as a result of the Emergency Act is sometimes confused with nationalisation which it is not per se. Nationalisation is when the state becomes a majority shareholder in the company in question by way of a statute and administers the nationalised entity by a ministerially appointed board.[16] Whilst the Icelandic state never obtained a majority stake in any of the three banks,[17] they are currently operating under the control of FME. The Icelandic government guaranteed their financial solvency; the act which has turned them into state entities for the purpose of debt management and restructuring. Therefore it may be argued that the principles of sovereign debt rescheduling apply to this case, although it must be stressed that Icelandic banking crisis is not a sovereign debt crisis in the conventional sense, e.g. as in Latin America and Asia during the 1980s-90s. This section will further discuss the issues of debt management and refer to the insolvency of South Korea and the lessons which may be learned from that case study for Iceland.

The nature of sovereign debt is such that "[it] lacks collateral and the judicial contract enforcement that typifies domestic lending:"[18] it cannot be enforced by foreign agencies; moreover, such intervention may also be interpreted as a violation of state sovereignty. It is however a common practice among states to include a waiver of sovereign immunity clause in loan agreements.[19] State assets located abroad usually remain in the ownership of the debtor state in question, subject to sovereign immunity.[20] There is generally a widespread agreement among the nations that "foreign offices are not debt-collecting agencies."[21] What determines repayment of a loan is not the country's fiscal *ability* to pay; rather it is its *willingness* to pay.[22] History shows that the amount of debt can be managed. Finland is a rare example of a country which repaid its First World War sovereign debt in its entirety. Although it did not

16 Definition of 'nationalised industries' in EA Martin (ed) A Dictionary of Law 5th ed. (OUP, Oxford 2003) at 325.

17 It purported to take a 75% stake in Glitnir once it became clear that the bank was about to default on its loan obligations in September 2008; but the bank was put into receivership before the shareholders had a chance to vote on the government takeover: see Buiter at 1.

18 Chui & Gai at 20.

19 P Wood, Project Finance, Subordinated Debt and State Loans (Sweet & Maxwell, London 1995) [hereinafter Wood I] at 150.

20 Sovereign Liquidity Crises at 157.

21 Wood I at 148.

22 Sovereign Liquidity Crises at 158.

receive preferential treatment or any concessions subsequently, it maintained a reputation as an honest borrower[23] which matters for sustainability of the international financial system, as the current recession has demonstrated.

The international financial system is ultimately built on faith. This premise can be best illustrated by the role of banks as intermediaries between depositors and borrowers:[24] banks engage in the business of lending money which carries a risk of a maturity mismatch; they borrow short and lend long. This means that banks are constantly quasi-insolvent; this fact however does not deter customers from making regular deposits into their current accounts. International financial markets operate on the same premise, the only difference is the amount of money being lent, the complexity of loan facilities and the relevant clauses in loan agreements. Loss of faith leads to a loss of investor confidence and disrupts cash flows between various market participants.

Sovereign lending and post-insolvency rescue can have an even greater impact on the market volatility since states are perceived to be more reliable borrowers than private entities, especially those awarded with investment grade ratings. In reality this is not always true. While the waiver of sovereign immunity clause is included in the majority of the loan agreements and security is usually taken in the form of government bonds with different periods of maturity, the argument above shows that the repayment remains largely at the discretion of the borrower which effectively makes such a loan unsecured. Even though a repudiation cannot, and does not, cancel the legal claim,[25] creditor remedies do not extend much further than litigation in the national courts which would be impractical. It is therefore of ultimate importance for both lenders and borrowers to act in good faith and honour contractual obligations. Examples from history demonstrate that the amount of debt can be managed provided that there is sufficient willingness on both sides (lender and borrower/debtor) to negotiate terms of repayment and relevant concessions (rollovers, write-offs etc).

The world economy was hit by a string of sovereign insolvencies in the eighties and nineties which included both developed countries and emerging economies.[26] The case closest to Iceland would be the one of South Korea which failed to adjust to currency overvaluation in 1997. They are similar because most of the South Korean debt was owed by the country's private borrowers who had absorbed large investments to fund a series of mergers and acquisitions with the purpose of creating

23 Financial Times, Iceland would benefit from paying up, 10 January 2010.

24 P Wood, Law and Practice of International Finance, University Edition (Sweet & Maxwell, London 2009) [hereinafter Wood II] at 12.

25 Wood I at 146.

26 Wood II 12-13.

global conglomerates. Total (both short-term and long-term) debt was $248.5bn at the height of the crisis.[27]

There were three key stages in the South Korean economic crisis. First, once the local currency, the won, depreciated, the country resisted accepting financial help from the IMF even though the domestic foreign currency reserves were insufficient to alleviate the consequences of the crisis. It is noteworthy that the people voted for the strongest opponent of the IMF relief at the presidential elections in December 1997 Kim Dae Jung. In the end, the country voluntarily accepted a package of $57bn when it became clear that local efforts to save the plummeting economy were inadequate. The major problem however was to restructure short-term loans which were coming due on 31 December 1997. The second stage in the rescue process was thus the decision adopted by the US Federal Reserve, the Bank of England, the Bundesbank and other central banks to urge major commercial banks to adopt a programme of short-term rollovers and long-term restructuring. Indeed, South Korea did reach an informal agreement with lenders to roll over its short-term debts for varying length of time. In the end (third stage) it chose the model suggested by Société Générale which involved converting outstanding debt into floating rate, government guaranteed notes with short-term maturities and a floating exchange rate of 2.25%, 2.5% and 2.75% over the six-month LIBOR (London Interbank Offering rate). This proved an efficient effort to revive the economy and by 1999 the crisis was declared to be over, although concerns remained over the country's economic fragility.[28]

The case of South Korea demonstrates that the most successful solutions are reached in a bilateral cooperation between lenders and borrowers: "[f]reely negotiated debt restructurings are still the best solution."[29] Sovereign insolvency is best managed where both parties are interested in abiding by the terms of already existing agreements to reach a win-win solution and uphold professional relationships in the long term. It may be more difficult to reach such an agreement for the parties in the Iceland case after the infamous Landsbanki Freezing Order 2008 which substantially hurt the relations between Iceland and the UK. The next section will look at the financial and economic lessons to be learned from the crisis and puts forward some potential solutions.

27 V Aggarwal, 'The Evolution of Debt Crises: Origins, Management and Policy Lessions' in V Aggarwal and B Granville (eds), Sovereign Debt: Origins, Crises and Restructuring (The Royal Institute of International Affairs, London 2003) at 16.

28 Ibid at 25-29.

29 R Grey, 'Bailouts, Moral Hazard and Burdern-Sharing' in V Aggarwal and B Granville (eds), Sovereign Debt: Origins, Crises and Restructuring (The Royal Institute of International Affairs, London 2003) at 151.

Implications and lessons

The scale and impact of the current recession were significant and dramatic, and resulted in a large number of academics and professionals rethinking previously favoured strategies of high-risk, uncertain investment. The recession has shown that reckless lending and borrowing not substantiated with an understanding of the quality or origin of the assets being traded can undermine institutions and states alike. This is the case when the 'too big to fail' thinking no longer works, as the failure of Lehman Brothers demonstrated. Here are some of the lessons derived from the crisis, both for Iceland and global economy combined.

- The problem referred to in literature on sovereign insolvency as *moral hazard*: a deliberate engagement in risky undertakings or reckless borrowing with an expectation that the IMF will bail out the country once it has defaulted.[30] It is of lesser significance in the Icelandic banking crisis, where there was a confident expectation that markets would not collapse, and warnings about the absence of the foreign currency LOLR which could provide a cushion during the crisis were ignored.[31] However the period from 1990 onwards, the longest running bull market in history, gave rise to expectations that trading in poorly-understood complex financial products could be quickly rewarded with little or no risk at all. This business strategy was founded on the presumption that extra cash in the international financial markets will always be available. Once the music stopped and the free flow of money within the market was halted, risks crystallized.
- There are three elements of the national financial systems missing in the international financial system: a bankruptcy regime, a financial regulator (the likes of FSA and FME) and a lender of last resort.[32] The IMF is indeed frequently perceived as a LOLR for insolvent states; although there is an argument which says this role further promotes moral hazard.[33] Iceland, faced with enormous debt and crippled economy, had little other choice but to be bailed out by the IMF. In that context, pressure coming from British and Dutch governments for the ratification of the Icesave agreement in exchange of extra lines of credit is unhelpful at the very least. There is a perceived need for a genuine international

30 V Aggarwal and B Granville, 'Sovereign Debt Management: Lessons and Policy Implications' in V Aggarwal and B Granville (eds), Sovereign Debt: Origins, Crises and Restructuring (The Royal Institute of International Affairs, London 2003) [hereinafter Sovereign Debt Management] at 281.

31 E.g. Professor Buiter's report which the parties agreed to keep confidential.

32 Scott at 8.

33 Sovereign Debt Management at 282.

LOLR vested with monitoring functions which operates independently of state governments, although questions will be raised as to its financing and legal status.

- The recession has also raised a question of the reliability of credit ratings and competency of agencies which assign them. Before the collapse, Iceland and its institutions have all been given triple A ratings, now reduced to that of high yield ('junk'). One of the criticisms of credit rating agencies is that their rating systems does not adequately reflect true systemic risks. There is clearly a need for an independent and unbiased benchmark of financial stability, but it requires an effort within the global financial and political community to produce one.
- The Icesave dispute raised the issue of the efficiency of the EU/EEA regime for cross-border bank regulation and deposit insurance in particular. This was addressed in the Turner Review, a major UK policy document which puts forward certain suggestions for improvement of the future financial system of the UK and EU. Previously, according to the EU Second Banking Directive 'home-country control' rule,[34] subsidiaries of companies incorporated in one of the EEA Member States were subject to control of the financial regulator in the country where the subsidiary carries out its operations; branches required an authorisation by the financial regulator of the recipient state but were subject to control of the regulator of their country of origin. The Turner Review concludes that "existing single market rules can create unacceptable risks to depositors or to taxpayers."[35]
- Finally, there is an obvious conclusion with regards to "the need to monitor and manage balance sheet positions pre-emptively."[36] It must be noted however that simply toughening regulatory controls may not be sufficient since they are likely to be relaxed once there is no longer a perceived danger of a financial crisis. The author advocates a balanced, systemic approach mainly through executive education about the risks, combined with adequate domestic and EEA-wide regulation.

These are just some of the conclusions about the recession in general and the Icelandic banking crisis in particular. Further recommendations have been presented by Kaarlo Jännäri and are cited in the Iceland's Financial Stability Report 2009.[37] They

34 EP Ellinger and others, Ellinger's Modern Banking Law 4th ed. (OUP, Oxford 2006) at 57.

35 *Financial Supervisory Authority, The Turner Review: A Regulatory Response to the Global Banking Crisis, March 2009, at 100.*

36 L Dixon and others, 'Measuring, Monitoring and Managing National Balance Sheets' in V Aggarwal and B Granville (eds), Sovereign Debt: Origins, Crises and Restructuring (The Royal Institute of International Affairs, London 2003) at 110.

37 Financial Stability Report at 80.

concern the creation of a smaller, more efficient financial regulatory system in Iceland, expansion of FME powers, tougher regulation and more active participation in EU/EEA financial regulatory regime.

Options for Iceland

In conclusion, this paper presents some of the potential options Iceland has for future debt management. These are some of the immediate options Iceland could implement in the near future, although all of them have long-term implications and consequences.

First, Iceland can repay the debt. Current Icesave agreement treats the loan as a standard term loan facility and defers the beginning of repayment by seven years from now with an interest rate of 5.55% per annum. There is a debate about whether this interest rate is too high; otherwise the agreement consists of standard clauses which are present a model LMA (Loan Market Association) agreement. The most serious one is a cross-default clause (11.1.5 in the Loan Agreement between The Depositors' and Investors' Guarantee Fund of Iceland, Iceland and The State of The Netherlands; and 12.1.5 in the Loan Agreement between The Depositors' and Investors' Guarantee Fund of Iceland, Iceland and The Commissioners of Her Majesty's Treasury) under which the facility may be accelerated should Iceland default on any of its external obligations not connected with the present facilities. The repayment of debt now depends on the outcome of the upcoming referendum, after the President of Iceland refused to sign the Icesave bill into law.[38]

Secondly, Iceland can liquidate its domestic banking operations: a move which would effectively wipe out the entire debt. This however will affect all of the current and savings accounts being held in the three banks; accelerate the repayment of loans and mortgages; hinder regular business transactions; rapidly decrease share value; and result in a chaos in the real economy in Iceland, leading to defaults and foreclosures. This is the fastest way to remove all the debt but the consequences are so severe that this option is strongly discouraged.

Finally, Iceland can securitise its debt. Securitisation is a process whereby a portfolio of assets or receivables (in this case the assets of Icelandic banks which were gathered prior to the liquidity crisis) is transferred into a special purpose vehicle (SPV), a company created solely for the purpose of holding the assets, in return for a purchase price payable immediately upon the transfer of assets. The SPV raises finance to purchase the debt from the originator by issuing bonds which are then purchased by third party investors, which could be UK and Netherlands govern-

38 Financial Times, Reykjavík stalls on Icesave deal, 1 January 2010.

ments or the leading institutional investors specialising in high yield bonds in our case. The originator (one of the Icelandic banks) is appointed the 'servicer' of receivables on behalf of the SPV for further management of the portfolio, and the SPV pays a servicing fee to the servicer. The originator makes a profit from the surplus income from the receivables once the bondholders have been paid an interest.[39] It must be noted that all of the underlying transactions are secured. An additional security is provided in the form of limited recourse rights of the bondholders, which ensure that SPV's assets are always greater than its liabilities thus eliminating the insolvency risk. Further, the use of non-petition covenants attached to the bonds stipulates that creditors will not petition to wind up the SPV, also eliminating solvent liquidation as a risk.

Securitisation is not the means of raising finance to cover debts in the international capital markets, which would incur further liabilities. However it has the advantages of removing debt from the balance sheets of the originator, improving their capital adequacy and transferring the risk to the investors who will invest in bonds issued by the SPV.[40] In this sense it is a mechanism for effective debt management. For Iceland, securitisation may have further advantages with regards to the rating of the bonds issued by the SPV, which are usually rated higher than a direct loan to the originator.[41] In the case of Iceland, the potential bondholders may be more willing to invest if they look at the quality of the underlying receivables; as it has been shown previously, Iceland had little exposure to subprime debt and the banks' assets were of good quality. Besides, having the British and Dutch governments as bondholders and the Icelandic banks as the originator will provide for a win-win situation: the former will take interest on the notes issued by the SPV and the latter will benefit from the remaining surplus and the servicing fees. Although securitisation will not eliminate the debt, it will remove it from the national balance sheets allowing the economy to recover and attract external investment, keeping Iceland as part of the international banking system at the same time.

While the banking crisis was a hard blow for Iceland and the recovery is not expected to be easy, the leading banking institutions have been preserved. In the long term, this means that, although the rate of international exposure previously maintained is unlikely to be repeated, Icelandic banks can successfully serve the needs of the domestic Icelandic industry, in particular its geothermal energy sector. Besides, if Iceland's application to join the EU is successful, the country will have access to

39 Wood II at 450-451.

40 Ibid at 455-458.

41 Ibid at 450.

the emergency funding from the European Central Bank which significantly mitigates the chance of a similar banking collapse occurring in the future.

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Ágúst Þór Árnason er brautastjóri við lagadeild Háskólans á Akureyri frá árinu 2009. Hann hefur starfað við Háskólann á Akureyri frá 2002 og vann meðal annars að undirbúningi stofnunar Félagsvísinda- og lagadeildar háskólans. Frá 2003-2008 starfaði hann sem kennari og verkefnastjóri við sömu deild. Ágúst stundaði grunnnám og meistaranám í heimspeki, lögfræði og stjórnmálafræði við Freie Universität í Berlín frá 1984-1990 með áherslu á mannréttindi. Hann var við doktorsnám við Goethe Universität í Frankfurt am Main á árunum 1998-2001. Hann starfaði sem fréttaritari Bylgjunnar í Berlín frá 1986-1989 og síðar sem fréttaritari hjá RÚV í Berlín frá 1989-1991. Frá 1991-1993 starfaði hann sem fréttamaður á RÚV. Ágúst vann að undirbúningi stofnunar Mannréttindaskrifstofu Íslands 1993-94 og var ráðinn fyrsti framkvæmdastjóri MRSÍ og gegndi því starfi til 1998. Hann var formaður stjórnar Reykjavíkur Akademíunnar frá stofnun hennar til nóvember 1998. Á árunum 2001-2002 var hann þátttakandi í rannsóknarverkefni í stjórnskipunarrétti við Norsku vísindaakademíuna „The Centre for Advanced Study (CAS) at the Norwegian Academy of Science and Letters“.

Lýðveldið, stjórnskipun og staða forseta

Í meira en eina og hálfa öld hefur réttur íslensku þjóðarinnar til sjálfsforræðis verið sem rauður þráður í stjórnmálaumræðu hvers tíma og mótað orðræðu hennar með varanlegum hætti. Umræðan um forræði þjóðarinnar á eigin málum var lengst af beintengd við kröfuna um eigin stjórnarskrá, síðar fullveldi og að lokum um fullt sjálfstæði og innlendan þjóðhöfðinga kjörin með lýðræðislegum hætti. Þrátt fyrir miklar og heitar umræður, innan þings sem utan, um rétt þjóðarinnar til að ráða ráðum sínum, bar lengst af lítið á skoðanaskiptum á Alþingi um stjórnskipun framtíðarríkisins með þeirri undantekningu þó sem lesa má í Alþingistíðindum seinni hluta vetrar 1944 þegar rætt var um tillögu þingnefndar að stjórnarskrá lýðveldisins.[1]

Fyrir utan all harðvítugar deilur lögskilnaðarsinna og hraðskilnaðarsinna um það hvernig staðið skyldi að endanlegum slitum á konungssambandinu snérist umræðan að mestu um flutning æðsta valds ríkisins inn í landið og um stöðu og hlutverk þjóðhöfðingjans sem yrði forseti Lýðveldisins Íslands. Tekist var á um það hvort forsetinn ætti að hafa algjört neitunarvald, sambærilegt og konungur hafði haft en

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1 Alþingistíðindi 1944 B, d. 20 – 139.

ekki beitt um hríð, eða einskonar synjunarvald sem fælist í málskotsrétti sem heimilaði honum að synja lagafrumvarpi staðfestingar og bar þá að vísa því til þjóðarinnar til endanlegrar ákvörðunar um það hvort það tæki gildi eður ei. Í því tilfelli að vald forseta yrði takmarkað við málskotsréttinn vaknaði í annan stað sú spurning hvort frumvarpið tæki gildi sem lög við undirritun ráðherra eða ekki fyrr en þjóðin hefði kveðið upp jákvæðan úrskurð sinn í allsherjaratkvæðagreiðslu. Niðurstaðan varð sem hér segir og er að finna í 26. gr. stjórnarskrárinnar:

> Ef Alþingi hefur samþykkt lagafrumvarp, skal það lagt fyrir forseta lýðveldisins til staðfestingar eigi síðar en tveim vikum eftir að það var samþykkt, og veitir staðfestingin því lagagildi. Nú synjar forseti lagafrumvarpi staðfestingar, og fær það þó engu að síður lagagildi, en leggja skal það þá svo fljótt sem kostur er undir atkvæði allra kosningabærra manna í landinu til samþykktar eða synjunar með leynilegri atkvæðagreiðslu. Lögin falla úr gildi, ef samþykkis er synjað, en ella halda þau gildi sínu.

Þótt ekki verði fallist á að forsetar lýðveldisins hafi í gegnum tíðina staðið með öllu utan við svið stjórnmálanna þá verður staða og hlutverk forsetans ekki sjálfstætt viðfangsefni fræðimanna fyrr en í byrjun síðasta áratugs 20. aldar og þá í aðdraganda aðildar Íslands að samningnum um hið Evrópska efnahagssvæði (EES).[2] Þrýst var á forsetann að synja frumvarpi til laga um EES-samninginn staðfestingar og vísa þannig málinu til þjóðarinnar. Vigdís Finnbogadóttir, sem þá gegndi embætti forseta, taldi sér ekki annað fært en að undirrita frumvarpið og gerði grein fyrir þeirri afstöðu sinni í sérstakri yfirlýsingu sem hún lét fylgja með undirrituninni.

Í skrifum sínum um stjórnskipunarlega stöðu forsetans hafa fræðimenn deilt um mögulegar innri mótsagnir stjórnarskrárinnar og vægi réttarheimilda en einnig hefur verið tekist á við spurninguna um pólitíska og lagalegan raunveruleika íslenskrar stjórnskipunar.[3] Hér er ætlunin, meðal annars, að skoða þá stöðu sem upp er komin eftir að sitjandi forseti, Ólafur Ragnar Grímsson, hefur í tvígang synjað lagafrumvörpum staðfestingar og þjóðaratkvæðagreiðsla hefur verið haldin í kjölfar seinni synjunarinnar í samræmi við ákvæði 26. gr. stjórnarskrárinnar. Það er einnig ætlun greinarhöfundar að fjalla um hugmyndafræðina sem liggur að baki stofnunar Lýð-

2 Sjá Sigurður Líndal, „Stjórnskipunarleg staða forseta Íslands“, Skírnir, 166 (haust 1992), bls 425–39.

3 Sigurður Líndal, „Stjórnskipuleg staða forseta Íslands“, Skírnir 166 (haust 1992), bls. 425-39, sjá einnig greinaflokkinn „Stjórnskipunarvald forseta Íslands“, Útvörður 8, 1 (1993), bls. 25–30; Þór Vilhjálmsson, „Synjunarvald forsetans“ í Katrín Jónsdóttir o.fl. (ritstj.), Afmælisrit: Gaukur Jörundsson sextugur (Reykjavík 1994), bls. 609-36; Gunnar Helgi Kristinsson, „Iceland“, Semi-Presidentialism in Europe, Oxford University Press, 1999, bls. 86-104; Þórður Bogason, „ „ og ég staðfesti þau með samþykki mínu“: forseti Íslands og löggjafarvaldið“, í Helgi Magnússon o.fl. (ritstj.), Afmælisrit til heiðurs Gunnari G. Schram sjötugum (Reykjavík 2002), bls. 555–81; Sigurður Líndal, „Forseti Íslands og synjunarvald hans“, Skírnir 178 (vor 2004), bls. 203-37.

veldisins og tengsl hennar við hugmyndina um embætti forsetans. Viðfangsefnið verður skoðað í ljósi viðtekinna lýðveldiskenninga frá því um miðja síðustu öld og þeirra hugmynda sem nútíma stjórnarskrárfestan byggir á. Leitast verður við að svara spurningunni hvort embætti forseta lýðveldisins eigi sér framtíð í þeirri mynd sem það hefur þróast eða hvort gildi rök hnígi að því að því þurfi að breyta.

Lýðveldisstofnunin

Lýðveldinu Íslandi var komið á fót við erfið skilyrði. Heimsstyrjöldin síðari hafði geisað um árabil og enn var ekki séð fyrir endann á þeim hildarleik. Af umræðum á Alþingi og skrifum í dagblöð og tímarit á þessum tíma má skilja að flestir sem höfðu afskipti af lýðveldisstofnuninni, eða *skilnaðarmálinu* eins og ferlið var stundum kallað, hafi verið áfram um að ljúka því af án tillits til þess hvort styrjöldinni væri lokið eður ei og töldu sumir mikils um vert að koma lýðveldinu á fót áður en vinna hæfist við að koma nýskipan á heimsmálin að ófriðnum loknum.[4]

Á Alþingi náðist sátt um að byggja stjórnarskrá hins nýja lýðveldis á stjórnskipan Konungsríkisins Íslands til að tryggja tímanlegan framgang málsins. Því skyldu ekki aðrar breytingar gerðar á stjórnarskránni frá 1920 en þær sem nauðsynlegar væru til að færa æðsta vald þjóðarinnar inn í landið og að öðru leyti nauðsynlegar til stofnunar lýðveldis.[5] Þótt stefnan væri sett á stjórnskipun undir merkjum lýðveldishugmyndarinnar er ekki hægt að sjá að sú leið hafi verið hugsuð eða útfærð á grundvelli sérstakrar greiningar á fyrirbærinu. Þó má segja að kjarni hugmyndarinnar hafi verið víðtækt samkomulag um að Íslendingar skyldu ekki hafa yfir sér erlendan þjóðhöfðingja og engan arfakonung af neinu tagi. Í greinum og ræðum nokkurra Alþingismanna má einnig sjá þá fullyrðingu að með lýðveldisstofnuninni séu Íslendingar að endurreisa hið frjálsa þjóðveldi sögualdartímans. Það fór þó ekki á milli mála að þeir sem þessu héldu fram voru sér vel þess vitandi að stofnanir þjóðveldisins voru bæði færri, einfaldari og veikari en valdastofnanir nútíma ríkisins og því ekki um annan samanburð að ræða en að stjórnskipun þjóðveldisins gerði ekki ráð fyrir öðru veraldlegu valdi en því sem til var stofnað innanlands og án erfðaréttar.[6]

Þegar leita skyldi fyrirmynda að nýrri stjórnskipun í miðri Seinni heimsstyrjöldinni var ekki um auðugan garð að gresja. Sú staðreynd blasti við að ríkin þrjú sem við töldum okkur í mestum skyldleikum við og höfðum nánust tengsl við voru öll

4 Einar Olgeirsson, Stofnun lýðveldis á Íslandi: Þáttaskipti í sjálfstæðisbaráttu á Íslandi, Andvari (1943), bls. 77–80. Fleiri greinar birtust um sjálfstæðismálið í Andvara á þessum árum s.s. Sjálfstæði Íslands og atburðirnir vorið 1940 eftir Bjarna Benediktsson (1940); Ályktanir Alþingis vorið 1941: um stjórnskipun og sjálfstæði Íslands eftir Bjarna Benediktsson (1941); Sjálfstæðismál Íslendinga eftir Jónas Jónsson (1942); Skilnaður Íslands og Danmerkur eftir Gísla Sveinsson (1943); Sjálfstæðismálið eftir Jörund Brynjólfsson (1943); Vér viljum skilnað — en skilja með sæmd eftir Jón Blöndal (1943).

5 Alþt. 1942 (Fyrra aukaþing) A, bls. 214-15.

6 Bjarni Benediktsson, „Lýðveldi á Íslandi“, ræða flutt á landsfundi Sjálfstæðisflokksins á Þingvöllum 18. júní 1943. Hér Land og lýðveldi, Fyrri hluti, Almenna bókafélagið, Reykjavík 1965; Gísli Sveinsson, „Skilnaður Íslands og Danmerkur“, Andvari (1943), bls. 65-76.

konungsríki þ.e. Danmörk, Noregur og Svíþjóð. Líklega þótti engum fýsilegt að byggja á reynslu Finna sem þó höfðu fram til þessa einir þjóða Norðurlandanna valið stjórnskipun lýðveldis þegar þeir áttu kost á fullu sjálfstæði við skilnaðinn frá Rússlandi 1918. Stjórnmálaástandið hafði verið óstöðug í Finnlandi frá því að landið varð sjálfstætt og í Seinni heimsstyrjöldinni áttu Finnar í langvarandi stríði við Sovétríkin og töpuðu stórum hluta austurhluta landsins.

Sú leið sem Norðmenn völdu við skilnaðinn frá Svíþjóð 1905 virðist heldur ekki hafa hugnast Íslendingum. Norðmenn kusu sér konung í þjóðaratkvæðagreiðslu en gerðu engar grundvallarbreytingar á stjórnskipan ríkisins aðrar en þær að færa þjóðhöfðingjann inn í landið. Þeir skilgreina stjórnskipun sína gjarnan sem „mónarkískt“ lýðveldi með vísun í þjóðaratkvæðagreiðsluna 1905 en konungdómur erfist í Noregi samkvæmt ákvæðum stjórnarskrárinnar.[7] Fyrir Íslendinga horfði málið augljóslega öðruvísi við og því ekki skrýtið þótt staða forseta yrði helsta umræðuefni þings og þjóðar þegar sameiginlegur kóngur Íslands og Danmerkur var kvaddur og komið skyldi á stjórnskipan með lýðveldisfyrirkomulagi.

Það er ljóst af lestri Alþingistíðinda frá umræðum um frumvarp til stjórnskipunar Lýðveldisins Íslands, að það var ekki bara hræðsla þingmanna við að ósætti um leiðina að sjálfu markmiðinu gæti hindrað þá í að losna úr konungssambandinu við Dani sem dró úr áhuga þeirra á að deila um vægi einstakra þátta stjórnarskrárinnar, heldur virtust flestir þeirra sannfærðir um að heildarendurskoðun á stjórnarskránni væri á næsta leyti.[8] Þetta skýrir að verulegu leyti hversu lítið fór fyrir umræðum á Alþingi um stofnanir lýðveldisins og fyrirkomulag þeirra utan embætti forseta Íslands.

Umræðan um embætti forseta fór víða en snérist þó aðalega um rétt hans til að vísa lögum til úrskurðar þjóðarinnar (sjá 26. gr. stjórnarskrárinnar). Við upphaf umræðunnar kom í ljós að mikill þrýstingur var á Alþingismenn með að tryggja það að þjóðin fengi að kjósa sér forseta. Upphafleg tillaga milliþingnefndar miðaði að því að Alþingi kysi forsetann en skýr vilji almennra flokksmanna allra flokka og alls almennings í landinu varð til þess að þingmenn sammæltust um breytingar á ákvæðinu um forsetakjörið.[9] Niðurstaðan varð sú að Alþingi kaus fyrsta forseta lýðveldisins, í beinu framhaldi af því að tilkynnt hafði verið um stofnun lýðveldisins, 17. júní 1944, og þá til eins árs. Að því liðnu átti þjóðin þess kost að ganga til kosninga og kjósa sér forseta. Af kosningu varð þó ekki fyrr en 1952 því enginn bauð sig fram á móti sitjandi forseta, Sveini Björnssyni, í þau tvö skipti sem hann bauð sig fram og var hann því, samkvæmt gildandi lögum, sjálfkjörinn í starfið.

7 Í 1. gr. norsku stjórnarskrárinnar Norges Grunnlov segir: „Konungsríkið Noregur er frjálst, sjálfstætt, ódeilanlegt og óháð ríki. Stjórnarfar þess byggist á takmörkuðu og erfðabundnu konungsvaldi.“

8 Alþt. 1944 B, d. 34 og d. 133.

9 Alþt. 1944 B, d. 25–29.

Stjórnskipuleg staða forseta Íslands

Eins og áður er getið hafa fræðimenn tekist á um það hver staða forsetans er í stjórnskipun lýðveldisins og hvort hann geti með réttu fylgt ákvæði 26. gr. stjórnarskrárinnar og synjað lögum staðfestingar án frekari eftirmála annarra en þeirra að þjóðin gangi til atkvæða um gildi laganna. Eftir þjóðaratkvæðagreiðslu um svokölluð Icesavelög, 6. mars 2010, er þessi deila í sjálfu sér leyst, sem og flest þau deiluefni sem voru til umfjöllunar í greinum viðkomandi fræðimanna. Það eru þó nokkur atriði þessara skrifa sem enn eiga erindi í frekari umræðu um stjórnskipun lýðveldisins. Í stuttu máli sagt þá snérist deilan aðallega um það hvort réttur forsetans samkvæmt 26. gr. væri einungis formlegur eða hvort forsetinn hefði raunverulega heimild til að synja lögum staðfestingar eins og stjórnarskráin gerir ráð fyrir.

Sigurður Líndal hefur í greinarskrifum sínum í Skírni gert ítarlega grein fyrir þeim sjónarmiðum sem fram komu við umræðu um tillögu að stjórnarskrá Lýðveldisins Íslands í byrjun árs 1944 og snéru að stjórnskipulegri stöðu forseta.[10] Í niðurstöðum sínum í fyrri greininni „Stjórnskipuleg staða forseta Íslands“ fullyrðir Sigurður að „Forseti [sé] ekki valdalaust sameiningartákn.“ og að „Þjóðkjör forseta [sé] til marks um að hann gegni í reynd því stjórnskipulega hlutverki sem finna má stoð fyrir í stjórnlögum – það styrki[i] stjórnskipulega stöðu hans.“[11]

Í grein Þórs Vilhjálmssonar, í Afmælisriti Gauks Jörundssonar, „Synjunarvald forsetans“ andmælir hann Sigurði og kemst að þeirri niðurstöðu að um „lagasynjanir gildi hin almenna regla um frumkvæði og meðundirritun ráðherra“. Því beri „Forseta [ ] skylda til þess eftir stjórnarskránni að fallast á tillögu ráðherra um staðfestingu (undirritun) lagafrumvarps sem Alþingi hefur samþykkt.“ Þór bætir því við að „Ef svo ólíklega færi að forsetinn undirritaði ekki, væri sú neitun þýðingarlaus og lögin tækju gildi sem staðfest væru og án þess að þjóðaratkvæðagreiðsla færi fram.“[12]

Í grein sem Þórður Bogason ritar í Afmælisrit til heiðurs Gunnari G. Schram, „og ég staðfesti það með samþykki mínu“ – Forseti Íslands og löggjafarvaldið, tekur hann undir það með Þór að „rökrétt samhengi fáist ekki í reglur stjórnarskrárinnar um lagasetningu nema byggt sé á almennum reglum um frumkvæði og með undirritun ráðherra og ráðherraábyrgð.“ og bætir jafnframt við að „afleiðing þingræðis, eins og það er útfært í íslenskri stjórnskipun, sé sú að persónulegt synjunarvald þjóðhöfðingjans sé eingöngu að nafni til“. Forseta beri því skylda til að staðfesta lög frá Alþingi.“[13]

10 Sigurður Líndal, „Stjórnskipuleg staða forseta Íslands“, Skírnir 166 (haust 1992), bls. 425-39; Sigurður Líndal, „Forseti Íslands og synjunarvald hans“, Skírnir 178 (vor 2004), bls. 203-37.

11 Sigurður Líndal, „Stjórnskipuleg staða forseta Íslands“, Skírnir 166 (haust 1992), bls. 439.

12 Þór Vilhjálmsson, „Synjunarvald forsetans“ í Katrín Jónsdóttir o.fl. (ritstj.), Afmælisrit: Gaukur Jörundsson sextugur (Reykjavík 1994), bls. 635.

13 Þórður Bogason, „ „ og ég staðfesti þau með samþykki mínu“: forseti Íslands og löggjafarvaldið“, í Helgi Magnússon o.fl. (ritstj.), Afmælisrit til heiðurs Gunnari G. Schram sjötugum (Reykjavík 2002), bls. 581.

Þegar grein Sigurðar Líndals í Skírni vorið 2004 er skoðuð, kemur skýrt fram að helsti veikleiki í röksemdafærslu Þórs og Þórðar snýr að því að þeim yfirsést sá munur sem er á hlutverki forsetans sem aðila að framkvæmdavaldinu annars vegar og hins vegar sem aðila að löggjafarvaldinu. Þegar ekki er þörf að deila frekar um rétt forseta í þessu sambandi þá er ekki úr vegi að skoða skrif þeirra Þórs og Þórðar betur í þeim tilgangi að taka stöðuna í fræðilegri umfjöllun um þá þætti stjórnskipunar lýðveldisins sem hér um ræðir. Fyrst ber að geta þess að Þór og Þórði er báðum tíðrætt um þingræðið og telja að persónulegt synjunarvald forsetans stangist á við megin reglur þess. Þeir hafa litla fyrirvara á gildi þingræðishugtaksins og má segja að skortur á fræðilegri greiningu og pólitískri umfjöllun um þingræðið komi berlega í ljós við lestur greina þeirra. Sú takmörkun á valdi Alþingis sem felst í 26. gr. er innan allra marka sem eðlileg geta talist og ljóst að þingheimi hefur verið full ljóst um hvað málið snérist þegar atkvæði voru greidd um frumvarp til laga um stjórnskipun Lýðveldisins.[14]

Hvorki Þór né Þórði virðist hugleikinn sá stjórnskipunarvandi sem fylgt gæti alveldi löggjafarsamkundunnar og verður að telja það sérkennilegt þar sem gagnvirkar hömlur valdastofnana ríkisins eru lykilatriði í stjórnarskrárfestu nútímaríkisins og eru mismunandi útfærslur aðgreiningar og eftirlitshlutverks þeirra að finna í stjórnskipun margra þeirra ríkja sem við viljum geta borið okkur saman við.[15] Í grein sinni „Synjunarvald forsetans“ vitnar Þór Vilhjálmsson til skrifa Björns Þórðarsonar, sem var forsætisráðherra fram á haust 1944, en í bókinni *Alþingi og konungsvaldið* segir Björn að 1944 hafi Alþingi „fengið hömlulaust einræði um lagasetningar.“[16] Björn var mikilvirkur í umræðunni um stjórnarskrárdrögin á Alþingi þótt stjórn hans væri utanþingsstjórn. Ástæðan fyrir nefndri skoðun hans var sú ákvörðun þingsins að láta lög taka strax gildi þótt forseti synjaði þeim staðfestingar í stað þess að láta gildistökuna bíða niðurstöðu allsherjaratkvæðagreiðslu þjóðarinnar. Þór leggur ekki frekar út af þessari skoðun Björns.

Í umræddri grein segir Þór enn fremur að „Ætla mætti, að fræðileg umfjöllun í Danmörku og Noregi kæmi lítt að gagni þegar skýra á 26. gr. stjskr. Þó að réttarkerfin í þessum ríkjum séu náskyld hinu íslenska, er réttarstaða þjóðhöfðingjans þar mótuð af því að þau eru konungsríki. Í stjórnarskrám þeirra eru og ákvæðin um lagasynjanir önnur en hér á landi“. Þór segir nánari athugun þó leiða í ljós „... að margar hugmyndir fræðimanna í grannlöndunum eru áhugaverðar.“ Þór vitnar í fræðimennina Alf Ross, Henrik Zahle og Johs. Andenæs í því skyni að styðja þá skoðun að

14 Alþt. 1944 B, d. 90.

15 Ágúst Þór Árnason, „Stjórnarskrárfesta: grundvöllur lýðræðisins“, Skírnir 173 (haust 1999), bls. 467-79.

16 Þór Vilhjálmsson, „Synjunarvald forsetans“ í Katrín Jónsdóttir o.fl. (ritstj.), Afmælisrit: Gaukur Jörundsson sextugur (Reykjavík 1994), bls. 617.

þjóðhöfðingjum í þingræðisríkjum sé óheimilt að synja lögum staðfestingar „sem ríkisstjórn leggur til að fái staðfestingu.“[17]

Um þetta er það að segja að sá grundvallarmunur sem er á stjórnskipunarlegri stöðu þjóðhöfðingja í lýðveldi og þjóðhöfðingja stjórnarskrárbundins konungsveldis (d. konstitutionelt monarki) gerir allan samanburð af þessu tagi merkingarlausan. Lýðveldi er samkvæmt allri seinni tíma skilgreiningu andstæðan við konungsveldi þegar um er að ræða stöðu þjóðhöfðingja. Það væri líka verið að gera lítið úr verki og fyrirætlunum þeirra sem stóðu að gerð stjórnarskrár Lýðveldisins Íslands og vilja þjóðarinnar ef hægt væri að álykta um lykilatriði í þeirri breytingu sem varð við stofnun lýðveldisins út frá þeirri stjórnskipan sem var verið að hafna. Það sem gæti verið áhugavert að skoða í þessu sambandi, þótt það skipti ekki beint máli í þessum greinarskrifum, er sú fræðilega umræða um stjórnarskrárfestu sem orðið hefur um allan heim á liðnum árum. Ýmislegt bendir til þess að fræðimenn í Noregi og Danmörku hallist nú frekar að því að stjórnarskrárákvæði um synjunarvald séu enn í fullu gildi þótt langt sé um liðið síðan þeim var síðast beitt.[18]

Í áðurnefndri grein Þórðar Bogasonar fellur höfundur í sömu gryfju og Þór þegar kemur að áhrifum íslensk-danskrar stjórnskipunar á lýðveldisstjórnarskrána. Þórður telur réttilega að „Þróun dansks stjórnskipunarréttar [hafi] framan af [haft] mikil áhrif á íslenskan stjórnskipunarrétt“ en fatast flugið þegar hann heldur áfram og fullyrðir að „útilokað [sé] annað en horfa til þess þegar greina þarf til hlítar íslenska stjórnskipun.“ Og áfram heldur Þórður og bætir því við að „ ... þrátt fyrir að grundvallarbreyting hafi átt sér stað 17. júní 1944 á stjórnarformi íslenska ríkisins, þ.e. breyting úr konungdæmi í lýðveldi, varð ekki sambærileg grundvallarbreyting á stjórnskipun þess.“[19] Þórður virðist ekki taka með í reikninginn að sú grundvallarbreyting sem hann talar um felst einmitt í breyttri stjórnskipun og breytir þá engu þótt hann tali um *stjórnarform* íslenska ríkisins í einu orðinu og *stjórnskipun* í hinu. Þegar kemur að þeim ákvæðum stjórnarskrár Lýðveldisins Íslands sem innihéldu nauðsynleg nýmæli til að hægt væri að koma lýðveldinu á fót er ekki um neina forsögu að ræða á og frá og með því augnabliki sem lýðveldið hefur verið stofnað.

Um það er engum blöðum að fletta að mikið verk er óunnið við rannsóknir á áhrifum og tengslum stjórnskipunar Lýðveldisins Íslands við stjórnskipun Konungsríkisins Íslands og ef því er að skipta við stjórnskipun Konungsríkisins Danmerkur. Þó ber að varast að álykta um of út frá ákvæðum stjórnskipunarlaga sem eiga sér rætur sínar í mjög svo sérstæðum jarðvegi stjórnmála og laga einstakrar ríkisheildar við

17 Sama rit, bls. 620-21.

18 Eivind Smith: Konstitusjonelt demokrati, Bergen 2008, bls. 246.

19 Þórður Bogason, „ „ og ég staðfesti þau með samþykki mínu“: forseti Íslands og löggjafarvaldið“, í Helgi Magnússon o.fl. (ritstj.), Afmælisrit til heiðurs Gunnari G. Schram sjötugum (Reykjavík 2002), bls. 558..

greiningu stjórnskipunarákvæða annars slíks fyrirbæris þótt samanburður geti oft komið af gagni ef rétt er að verki staðið og um samanburðarhæfa þætti sé að ræða.

Endurskoðun stjórnarskrárinnar

Í kjölfar synjunar forseta Íslands á svokölluðum fjölmiðlalögum í júní 2004 skipaði forsætisráðherra nefnd til að vinna að endurskoðun stjórnarskrárinnar. Samkvæmt skipunarbréfi nefndarinnar átti endurskoðunin einkum að vera bundin við I., II. og V. kafla stjórnarskrárinnar og þau ákvæði í öðrum köflum hennar sem tengjast sérstaklega ákvæðum þessara þriggja kafla. Af þessu mátti augljóst vera að ætlunin væri að koma fram breytingum á stjórnskipulegri stöðu forsetans en I. og II. kafli stjórnarskrárinnar fjalla að mestu um embætti forsetans og tengsl þess við löggjafarvaldið annars vegar og framkvæmdavaldið hins vegar. Nefndin lauk ekki störfum fyrir Alþingiskosningarnar vorið 2007, eins og til stóð, en hún hefur ekki verið kölluð saman að nýju svo vitað sé.

Í kjölfar hrunsins svokallaða, haustið 2008 kom upp sterk krafa um að boðað yrði til þjóðfundar sem fengi það verkefni að endurskoða stjórnarskrána. Þegar þetta er skrifað er enn óljóst hvað verður í þeim efnum. Það er ekki ætlun greinarhöfundar að fjalla frekar um hugsanlega endurskoðun stjórnarskrárinnar á þessum vettvangi að öðru leyti en því sem snýr að stöðu forsetans að stjórnlögum. Hvað sem öðru líður þá er ósennilegt að lagt verði í þá vegferð að huga að breytingum á stjórnarskránni, við þær aðstæður sem nú ríkja og í ljósi þess sem á undan er gengið, nema með það að markmiði að endurskoða stjórnskipunina í heild sinni. Það er ekki sjálfgefið að niðurstaðan verði fjarri þeirri stjórnskipun sem við búum við í dag. Þá má spyrja hvort rétt væri eða nauðsynlegt að breyta embætti forseta lýðveldisins svo einhverju nemi eða hvort hugsanlegt væri að skjóta frekari stoðum undir stjórnskipulega stöðu þess eins og hún er samkvæmt gildandi ákvæðum.

Við lestur Alþingistíðinda frá umræðunni um stjórnarskrá lýðveldisins síðla vetrar 1944 kemur fram að þingmenn voru ekki á eitt sáttir þegar skilgreina átti valdheimildir forsetans. Þó er erfitt að greina að nokkur hafi talið málskotsréttinn stefna völdum Alþingis í verulega hættu. Þingmenn voru sér þess þó meðvitaðir að óþægindi gætu fylgt forseta sem beitir málskotsréttinum í tíma og ótíma.[20] Ef saga lýðveldisins er skoðuð er erfitt að sjá annað en að forsetum þess hafi öllum verið umhugað um að gegna embætti sínu af trúmennsku við þjóðina og virðingu við valdastofnanir ríkisins. Þegar viðbrögð stjórnmálamanna, almennings og fjölmiðla við þeirri ákvörðun forsetans að synja lagafrumvörpum staðfestingar er skoðuð kemur í ljós að

20 Alþt. 1944 B, d. 111.

hún er viðurkennd sem stjórnskipunarlegur raunveruleiki þótt fjölmargir hafi verið ósáttir við athafnasemi eða réttara sagt athafnaleysi forseta.

Eftir stendur að einu ákvæði stjórnarskrárinnar sem hægt er að segja að séu stjórnskipunarlegt framlag Íslendinga sjálfra til Lýðveldisstofnunarinnar, þ.e. grein 3 (þjóðkjör forseta) og grein 26 (málskotsréttur og þjóðaratkvæði), hafa staðist bæði tímans tönn og álag af viðbrögðum við lagasetningu sem virtist stefna samheldni þjóðarinnar í voða. Í ljósi þessa ætti að gjalda varhug við hugmyndum um að breyta ákvæðum um stjórnskipulega stöðu forsetans svo neinu nemi.

Lýðveldishugmyndin

Hugmyndina um lýðveldi (e. republic) má rekja til hins forna Rómaveldis en hugtakið *res publica*, hið opinbera, táknaði andstæðuna við málefni fjölskyldunnar. Lýðveldi var einnig notað til að lýsa stjórnskipun tímabilsins sem hófst við lok konungsveldis Rómverja 509 f.kr. og lauk með tilkomu Rómverska keisaradæmisins á tímabilinu 44 – 27 f. kr. Rómverska lýðveldið var frá upphafi andstæða konungsveldis og stjórnskipun þess gerði ekki ráð fyrir öðru valdi en því sem átti rót sína í samfélaginu.[21] Við fall Rómar árið 476 e. kr. hvarf hugmyndin um lýðveldislega stjórnskipun af sjónarsviðinu og var fyrst endurvakin í ítölsku borgríkjunum á há- og síð-miðöldum. Það var þó ekki fyrr en með stjórnskipunarlegum nýjungum í Norður-Ameríku og Frakklandi við lok 18. aldar að lýðveldishugmynd nútímans sá dagsins ljós. Á 19. öld fjarar þó aftur undan hugmyndinni, nema þá helst í Frakklandi, og hugmyndafræði frjálshyggju og stjórnarskrárfestu ná yfirhöndinni.[22]

Lýðveldishugmyndin lifnaði aftur við að lokinni fyrri heimsstyrjöldinni. Árið 1919 voru stofnuð lýðveldi í Austurríki, Finnlandi og Þýskalandi. Írar stofnuðu lýðveldi 1937. Þegar Íslendingar stofnuðu lýðveldi 1944 áttu þessi lýðveldi Mið- og Vestur-Evrópu ýmist í stríði við nágranna sína eða nutu takmarkaðs sjálfstæðis. Ljóst er að þetta ástand hafði veruleg áhrif á umræðuna hér á landi. Þegar styrjöldinni lauk var stofnað lýðveldi á Ítalíu 1946 og sama ár var lýðveldið endurreist í Frakklandi (IV. Lýðveldið) og í Vestur-Þýskalandi var Sambandslýðveldið Þýskaland stofnað árið 1949. Austurríki sem hafði verið innlimað í Þýskaland 1938 var hersetið af Bandamönnum fram til 1955. Það varð fullvalda að nýju þegar austurríska lýðveldið var endurreist það sama ár. Síðust til að bætast í hóp þeirra vestrænu ríkja sem tekið hafa upp stjórnskipun lýðveldis voru Portúgal (1974) og Grikkland (1975). Í engu þessara ríkja nema Frakklandi varð mikil umræða um sjálfa lýðveldishugmyndina eða sérstakt form stjórnskipunar lýðveldis annað en að þjóðhöfðingi skyldi kjörin af þjóð eða þingi.

21 Wihelm Henke: Die Republik in Handbuch des Staatsrechts der Bundesrepublik Deutschland, Heidelberg 1987, p. 869 – 879.

22 Ágúst Þór Árnason, „Stjórnarskrárfesta: grundvöllur lýðræðisins“, Skírnir 173 (haust 1999), bls. 467-79.

Tilkoma nýrra lýðvelda í Vestur-Evrópu eftir seinni heimsstyrjöldina og endurreisn annarra virðist ekki hafa haft mikil áhrif á stjórnmálaumræðuna á Íslandi né umræðuna um endurskoðun stjórnarskrárinnar. Það sem virðist hafa vakið íslenska stjórnmálamenn til dáða var sú skondna tilviljun að lýðveldið fyllti þriðja tuginn árið 1974 en það ár voru 1100 ár liðin frá því að byggð hófst í landinu og 100 ár frá því Íslendingar fengu sína fyrstu stjórnarskrá 1874. Árið 1972 var sett á fót enn ein stjórnarskrárnefndin undir forsæti Hannibals Valdimarssonar þáverandi félags-og samgöngumálaráðherra. Sú nefnd lauk ekki störfum en árið 1978 var aftur skipuð nefnd til að semja tillögur að heildarendurskoðun stjórnarskrárinnar. Var nefndin undir forsæti Gunnars Thoroddsen þáverandi þingmanns og síðar forsætisráðherra. Nefndin skilaði af sér tillögum að endurskoðaðri stjórnarskrá 1982 en ekki náðist samkomulag milli stjórnmálaflokkanna um að frumvarp á grundvelli þeirra. Gunnar Thoroddsen, sem var þá forsætisráðherra, bar upp frumvarpið í eigin nafni 1983 en það var aldrei rætt á Alþingi og dagaði þar uppi. Í þeim hugmyndum sem fram komu í greinargerð með frumvarpinu var ekki tekið sérstaklega á lýðveldinu sem slíku.

Lýðveldið, stjórnarskrárfesta og staða forsetans

Eins og fram hefur komið þá lá ekki mikið meira að baki lýðveldishugmynd 20. aldarinnar en að þjóðhöfðinginn væri ekki konungur og hann bæri að kjósa með beinum eða óbeinum hætti í lýðræðislegum kosningum. Það er því ekki annað hægt að segja en að Íslendingar hafi leyst stjórnskipunarvanda lýðveldisstofnunarinnar með sómasamlegum hætti. Það sem á skortir er fagleg og almenn umræða um heildarendurskoðun stjórnarskrárinnar og hvernig koma megi við íslenskri útfærslu á hugmyndum stjórnarskrárfestunnar.[23]

Í grein sinn „The Essence of Constitutionalism“ gerir Dick Howard grein fyrir því sem hann telur að séu forsendur þess að stjórnarskrárfestan fái dafnað í hinu frjálslynda lýðræðisríki (liberal democracy). Í stjórnarskránni, segir hann, þarf að koma skýrt fram að ríkisvaldið á upptök sín hjá þjóðinni (sbr. “We the People of the United States ...“). Um leið er stjórnarskráin ígildi sáttmála þegnanna innbyrðis (samfélagssáttmála) um það hvernig þeir vilja láta stjórna sér (consent of the governed). Valdsvið stjórnvalda þarf að vera afmarkað. Með aðgreiningu valdastofnana og jafnvægi þeirra í millum verður komið í veg fyrir að samþjöppun valds ógni einstaklingsfrelsinu (limited government). Til að tryggja opna umræðu um þjóðfélagsmál verði stjórnvöld að sætta sig við að gagnrýni á störf embættismanna fari út yfir mörk „almenns velsæmis“ og virðist bæði óréttmæt og ósanngjörn (the open society). Virða þurfi reglur réttarríkisins og tryggja skuldbindingargildi stjórnarskrárinnar. Howard

23 Sama rit bls. 475-76.

bætir því við að stjórnarskrárfestan standi og falli með því hvort stjórnvöld sýni helgi mannsins tilhlýðilega virðingu (sanctity of the individual).

Á það hefur verið bent að „Með því að gangast stjórnarskrárfestunni á hönd ákveð[i] lýðræðisríkið að binda hendur stjórnvaldsins þannig að ákveðin tegund mála, sem [koma] til kasta löggjafans eða stjórnarskrárgjafans, [njóti] sérstakrar og vandaðri meðferðar en önnur þingmál.“[24] Við þetta má bæta að stjórnarskrárfestan vísar almennt til takmörkunar á ákvörðunarvaldi hins pólitíska meirihluta en sérstaklega til slíkra takmarkanna sem ákveðinn meirihluti hefur sett sér sjálfviljugur. Ef störf Alþingis í aðdraganda lýðveldisstofnunarinnar eru skoðuð með hliðsjón af þessu er ekki annað hægt að segja en að samkomulagið um 26. gr. stjórnarskrárinnar hafi tengt Lýðveldið Ísland með óyggjandi hætti við grundvallaratriði stjórnarskrárfestunnar. Þetta ber að hafa í huga þegar þjóð og þing sameinast um að endurskoða stjórnarskrána með verðugum hætti.

24 Sama rit bls. 476.

Jakob Þ. Möller
Höfundur flutti erindið á Lögfræðitorgi Háskólans
á Akureyri 24. október 2008

Jakob Þ. Möller er heiðursprófessor við Háskólann á Akureyri. Hann var forseti mannréttindadeildar stjórnlagadómstóls Bosníu og Hersógóvínu 2004-2005, dómari við mannréttindadómstól Bosníu-Hersógóvínu 1996-2003, ritari Mannréttindaráðs Sameinuðu þjóðanna 1995-96 og yfirmaður kærudeildar Mannréttindaskrifstofu Sameinuðu þjóðanna í Genf 1974-96 og lögfræðingur við Mannréttindaskrifstofu Sameinuðu þjóðanna 1971-74. Jakob er lögfræðingur frá Háskóla Íslands, brautskráðist 1967. Hann starfaði sem aðstoðardómari við embætti bæjarfógetans í Keflavík 1967-71. Jakob hefur skrifað fjölda greina um mannréttindi og tengd efni í bækur og tímarit. Hann hefur einnig sinnt kennslu og þjálfun fólks sem unnið hefur að mannréttindamálum í Afríku, Asíu og Evrópu.

Mannréttindayfirlýsing Sameinuðu þjóðanna 60 ára

Ritun mannréttindareglna á sér langa sögu. Í lögbók Hammúrabís konungs í Babýlon, sem meitluð var í stein fyrir meira en 3500 árum og þykir ein hin fyrsta tilraun í sögunni til að koma á réttarkerfi, er að finna ákvæði um mannréttindi. Á steinhellunni, högginni 282 greinum, eru áheit konungs til þjóðarinnar um að réttlæti muni ríkja, illvirkjum rutt úr vegi, svo þeir megi eigi troða á rétti annarra, velmegun verði tryggð og réttur munaðarleysingja og ekkna.

Meira en 1000 árum síðar náði Cýrus II, hinn mikli, yfirráðum í sömu borg, Babýlon, og lagði grunninn að stórveldi Persa. Réttindaskrá sú, sem við hann er kennd, greypt í sívalning árið 539 fyrir Krist, er mögnuð og svo framúrstefnuleg að furðu sætir. Svo mælti Cýrus mikli, ef gripið er niður í mannréttindaskrá hans:

- Ég heiti því að virða trúarbrögð og siði allra þjóða í ríki mínu;
- Ég mun enga þjóð knýja undir ríki mitt, né leyfa neinni þjóð að undiroka aðra;
- Engum mun líðast að sölsa undir sig eigur annarra eða draga til sín án samráðs við eiganda og greiðslu fullra bóta;
- Engum mun líðast að þvinga annan til vinnu eða nýta sér ólaunaða vinnu;
- Öllum er frjálst að velja sér trúarbrögð;
- Hver maður ber ábyrgð á sjálfum sér;
- Engan mann og enga konu má hneppa í ánauð... sá siður skal útlægur ger um víða veröld.

Það er freistandi að velta því fyrir sér, hvort hér hafi verið lagður grunnurinn að seinni tíma þjóðarétti og þjóðréttarvenjum á sviði mannréttinda. Öll þau ákvæði, sem upp voru talin, eiga sér stoð í dag í gildum þjóðréttarheimildum, annað hvort í þjóðréttarsamningum eða þjóðréttarvenjum. Þess má geta, að þremur árum eftir birtingu réttarskrárinnar leysti Cýrus mikli Gyðinga í Babýlon úr ánauð og greiddi för þeirra til Ísraels.

Má skjóta því hér inn, að mér var löngum gjarnt á erlendri grund að stæra mig af því, að Alþingi Íslendinga við Öxará hefði fyrr á öldum verið fyrst löggjafa til að leggja niður þrælahald. Ég vissi ekki að Cýrus hinn mikli hefði orðið fyrri til.

Tíminn leyfir vart að stiklað sé gegnum söguna, en mannrækt, manngöfgi og jafnræði, með hjálpsemi og stuðningi við bágstadda, er sameiginlegt einkenni á siðfræði helstu trúarbragða heims, og í straumum heimspeki fornaldar og miðalda. Þar eiga mannréttindi rætur, á dagleiðinni frá Mesapótamíu til Grikkja og Rómverja, frá hugmyndum um náttúrurétt, að lög og réttur eigi rætur í eðli hlutanna, en ekki samningi; greinar Rómarréttar í *jus civile* fyrir þegna veldisins og *jus gentium* fyrir heimsbyggðina. Cicero hélt því fram að til væri eilíft og óbreytanlegt lögmál, sem allir væru ávallt bundnir af og það lögmál væri sprottið frá Guði. Í kenningum katólsku kirkjunnar á miðöldum voru Guðs lög ofar lögum manna. Heilagur Ágústínus hélt því fram, að mannleg lög, sem færu í bága við lögmál Guðs, væru ógild *ab initio* og heilagur Tómas frá Akvínó var þeirrar skoðunar að lagareglur samfélagsins væru því aðeins gildar að þær samsvöruðu réttri, guðlegri skynsemi. Þá væru þær einnig í samræmi við náttúrulögmálið og náttúruréttinn.

Heimspekingar 18. aldarinnar, upplýsingaaldarinnar, höfnuðu því, að náttúruréttur væri réttur guðlegrar forsjár. Hugo Grotius hafnaði ekki náttúrurétti, en taldi hann sprottinn af mannlegri skynsemi. Hobbes greindi á milli náttúru- og náttúrulegs réttar og grundvallaði hugmyndina um félagslegan samning milli þegnanna og þjóðhöfðingja. John Locke þróaði hugmyndina og ályktaði að samningur þegna og ríkisvalds útheimti samþykki þegnanna og stæðu valdhafar eigi við samninginn, félli hann niður ógildur og stofna þyrfti til nýs félagslegs samnings við nýja valdherra. Jean-Jacques Rousseau þróaði enn frekar þessa fræðikenningu í riti sínu „Félagslegur samningur," ("Social contract") sem út kom 1792. Samkvæmt kenningu hans voru allir menn jafn réttháir, en höfðu undirgengist að lúta vilja meirihlutans (*la volonté générale*). Með þeim vilja voru lögin sett. – Kenningin um mannréttindi snérist á upplýsingaöld um réttinn til lífs, frelsis, mannhelgi og eignarréttar, og var farin að taka á sig mynd, sem Persakonungur, meira en 2000 árum fyrr, hafði boðað. Hefði hann verið í aðstöðu til, hefði hann skrifað undir Sjálfstæðisyfirlýsinguna, 4. júlí 1776, og Virginíuréttarskrá sama árs, vestan Atlantsála, sem og Frönsku Mannrétt-

indayfirlýsinguna 1789, sem hafði alþjóðlega skírskotun. Dagleiðin langa fram að stofnun Sameinuðu þjóðanna var að styttast og er ég nú loks að komast að efninu.

Eftir tvær heimsstyrjaldir 20. aldar voru Sameinuðu þjóðirnar stofnaðar í þeim tilgangi að tryggja heimsfriðinn og friðsamleg samskipti þjóða og til að vinna að framgangi og virðingu fyrir mannréttindum og grundvallarfrelsi sem allir skyldu njóta, karlar og konur, á jafnræðisgrundvelli. Stofnskráin var undirrituð í San Francisco 26. júní 1945 og gekk í gildi 24. október sama ár, þ.e. fyrir réttum 63 árum.

Stofnskráin er fremur fáorð um mannréttindi. Trú á grundvallarmannréttindi, göfgi og virðingu mannsins og jafnan rétt karla og kvenna er áréttuð í aðgangsorðum og í 1. gr., markmiðsgreinni, er því lýst yfir, að framgangur, efling og virðing fyrir mannréttindum sé meðal höfuðmarkmiða stofnunarinnar. Mannréttinda er síðan getið í 13. grein, 55., 56., 62. og 68. grein.

Helzta efnisákvæðið er í 55. grein, sem mælir fyrir um, að Sameinuðu þjóðirnar skuli efla með þjóðum heims virðingu fyrir og framgang (observance) mannréttinda og grundvallarfrelsis fyrir alla án greinarmunar vegna kynþáttar, kynferðis, tungu eða trúar. Samkvæmt 56. grein heita aðildarríkin því að beita sér fyrir því, hvert í sínu lagi og í samvinnu við önnur ríki og Sameinuðu þjóðirnar, að markmið 55. greinar megi takast. Engin tilraun er hins vegar gerð í texta Stofnskrárinnar til að skýra hvað átt sé við með hugtökunum *mannréttindi* og *grundvallarfrelsi*, en hafa ber í huga, að Stofnskráin er gildur þjóðréttarsamningur aðildarríkjanna.

Eins og í öðrum stjórnarskrám (en Stofnskráin er stjórnarskrá Sameinuðu þjóðanna), hefði hún átt að geyma mannréttindakafla. Með það fyrir augum höfðu Kúba, Mexíkó og Panama lagt til á San Francisco ráðstefnunni, að samþykktar yrðu tvær yfirlýsingar, önnur um réttindi og skyldur þjóða, (í enskri þýðingu „Declaration on the Rights and Duties of Nations“), hin um helztu mannréttindi (í enskri þýðingu „Essential Rights of Man“). En ráðstefnan lenti í tímaþröng og hugmyndir ríkjanna þriggja dagaði uppi. Panama greip þá til þess ráðs, að leggja fram tvö þingskjöl á fyrsta þingi Allsherjarþingsins, þ.e. uppkast af yfirlýsingu um „réttindi og skyldur ríkja“ (Rights and duties of States) og uppkast af yfirlýsingu um „grundvallarmannréttindi og frelsi“ (Fundamental Human Rights and Freedom). Allsherjarþingið sendi fyrra skjalið til Alþjóðalaganefndarinnar (International Law Commission) til umfjöllunar, en seinna skjalið til Efnahags- og Félagsmálaráðsins til framsendingar og umfjöllunar í Mannréttindanefndinni (Commission of Human Rights, lögð niður 18. júní 2006).

Þannig stóð málið, þegar mannréttindanefndin hóf sína fyrstu fundarsetu í janúar 1947.

Ég get ekki stillt mig um að nefna tvær aðrar stórmerkilegar tillögur, sem lagðar

voru fyrir nefndina í þessari fundarsetu. Fulltrúi Indlands lagði til að öllum erindum um meint mannréttindabrot yrði vísað til Öryggisráðsins. Ástralía bætti um betur og lagði til að settur yrði á stofn alþjóðlegur mannréttindadómstóll. Tillögur þessar fengu engar undirtektir og eru þær úr sögunni.

Nefndin ákvað að efna til frekari gagnaöflunar, með aðstoð Mannréttindaskrifstofu stofnunarinnar, áður en hún hæfist handa við að semja alþjóðlega mannréttindaskrá (International bill of human rights). Var skrifstofunni m.a. falið að safna saman mannréttindaákvæðum úr stjórnarskrám sem flestra aðildarríkja stofnunarinnar, sem hafa mætti til hliðsjónar. Því var það ekki fyrr en um Jónsmessu 1947, sem nefndarmenn hófust handa við að semja réttarskrána.

Uppkast Mannréttindanefndarinnar var fullbúið ári síðar og var lagt fyrir Efnahags- og Félagsmálaráðið. Ráðið gerði engar breytingar þar á og framsendi uppkastið til meðferðar í þriðju nefnd Allsherjarþingsins. Langar fundarsetur tóku við og ýmsar breytingar gerðar áður en Mannréttindayfirlýsing Sameinuðu þjóðanna var samþykkt af Allsherjarþinginu hinn 10. Desember 1948 í Palais de Chaillot í París. Haldið hefur verið uppá þann dag æ síðan sem Mannréttindadag Sameinuðu þjóðanna. Yfirlýsingin er ekki þjóðréttarsamningur, heldur áskorun beint til allra ríkja og þjóða til eftirbreytni.

Sá lævíslegi áróður er stundum rekinn, að ákvæði Mannréttindayfirlýsingarinnar endurspegli að mestu vestræn gildi, sem ekki eigi sér samsvörun í öðrum heimshlutum. Hvort ætlunin er að gera lítið úr öðrum þjóðum, eða fáfræði, hræsni eða hroka er um að kenna, veit ég ei, en tal af þessum toga er einkar niðurlægjandi fyrir þjóðir annarra heimshluta, menningu þeirra og menningararf. Skoðum aðeins efniviðinn sem hafður var til hliðsjónar og hverjir komu helzt við sögu við samningu yfirlýsingarinnar:

Mannréttindaskrifstofan lagði fyrir Mannréttindanefndina úrdrátt úr 55 stjórnarskrám frá Afríku, Asíu, Suður-Ameríku og frá Austur- og Vestur-Evrópu. Aðeins 14 voru frá vestrænum löndum, 41 frá öðrum heimshlutum. Varla getur talizt að skjalið hafi verið ofhlaðið vestrænu efni. Og hverjir komu helzt við sögu? Formaður Mannréttindanefndarinnar var Eleanor Roosevelt. Enginn hefur borið forsetafrúnni á brýn að hún hafi ekki gætt ýtrustu óhlutdrægni í vandasömu starfi. Leiðtogahæfileikar hennar voru hins vegar rómaðir. Helzti vestræni höfundurinn var franski hugsuðurinn René Cassin, virtur af öllum þeim, sem tóku virkan þátt í samningu yfirlýsingarinnar. Aðrir áberandi meðhöfundar voru P.C. Chang, prófessor í Nanking í Kína; Hernan Santa Cruz, lögmaður frá Chile; Dr. Charles Malik, heimspekiprófessor frá Líbanon (sem jafnframt var formaður þriðju nefndar, en Bodil Begtrup, sendiherra Dana á Íslandi, var varaformaður hennar); Omar Loufti og Osman Obeid frá Egypta-

landi; frú Hansa Mehta, sendiherra Indlands hjá Sameinuðu þjóðunum; Carlos P. Romulo, herforingi frá Filipseyjum; Bogomolov frá Sovétríkjunum og Ribuikar frá Júgóslavíu. Ekkert sérlega vestrænn hópur, en áhrif þeirra allra og margra annarra frá öllum heimshlutum má rekja í fundargerðum Mannréttindanefndarinnar og/eða þriðju nefndar og Allsherjarþingsins sjálfs.

Við tilraunir til að draga úr gildi Mannréttindayfirlýsingarinnar hefur verið gripið til úrræðis sem kallað hefur verið „menningarlega afstæðiskenningin“ (cultural relativity), sem á að merkja, að ákvæðin hafi mismunandi gildi í hinum ýmsu menningarheimum. Gripið er til þessa örþrifaráðs, ef ríki telja of nærri sér höggvið eða vilja skorast undan ábyrgð. Af sama toga spunnar eru raddir um að tími sé til þess kominn að endurskoða ákvæði yfirlýsingarinnar. Það væri fráleitt.

Í fyrsta lagi leikur enginn vafi á því, að mörg ákvæði Mannréttindayfirlýsingarinnar eru skrifleg staðfesting á viðurkenndum þjóðréttarvenjum, og eru réttur til lífs og lima, bann við pyntingum, bann við þrælahaldi og ánauð, réttur allra til viðurkenningar fyrir lögum, jafnræðisreglan og bann við frelsissviptingu af geðþótta á meðal þeirra.

Í öðru lagi hafa ákvæði Mannréttindayfirlýsingarinnar verið staðfest sem bindandi lög í alþjóðlegum og svæðisbundnum þjóðréttarsamningum og yfirlýsingum, svo sem í stjórnarskrá Afríkusambandsins (African Union - áður OAU), the African Charter on Human and People’s Rights, the Arab Charter on Human Rights, the Cairo Islamic Declaration on Human Rights og the Lawasia Statement of Basic Principles of Human Rights, Mannréttindasáttmála Ameríkuríkja og Mannréttindasáttmála Evrópu með viðaukum.

Í þriðja lagi vísa helztu þjóðréttarsamningar beinlínis til Mannréttindayfirlýsingarinnar til áherzlu. Í inngangsorðum Mannréttindasáttmála Evrópu er þess getið, að ríkisstjórnir aðildarríkjanna séu staðráðnar í því að stíga fyrstu skrefin að því marki að tryggja sameiginlega nokkur þeirra réttinda sem greind eru í Mannréttindayfirlýsingu Sameinuðu þjóðanna. Í alþjóðlegum samningum Sameinuðu þjóðanna um borgaraleg og stjórnmálaleg réttindi og um efnahagsleg, félagsleg og menningarleg réttindi segir í aðfaraorðum að aðildarríkin hafi í huga skyldur sínar samkvæmt Stofnskránni og vísa í því sambandi til ákvæða Mannréttindayfirlýsingarinnar.

Auk tilvísunar til Mannréttindayfirlýsingarinnar í aðfaraorðum er einkar athyglisvert efnisákvæði í 4. grein Alþjóðasamnings Sameinuðu þjóðanna um afnám alls kynþáttamisréttis. Þar skuldbinda aðildarríkin sig til þess að grípa til skjótra ráðstafana til að uppræta allan áróður fyrir kynþáttamisrétti eða athæfi sem í felst kynþáttamisrétti, en tillit verði samt sem áður að taka til ákvæða Mannréttindayfirlýsingarinnar þegar gripið er til slíkra ráðstafana. – Og svo mætti lengi telja. Ákvæði

þjóðréttarsamninga eiga rætur í Mannréttindayfirlýsingunni og til hennar er vísað berum orðum í hverjum samningi á fætur öðrum.

En mótbárur eru þrálátar. Er því borið við að þjóðréttarsamningar séu aðeins bindandi fyrir aðildarríkin, en ekki þau ríki, sem standa utan þeirra. Rétt er það – en hve mörg ríki hafa nú þegar gerzt aðilar að helztu mannréttindasamningum Sameinuðu þjóðanna?

- Samningur um réttindi barnsins (CRC): 193 aðildarríki
- Samningur um afnám allrar mismununar gagnvart konum (CEDAW): 185 “
- Alþjóðasamningur um afnám alls kynþáttamisréttis (CERD): 173 “
- Alþjóðasamningur um borgaraleg og stjórnmálaleg réttindi (CCPR): 162 “
- Alþjóðasamningur um efnahagsleg, félagsleg og menningarleg réttindi (CESCR): 159 “
- Samningur gegn pyndingum og annarri grimmilegri, ómannlegri eða vanvirðandi meðferð eða refsingu (CAT): 145 “

Benda ofangreindar tölur ekki til þess, að tími sé til þess kominn, að fallast endanlega á, að meginreglur Mannréttindayfirlýsingarinnar, eins og þær speglast í þjóðréttarsamningum hafi hnattrænt lagagildi, sem hafið er yfir vafa og verði því eigi breytt? Ég hygg að svo sé. – Geta má þess, að aðildarríki Sameinuðu þjóðanna eru 192.

Leyfist mér að geta þess í þessari andrá, að því er stundum haldið fram í ólund, að mannréttindaákvæði hafi þann tilgang helzt að vernda afbrotamenn fyrir samfélaginu. Þessi skoðun virðist sprottin af þeirri bábilju að þjóðhagslega sé rangt að gera því skóna, að þeir sem sakaðir eru um refsivert athæfi, skuli sæta réttlátri málsmeðferð fyrir óvilhöllum og óháðum dómi, og skuli taldir saklausir þar til sekt þeirra er sönnuð samkvæmt lögum. Sérstaklega fer það, að því virðist, í taugarnar á þeim, sem haldnir eru þessari bábilju, að sakborningur njóti vafans, ef sönnun er áfátt. Hætt er við, að réttarríkið myndi riða til falls, ef slakað væri á ákvæðum 10. og 11. greinar í Mannréttindayfirlýsingunni. Í 10. grein segir: „Allir menn skulu vera jafnir fyrir dómstólum og njóta réttlátrar, opinberrar málsmeðferðar fyrir óháðum og óvilhöllum dómi, þegar skorið er úr um rétt þeirra og skyldur eða um meint refsivert athæfi.“ (Ég hef hnikað nokkuð orðalagi frá núverandi íslenskri þýðingu). 11. grein

kveður á um, að „hvern þann mann, sem borinn er sökum um refsivert athæfi, skal saklausan telja, unz sök hans er sönnuð lögfullri sönnun í opnu réttarhaldi, enda hafi honum verið tryggð öll úrræði til varna.“ (Aftur hef ég vikið frá núverandi orðalagi í íslenskri þýðingu).

En efnisákvæði Mannréttindayfirlýsingarinnar snúast ekki bara um réttláta meðferð fyrir dómi. Grunur minn er sá, að æðimörgum hafi láðst að kynna sér efni hennar. Ég sleppi aðfaraorðum, sem eru þrungin af innblæstri og vel þess virði að kynna sér, en leyfi mér, vegna tilefnisins, að renna augum yfir efnisgreinarnar 30. Hver eru þau réttindi og það grundvallarfrelsi sem þær hafa að geyma?:

- að hver maður sé borinn frjáls og jafn öðrum að virðingu og réttindum
- allir skulu njóta þeirra réttinda og þess frjálsræðis, sem yfirlýsingin kveður á um, án mismununar af nokkrum toga
- allir eiga rétt til lífs, frelsis og mannhelgi
- engan má hneppa í ánauð
- enginn skal sæta pyntingum né grimmilegri, ómannlegri eða vanvirðandi meðferð eða refsingu
- allir skulu viðurkenndir fyrir lögum
- allir eru jafnir fyrir lögum og skulu njóta jafnræðis, án mismununar
- allir, sem misgert er við, skulu eiga rétt á úrbótum
- enginn skal sæta handtöku eða frelsisskerðingu, né gerður útlægur, vegna geðþótta ákvarðanna án dóms og laga
- sérhver, sakaður um refsivert athæfi, skal talinn saklaus þar til sekt hans er sönnuð fyrir dómi, enda njóti hann allra úrræða til varna
- eigi má raska heimilisfriði nokkurs manns eða einkahögum, né spilla mannorði hans
- allir skulu frjálsir ferða sinna
- rétt skal öllum að leita og njóta griða gegn ofsóknum
- allir eiga rétt til ríkisfangs
- réttur til stofnunar hjúskapar og fjölskyldu skal öllum tryggður með lögum, án mismununar byggðum á kynþætti eða trúarbrögðum
- eignarréttur skal tryggður
- hugsana- og trúfrelsi skal tryggt
- skoðunar- og tjáningarfrelsi skal tryggt
- félagafrelsi skal tryggt
- stjórnmálaleg réttindi skulu tryggð, sem og jafn réttur til að gegna opinberum störfum

- allir eiga rétt til félagslegs öryggis eftir því sem aðstæður hvers lands leyfa
- vinnuréttur skal öllum tryggður
- öllum ber réttur til hvíldar og afþreyingar (tómstunda)
- öllum ber réttur til lífskjara sem tryggja afkomu hans og fjölskyldu hans
- allir eiga rétt til menntunar
- öllum ber réttur til að taka þátt í menningar- og listalífi samfélagsins.

Þrjár síðustu greinarnar, nr. 28 til 30, eru af öðrum toga. 28. grein kveður á um rétt til samfélagslegs og alþjóðlegs skipulags, sem tryggir að réttinda þeirra og frjálsræðis, sem Mannréttindayfirlýsingin kveður á um, verði í raun að fullu notið.

Sérstaklega ber að gefa 29. grein gaum. 29. grein fjallar um skyldur einstaklinga við samfélagið og þær lögmæltu takmarkanir sem lúta að því að réttindi og frelsi sé ekki misnotað, þannig að réttur og frelsi annarra sé fyrir borð borinn. Þessi grein virðist vera að fá aukið vægi í því alþjóðlega samfélagi sem við lifum í í dag. 30. og síðasta grein Mannréttindayfirlýsingarinnar kveður síðan á um það að hvorki ríki, samtök eða einstaklingar megi aðhafast neitt það, er stefni að því að gera að engu þau réttindi eða frelsi sem Mannréttindayfirlýsingin geymir.

En hvernig hefur varðstaðan um Mannréttindayfirlýsingu Sameinuðu þjóðanna tekizt í 60 ár? Lögin hafa verið samin, og þá á ég við þjóðréttarsamningana og þau eftirlitskerfi sem komið hefur verið á. Það er stórt skref fram á við. Hins vegar blandast engum manni hugur um það, að mannréttindi eru víða fótum troðin. Fregnir berast nær daglega af grófum, meiri háttar, útbreiddum og skipulögðum brotum, jafnvel þjóðflokkahreinsunum og þjóðarmorðum. Hefur þá til einskis verið barizt? Hefur varðstaðan misheppnast? Svo virðist sumum. En lögin eru gild og ákvæði Mannréttindayfirlýsingarinnar eru gild, þótt þau séu þverbrotin. Varðstöðuna um gildi ákvæða Mannréttindayfirlýsingarinnar ber að efla. Mannréttindamenning er, þrátt fyrir allt, takmark sem ber að stefna að. – En hverjir eiga þar hlutverki að gegna?

Í íslenskri þýðingu Mannréttindayfirlýsingarinnar segir svo í aðfaraorðum: „Skulu *einstaklingar* og *yfirvöld* jafnan hafa yfirlýsingu þessa í huga og kappkosta með fræðslu og uppeldi að efla virðingu fyrir réttindum þeim og frjálsræði, sem hér er að stefnt.“ Ég hnýt um orðin *einstaklingar* og *yfirvöld*, en í ensku frumútgáfunni er talað um „every individual and every organ of society...“. Er ekki hugsanlegt að með orðalaginu „every individual and every organ of society,“ sé ekki bara átt við einstaklinga og yfirvöld, heldur sé hér höfðað til sérhvers einstaklings og allra samtaka og stofnana samfélagsins? Með öðrum orðum, auk sérhvers einstaklings sé því beint til höfuðstoða ríkisins, löggjafans, dómsvaldsins og framkvæmdavaldsins, þ.e.

stjórnvalda ríkisins, sem og stjórnenda bæjar- og sveitarfélaga, menntastofnana, samtaka og stofnana atvinnu- og viðskiptalífs, starfsgreinasambanda, frjálsra félagasamtaka, stjórnmálaflokka, trúfélaga, íþróttafélaga, æskulýðsfélaga, góðgerðarfélaga, – að öllum þessum aðilum beri að hafa Mannréttindayfirlýsingu Sameinuðu þjóðanna að leiðarljósi og stuðla eftir megni að framgangi þeirra markmiða, sem hún setur þjóðum öllum. Ég hef tilhneigingu til þess að skilja orðalagið "every organ of society" þannig, að átt sé við innviði og stoðir samfélagsins, þ.e. samfélagskefið allt, hvar í heimi sem er. Markmið Mannréttindayfirlýsingarinnar eiga það skilið að njóta þeirrar varðstöðu.

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Comparative Introduction to Environmental Protection and Biodiversity Conservation in the Antarctic and Arctic Regions

Introduction

The historical isolation of the Polar Regions has eroded during the last century, and the regions are faced with rapid changes due to climate change, globalization, resource utilization, infrastructure expansion, and tourism (UNEP GRID-Arendal, 2009, ACIA 2004, Bastmeijer and van Hengel, 2009 and Koivurova, 2009). These unprecedented and rapid changes pose additional challenges to biodiversity protection and other governance matters.

The aim of this paper is to provide an overview of the state of environmental protection regarding the conservation of biodiversity in the Polar Regions. Brief descriptions of the Polar Regions will be presented along with some of the threats to each region's biodiversity. Polar governance platforms and the legal mechanisms by which these threats are being addressed will be compared with a view to discern-

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ing whether the extant biodiversity protection measures and their implementation in each of the Polar Regions are adequate, comparable and potentially complimentary. Although the Arctic and the Antarctic are unique regions with fundamental differences, it is the author's assertion that there is scope for identifying "best practices" in one region that can be applicable to addressing challenges in the other and that continued collaboration between parties in each region will enhance our abilities to address these challenges.

Biodiversity Conservation

The term "biodiversity conservation" is relatively new and continues to evolve and be refined (Birnie, et al., 2009, 585). According to the 1992 Convention on Biological Diversity (CBD), "biological diversity" means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems" (CBD, 1992). The International Union for the Conservation of Nature and Natural Resources[1] (IUCN) defines biodiversity as "the backbone of all life on Earth" (IUCN, 2009$_a$), and recognizes in the preamble of its statutes that the "conservation of nature and natural resources involves the preservation and management of the living world, the natural environment of humanity, and the earth's renewable natural resources on which rests the foundation of human civilization" (IUCN, 1948). Although environmental protection efforts in the Polar Regions predate the term "biodiversity conservation"[2], these efforts are very closely related to the preservation of the biodiversity and associated ecosystem functions within the polar ecosystems.

The Arctic Region

Maritime areas dominate the Arctic Region (Rothwell, 1996), and coastal sovereign states ring the Arctic Ocean. The region encompasses nearly 30 million square kilometers, and contains many terrestrial and marine biomes.[3] Despite the demanding and harsh environment, the Arctic has been inhabited for thousands of years, and approximately 4 million people live there today (Bogoyavlenskiy and Siggner,

1 The IUCN, also known as the International Union for the Conservation of Nature, is the world's largest and oldest conservation organization. They have been working towards conservation in the Polar Regions for decades. For example, the Polar Bear Research Group had its initial meetings in 1965. See http://pbsg.npolar.no/en/index.html.

2 Sir Douglas Mawson campaigned for protected status for sub-Antarctic Macquarie Island following the 1911 – 1914 Australasian Antarctic Expedition, and the first of many layers of protected status was granted following the 1919 establishment of his scientific research station on the island (WCMC, 2008). *"[The elephant seal] was so hunted in all its haunts that its extermination was now only a matter of a few years…[while] the King penguins have been so enormously reduced by slaughter that their final extinction is threatened."* – Sir Douglas Mawson (Commonwealth of Australia, 2009).

3 Including, inter alia, tundra, boreal forests, wetlands, sea ice, coastal and benthic habitats (CAFF, 2002 and Kurvits, et al., 2006).

2004). Current environmental threats (which threaten human health and security as well as biodiversity) include increased exploitation of renewable and non-renewable resources, increased infrastructure pressures, pollutants and climate change impacts[4] (Nowlan, 2001, ACIA, 2004). Increased anthropogenic disturbances on the biodiversity of the Arctic are detrimental to the ecosystem functions on which many people depend for livelihoods and many species vitally depend (Ahlenius, et al., 2005 and Koivurova, 2009). The key findings of the 2004 Arctic Climate Impact Assessment and the 2001 GLOBIO Report of the United Nations Environment Programme illustrate the severity of current and anticipated impacts in the Arctic as well as the global implications of these changes (ACIA, 2004 and UNEP, 2001).

The Antarctic Region

The Antarctic Polar Front and the Subtropical Front climatically isolate the Antarctic region, and living conditions are harsh and unique (McGonigal and Woodworth, 2002). The 14 million square kilometer continent of Antarctica is 98% covered by an ice sheet and is ringed by the Southern Ocean, an area in which terrestrial habitats are scarce (Nowlan, 2001 and CIA, 2009); therefore, the bulk of Antarctic biodiversity inhabits the marine and coastal environments (Rothwell, 1996). There are no indigenous populations of humans in Antarctica, however a number of permanent research stations facilitate year-round scientific research for a transient population of scientists and support personnel[5]. Human activities in the last two hundred years – namely resource exploitation[6], exploration, scientific research and tourism – have profoundly impacted the once-isolated ecosystems of Antarctica (Tin, et al., 2008 and Shirihai, 2002). As with the Arctic, the isolation that kept anthropogenically-introduced threats from the ecosystems is now a factor contributing to the vulnerability of the native biota. As stated in 1999 by Simon Upton, previous Environmental Minister to New Zealand, "Antarctica[s] greatest defence was isolation but that isolation has evaporated rapidly" (Bastmeijer, 2000).

International Legal Regime Relating to Environmental Challenges of the Polar Regions

The many and complex environmental challenges in the Polar Regions are intercon-

4 Including rising temperatures, declining sea ice, glacial reduction, sea level rise, coastal erosion, thawing permafrost, shifts in habitats of plant and animal species, introduced species (ACIA, 2004).

5 See the UNEP-GRID Arendal map of Antarctic research stations at http://maps.grida.no/go/graphic/major-research-stations-in-antarctica.

6 Historically, sealers and whalers opened vast areas of the Southern Ocean to further navigation by mapping the area in their search for the whale, seal and penguin stocks, which they exploited to the brink of extinction (McGonigal and Woodworth, 2002). Today illegal, unregulated and unreported fishing is a threat to the marine ecosystem of the Southern Ocean (CCAMLR, 2009a).

nected with other legal challenges. In addition to biodiversity conservation, legal challenges common to both the Antarctic and the Arctic include sovereignty issues[7] and renewable and non-renewable resource matters[8]. The scope, complexity and interrelated nature of these challenges impact the ability of the parties involved to develop and implement good governance practices and policies for the Polar Regions in the face of social and environmental transition.

There are a number of instruments of international law that are relevant to the Polar Regions, some of which are global in scope and some which are specific to the Polar Regions (Birnie, et al., 2009 and Rothwell, D., 1996). Instruments of international law that are of particular importance to biodiversity conservation in the Polar Regions include:

- 1946 International Convention on the Regulation of Whaling[9]
- 1959 Antarctic Treaty
  - 1972 Convention for the Conservation of Antarctic Seals
  - 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)
  - 1991 Protocol on Environmental Protection to the Antarctic Treaty
- 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat
- 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage
- 1972 Convention on International Trade in Endangered Species of Fauna and Flora (CITES)
- 1979 Berne Convention on the Conservation of European Wild Life and Natural Habitats
- 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals
- 1982 United Nations Law of the Sea Convention (UNCLOS)[10]

7 Article IV of the Antarctic Treaty addressed sovereignty claims by asserting that "No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica" (Antarctic Treaty, 1959), however it did not fully resolve sovereignty issues, but only "froze" claims.

8 Additional issues pertinent to the Arctic include governance participation, dispute resolution, the development of sustainable autonomy and self-determination for indigenous peoples, and the foreseen expansion of various industries such as shipping and oil and gas extraction (Young and Einarsson, 2004).

9 In 1994, the International Whaling Commission (IWC) adopted the Southern Ocean Sanctuary in which commercial whaling activities are prohibited (IWC, 2009 and CIA, 2009). The first Antarctic sanctuary was established by the IWC in 1938. The boundary of the Southern Ocean Sanctuary fluctuates between 40˚S - 60˚S around the continent of Antarctica. The Indian Ocean Sanctuary extends to 55˚S, meeting the boundary of the Southern Ocean Sanctuary. These sanctuaries are reviewed every ten years. See http://www.iwcoffice.org/conservation/sanctuaries.htm.

10 Of especial relevance to biodiversity conservation in the Polar Regions are Articles 63-67 of UNCLOS regarding regulation of exploitation to ensure species conservation and defining the rights and duties for the parties, Article 77 for exploitation and conservation responsibility as regarding sedimentary species, and Article 116 for rights and responsibilities in regards to the living resources of the high seas (UNCLOS, 1982).

- 1991 Agreement on the Conservation of small cetaceans of the Baltic, North East Atlantic, Irish and North Seas (the ASCOBNS)
- 1991 Convention on Environmental Impact Assessment in a Transboundary Context
- 1992 United Nations Framework Convention on Climate Change
  - 1998 Kyoto Protocol to the United Nations Framework Convention on Climate Change (not in force)
- 1992 Convention on Biological Diversity (CBD)
  - 2001 CBD Protocol on Biosafety
- 1992 Rio Declaration on Environment and Development[11]

As seen by the instruments listed above, international attention to biodiversity loss and other environmental challenges has grown during the last decades, and awareness of these issues in the Polar Regions has likewise increased. A number of intergovernmental and international organizations have responded by the development of dedicated research programs. The United Nations Environmental Programme (UNEP) has defined six areas for priority of focus regarding global environmental challenges: Climate Change, Disasters and Conflicts, Ecosystem Management, Environmental Governance, Harmful Substances and Resource Efficiency (UNEP, 2009). Each of these focal areas has relevance to the Polar Regions. Two UN programs that address environmental protection and impacts in the Polar Regions are UNEP GLOBIO in *Mapping Human Impacts on the Biosphere: Polar Regions* (UNEP, 2001) and UNEP GRID-Arendal in the *Polar* work (UNEP GRID-Arendal, 2009). The IUCN likewise addresses polar issues within their main areas of focus, which are "Biodiversity, Climate Change, Energy, Livelihoods and Green Economy" (IUCN, 2009_a) by the development of an Arctic Strategy (IUCN, 2005), and the work of the Antarctic Thematic Group of the IUCN Commission on Ecosystem Management IUCN, 2009_d).

Regional Platforms for Addressing Environmental Challenges of the Polar Regions

On a regional scale, the methods and platforms for addressing environmental legal challenges specific to the Polar Regions differ between the Arctic and the Antarctic.

11 Articles of significant relevance to environmental protection and the conservation of biodiversity in the Polar Regions include Articles 2 (rights and responsibilities regarding resource exploitation and environmental impacts), 3 (noting the dependence of future generations on the environment), 4 (mandating that environmental protection shall be an integral component of development), 7 (calling for cooperation in environmental protection and restoration), 10 (advocating multi-level participation in dealing with environmental issues), 11 (calling for enactment of environmental legislation), 15 (advocating a precautionary approach), 17 (concerning Environmental Impact Assessment) and 19 (calling for early notification of trans-boundary environmental impacts) (Rio Declaration, 1992).

The legal challenges of the Antarctic Region are primarily addressed through the Antarctic Treaty System, and the legal challenges of the Arctic Region are addressed in various fora, from the international and intergovernmental level[12] down to the local community level.

Antarctic Forum for Addressing Environmental Legal Challenges

The Antarctic Treaty of 1959 established the area south of 60° as a zone reserved for peaceful cooperation and scientific research (Antarctic Treaty, 1959). The Antarctic Treaty and subsequent agreements developed by the Antarctic Treaty Consultative Parties have formed the Antarctic Treaty System (ATS) (U.S. State Department, 2002). These agreements consist of:

- 1964 Agreed Measures for the Conservation of Antarctic Fauna and Flora
- 1972 Convention for the Conservation of Antarctic Seals
- 1980 Convention on the Conservation of Antarctic Marine Living Resources
- 1991 Protocol on Environmental Protection to the Antarctic Treaty (The Madrid Protocol)[13]
- 2004 Agreement on the Conservation of Albatrosses and Petrels (ATS, 2009).

As seen by the legal instruments of the ATS, environmental protection has been a consistent theme in the cooperative participation of the Parties to the Treaty.

Within the ATS, the annual Antarctic Treaty Consultative Meetings (ATCM) serve as the platform for policy makers to address legal, operational and environmental matters. Consultative and Non-consultative Parties meet with representatives from the Committee on Environmental Protection (CEP) and the Scientific Committee on Antarctic Research (SCAR) in addition to experts from international and non-governmental organizations[14] (ATCM XXXII, 2009). Both binding and non-binding legal instruments are developed within the ATS. Current legal challenges which pertain directly and indirectly to environmental protection can be seen in the items on the Agenda of the 2009 ATCM XXXII:

12 Including the Arctic Council, the United Nations International Maritime Organization (IMO), International Labor Organization (ILO), the Economic and Social Council (ECOSOC)), the Council of Nordic Ministers, the Council of the Baltic Sea States and the Barents Euro-Arctic Council.

13 The Madrid Protocol, which designated Antarctica as a natural reserve, was preceded by the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA), however CRAMRA is not in force due to great controversy concerning resource extraction and associated environmental impacts (Birnie, et al., 2009).

14 The attendees of the Thirty-second ATCM in 2009 included the Secretariat of the Agreement on the Conservation of Albatrosses and Petrels (ACAP), the Secretariat of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), the International Maritime Organization (IMO), the Intergovernmental Oceanographic Commission (IOC), the United Nations Environment Programme (UNEP), the World Meteorological Organization (WMO), the International Union for the Conservation of Nature (IUCN), the International Programme Office for the International Polar Year (IPY-IPO), the World Hydrographic Organization (IHO), the World Tourism Organization (WTO) and the two permanent observers to the ATCMS, the International Association of Antarctica Tour Operators (IAATO) and the Antarctic and Southern Ocean Coalition (ASOC) (ATCM XXXII, 2009).

- "Liability: Implementation of Decision 1 (2005) [The ratification and implementation of the Annex on Liability to the Environmental Protocol to the Antarctic Treaty]
- Safety and Operations in Antarctica
- The International Polar Year 2007 - 2008
- Tourism and other non-governmental activities in the Antarctic Treaty Area
- Inspections under the Antarctic Treaty and the Environmental Protocol
- Science Issues, Including Climate-related Research, Scientific Co-operation and Facilitation
- Operational Issues
- Educational Issues
- Exchange of Information
- Bioprospecting in Antarctica" (ATS, 2009).

The emphasis on environmental protection as a challenge (legal and operational) to the Antarctic Region is illustrated by the sixteen legally-binding Measures adopted at ATCM XXXII regarding Antarctic Specially Protected Areas, Antarctic Specially Managed Areas, tourism and the Protocol on Environmental Protection; the eight internal organizational Decisions made regarding climate change, tourism and the Committee for Environmental Protection (CEP); and the nine hortatory Resolutions made regarding environmental protection, vulnerable species protection and regulations for shipping, tourism and bioprospecting (ATCM XXXII, 2009).

Arctic Fora for Addressing Environmental Legal Challenges

Unlike the ATS in the Antarctic Region, there is no single, comprehensive platform for addressing environmental stewardship issues and developing binding legal instruments in the Arctic. Ultimately, the legal authority in the Arctic lies with the eight Arctic states. However, Arctic governments and citizens have been proactive in working to develop organizations that promote regional and international cooperation[15] and others that assert under-recognized rights and expectations for governance participation in various areas, including conservation[16]. Additionally, there has been a great deal of effort to define extant or potential applicability of various existing instruments of international law to Arctic governance and environmental stewardship[17] (Bankes, 2004 and Birnie, et al., 2009).

15 Such as the Nordic Council of Ministers, the Barents Euro-Arctic Council and the Arctic Council (Nordic Council, 2009; BEAC, 2009 and Arctic Council, 2009a).

16 Including indigenous organizations such as the Inuit Circumpolar Council (ICC) and the Russian Association of the Indigenous Peoples of the North (RAIPON) (ICC, 2009 and RAIPON, 2009).

17 For example, the UN Convention on the Law of the Sea, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the ILO Convention 169 on Indigenous and Tribal Peoples, the Convention on Biological Diversity and the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

The framework for environmental protection in the Arctic is furnished by the domestic policies of the eight sovereign Arctic states[18] (Nowlan, 2001). A number of bilateral environmental agreements between Arctic states and multiple non-binding agreements have been created (Birnie, et al., 2009 and Rothwell, D., 1996). Arctic cooperation initiatives[19], global treaties and environmental movements have had increasing influence on domestic policies (Nowlan, 2001). This influence can be seen within the context of national Arctic strategy documents and regional policy directives. The order of issues as addressed in Arctic policy documents of the eight Arctic States that currently have Northern or Arctic Strategies/Policies are depicted in Table 1, and the order of issues as addressed in the EU Northern Dimension and the Chairman's Conclusions from the NATO Seminar on Security Prospects in the High North are shown in Table 2.

These tables demonstrate that environmental protection and biodiversity conservation are among the priorities of these Arctic stakeholders[20]; however, it is also visible that they are ranked and prioritized differently amongst other areas demanding allocation of resources in order to address the varied challenges of governance. Cooperation and collaboration amongst Arctic stakeholders has been one method of addressing these challenges.

The Arctic Environmental Protection Strategy (AEPS) was a major collaborative work that brought about the creation of the Arctic Council. Ministers of the eight Arctic States worked in conjunction with the Inuit Circumpolar Council, the Nordic Saami Council, the USSR Association of Small Peoples of the North, the Federal Republic of Germany, Poland, the United Kingdom, the UN Economic Commission for Europe, the UN Environment Program and the International Arctic Science Committee (Arctic Council, 2009$_a$). The multi-level cooperation in the creation of the AEPS demonstrates the gravity of the legal challenge of environmental protection as regarded by parties from the international level to the local level. The Arctic Council was established "as a high level intergovernmental forum to provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic Indigenous communities and other Arctic inhabitants

18 The eight Arctic states, Canada, Denmark (in relation to Greenland), Finland, Iceland, Norway, the Russian Federation, Sweden and the United States of America, are all members of the Arctic Council.

19 Cooperative governance initiatives for the Arctic include the Arctic Council, the Northern Forum, the Standing Committee of Parliamentarians of the Arctic Region, the Nordic Council, the Barents Euro-Arctic Council, the International Arctic Science Committee, the Saami Council, the Inuit Circumpolar Council, the North Atlantic Marine Mammal Commission, the Standing Committee of Parliamentarians of the Arctic Region and the North American Treaty Organization.

20 For purposes of comparison, the priorities of other Arctic stakeholders such as the indigenous peoples of the Arctic can be found in documents such as 2009 Anchorage Declaration from the Indigenous Peoples' Global Summit on Climate Change (http://www.indigenoussummit.com/servlet/content/declaration.html) and the Statement by Representatives of Arctic Indigenous Peoples Organizations on the Occasion of the Eleventh Conference of Parties to the United Nations Framework Convention on Climate Change (http://www.arcticathabaskancouncil.com/uploads/Ep/3S/Ep3STgpeAY_5OL8H3nGNAQ/UNFCCCCOP11.pdf).

Canada	Denmark Greenland Faroe Islands	Iceland	Norway	Russian Federation[1]	USA
Arctic Sovereignty	Foreign Policy and Cooperation, Development of Greenland Authorities, EU Northern Dimension	International Cooperation	Foreign Policy Including Energy and Military Matters	Strategic Resource Base for Social & Economic Development: Resource Utilization	National Security
Protecting Environmental Heritage	Arctic Peoples' Rights, Traditional Knowledge	Security and Defense, including Military, Terrorism and Tourism Shipping	**Research:** Marine, Petroleum, **Environment,** Climate, Polar	Maintenance of Peace and Collaboration; Security and Protection	**Environmental Protection and Conservation of Biological Resources**
Promoting Social and Economic Development	Energy and Oil/ Gas/ Mineral Extraction	Natural Resource Utilization and **Environmental Protection**	Indigenous Peoples Issues	Economy of and **Protection of Ecological Systems**	Sustainable Natural Resource Management and Economic Development
Improving and Devolving Northern Governance	Utilization of Flora and Fauna	Transportation: Shipping	Cultural Cooperation	Northern Seaway Utilization	International Cooperation between Arctic Nations
	Protection of Environment, **Pollution, Climate and Weather**	Culture and People: Cooperation with Indigenous Peoples	Climate Change, **Pollution,** Integrated Management of Northern Seas	Knowledge Maintenance and Exchange	Indigenous Community Involvement in Decision-making Process
	Emergency Response, SAR	Science and Monitoring, Climate Change	**Management and Utilization of Marine Resources,** **IUU Fishing**	Research Commitment	**Scientific Monitoring and Research on Local, Regional and Global Environmental Issues**
	Economy and Trade		Petroleum Activities Maritime Transport	International Collaboration	
	Human Health Research		Business Development		

Table 1. Legal Issues in Order as Addressed by Arctic States in their Arctic Strategies and Policies[1] (Environmental Issues in bold type) Adapted from Bailes, 2009; Canada, 2009; Denmark, 2008, Iceland, 2009; Norway, 2007; Russia, 2008; and USA, 2009.

1 The State Policy of the Russian Federation in the Arctic contains both national interests and objectives, and both are provided in the table.

2 Finland is expected to release its Arctic Policy very soon. Arctic environment, economy and international politics were the three main topics of the September 29 2009 speech, *A New Arctic Era and Finland's Arctic Policy*, by Finland's Minister of Foreign Affairs, Alexander Stubb, at the 20th Anniversary Seminar of the Arctic Centre. See internet for full text: http://formin.finland.fi/public/default.aspx?contentId=171839&nodeId=15145. An Arctic policy or strategy for Sweden could not be located, however climate change, Arctic shipping and oil and gas extraction were the three main topics addressed by the Swedish Delegation to the April 2009 ministerial meeting of the Arctic Council. See online for press release: http://www.sweden.gov.se/sb/d/11858/a/125432.

on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic" (Arctic Council, 2009_a). The Arctic Council is a consensus-based organization that does not coordinate Arctic policy apart from areas agreed-upon in advance (Koivurova and Molenaar, 2008), and it cannot produce any legally binding regulations. The Arctic Council was originally intended to be a minor forum for limited discussion (Grímsson, 2009), however there has been significant environmental protection and conservation work accomplished by the Arctic Council's Permanent Working Groups (The Arctic Contaminants Action Pro-

EU	NATO
Economic Cooperation	**Environment**
Freedom, Security and Justice	Accidents
External Security: Civil Protection	Economic and Energy Security
Research, Education and Culture	Rule of Law
Environment, Nuclear Safety and Natural Resources	International Cooperation
Social Welfare and Healthcare	NATO Security Interests
	Situational Awareness, Surveillance

Table 2. Order of Legal Issues Addressed by the European Union and the North Atlantic Treaty Organization. (Environmental Issues in bold type) Adapted from Bailes, 2009; EU, 2006; and NATO, 2009.

Tromsø Declaration on the Occasion of the Sixth Ministerial Meeting of the Arctic Council	**Conference Statement of the Eighth Conference of Parliamentarians of the Arctic Region**
Climate Change in the Arctic	Human Health in the Arctic
The International Polar Year and its Legacy	Arctic Maritime Policy for Safety at Sea
The Arctic Marine Environment	**Adaptation to Climate Change**
Human Health and Development	Development of Renewable Energy Resources
Energy Contaminants	
Biodiversity	

Table 3. Main Themes Addressed in the Tromsø Declaration and the Conference Statement of the Eigth Conference of Parliamentarians of the Arctic Region. (Environmental Issues in bold type) Adapted from Arctic Council, 2009b and CPAR, 2008.

gram; The Arctic Monitoring and Assessment Programme; Conservation of Arctic Flora and Fauna; Emergency Prevention, Preparedness and Response; Protection of the Arctic Marine Environment; and the Sustainable Development Working Group) under the auspices of the Arctic Council (Koivurova, 2009).

The priorities of challenges addressed by the Arctic Council are discernable by the establishment of the six Working Groups. Additionally, the main themes of the Tromsø Declaration and the Conference Statement of the Eighth Conference of Parliamentarians of the Arctic Region demonstrate the attention being paid to addressing environmental legal challenges in the Arctic (see Table 3).

Conservation Initiatives in the Polar Regions

Two brief examples are provided as an introduction to biodiversity conservation efforts in the Polar Regions: the work of CAFF in the Arctic and the work of the CCAMLR Commission in the Antarctic.

Conservation of Arctic Flora and Fauna

The main goals for the Permanent Working Group of the Arctic Council, Conservation of Arctic Flora and Fauna (CAFF), are:

- "To conserve Arctic flora and fauna, their diversity and their habitats
- To protect the Arctic ecosystems from threats
- To improve conservation management laws, regulations and practices for the Arctic
- To integrate the Arctic interests into global conservation fora" (CAFF, 1997).

In 1993, CAFF was tasked with suggesting ways to facilitate cooperation among Arctic Council countries in advancing the goals of the CBD, and the Biological Diversity Task Force was created in response to this (CAFF, 1997). The 1997 Cooperative Strategy for the Conservation of Biological Diversity in the Arctic Region defined the following action areas to meet CAFF's conservation goals:

- Identification of biological diversity
- Monitoring of biological diversity
- Species and habitat conservation and restoration
- Identification of threats
- Environmental Impact Assessments
- Protected Areas
- Conservation outside protected areas
- Collaborative research

- Sustainable use of biological resources
- Sectoral and cross-sectoral integration
- Data and information sharing
- Harmonization of legislation
- Indigenous and other local people
- Education and public awareness

Many of these action areas have found expression in subsequent years. The Circumpolar Biodiversity Monitoring Program (CBMP) was developed by CAFF in 2002 as directed by the Arctic Council[21] (Zöckler and Harrison, 2004), and it is one of the two main mechanisms by which CAFF is responding to the calling action items of the Co-operative Strategy for the Conservation of Biological Diversity in the Arctic Region. The second main mechanism is the Arctic Biodiversity Assessment (ABA), which was endorsed by the Arctic Council in 2006 to "synthesize and assess the status and trends of biological diversity in the Arctic" (CAFF, 2008).

Convention on the Conservation of Antarctic Marine Living Resources

The primary objective of CCAMLR is the conservation of Antarctic marine living resources[22] in the area covered by the Convention[23]. There is close cooperation in the implementation of CCAMLR and the Protocol on Environmental Protection to the Antarctic Treaty[24], the Convention on the Conservation of Antarctic Seals, and the International Convention for the Regulation of Whaling. The Commission regulates resource utilization activities[25] by the creation of policies governing the Treaty area (Stokke and Vidas, 1996). Assessments by the Working Group on Ecosystem Monitoring and Management, the Working Group on Fish Stock Assessment and CCAMLR's Scientific Committee form the basis of these regulatory measures, and they are developed in accordance with an ecosystem approach to management that acknowledges the interlinked and complex ecological systems of the Southern Ocean biomes. The conservation principles that guide CCAMLR's management include:

- "Prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment […]
- Maintenance of the ecological relationships between harvested, dependent and

21 There is collaboration between the CBMP and the Arctic Monitoring and Assessment Programme as well as collaboration between the CBMP and various species conservation networks (Zöckler and Harrison, 2004).

22 Including 'rational use'

23 See http://www.ccamlr.org/pu/E/conv/map.htm for Treaty area.

24 Namely Annex II: Conservation of Antarctic Flora and Fauna.

25 CCAMLR regulates the utilization of all Antarctic marine living resources other than cetaceans and seals, which are regulated respectively by the International Convention on the Regulation of Whaling and the Convention for the Conservation of Antarctic Seals.

related populations of Antarctic marine living resources and the restoration of depleted populations […]

- Prevention of change(s) or minimisation of the risk of change(s) in the marine ecosystem which are not potentially reversible over two or three decades, taking into account the state of available knowledge of the direct and indirect impact of harvesting, the effect of the introduction of alien species, the effects of associated activities on the marine ecosystem and of the effects of environmental changes, with the aim of making possible the sustained conservation of Antarctic marine living resources" (CCAMLR$_b$, 2009: Pp. 3).

The incorporation of these principles into CCAMLR's management practices is integral to CCAMLR's aim to follow both a precautionary approach and an ecosystem approach to regulation of the harvesting of Antarctic marine living resources. In keeping with these principles, the CCAMLR Ecosystem Monitoring Program (CEMP) was created in 1984 to "(i) detect and record significant changes in critical components of the ecosystem, to serve as a basis for the conservation of Antarctic marine living resources and (ii) to distinguish between changes due to harvesting of commercial species and changes due to environmental variability, both physical and biological" (cited to www.ccamlr.org in Berkman, 2002). The Working Group on Ecosystem Monitoring and Management coordinates the efforts of the CEMP. Standard methods for data collection and analysis were first established in 1987 and revised in 1997. Via these methods, CCAMLR has collected and analyzed ecosystem data from numerous sites, species and other parameters (CCAMLR, 2004).

The CCAMLR Catch Documentation Scheme (CDS) for Antarctic toothfish is an example of application of an ecosystem approach and a precautionary approach to governance of living resources. The CDS aims to "(i) monitor the international toothfish trade (ii) identify the origins of toothfish imports or exports, (iii) determine whether toothfish catches have been made in accordance with CCAMLR conservation measures, and (iv) gather catch data for the scientific evaluation of toothfish stocks" (CCAMLR, 2009$_b$). This program promotes responsible fishing techniques and accountability in the commercial fishing industry. The CDS operates in conjunction with CCAMLR monitoring programs for krill, finfish and sea birds in order to provide a more comprehensive view of the ecosystem health. Additionally, survey data (from fisheries and fishery-independent surveys) and strategic modeling are methods utilized by the CCAMLR Scientific Committee to assess ecosystem status (CCAMLR, 2009$_c$).

Cooperation, Best Practices and Applicability to Other Polar Regions

The examples of CAFF and CCAMLR are representative of the high caliber work that is being undertaken for the conservation of biodiversity in the Polar Regions, and they represent the work of only two organizations amongst many that are dedicating resources to environmental protection. Despite the work of CAFF, CCAMLR and similar organizations – and despite the amount of environmental legislation in place – there are many difficulties in implementing biodiversity conservation policies. One such challenge is that many of the benefits[26] of the protected areas are difficult to quantify in economic terms, and this leads to under-representation of environmental protection considerations in resource or land-use policy development (CAFF, 2002).

In facing these challenges, biodiversity conservation methods from each Polar Region have met with both successes and challenges, and the efforts in each region could be well served by expanding the cooperation that is evident in conservation efforts to include collaboration between experts from the opposite Polar Region. For example, elements of the precautionary ecosystem management system utilized by the CCAMLR could be complimentary to the implementation of marine protected area management measures in the Arctic[27], and the methods used in CAFF's Arctic Biodiversity Assessment could be employed in the current work on assessing Antarctic biodiversity[28]. These are only two of many areas of biodiversity conservation work that could potentially benefit from a collaborative sharing of expertise and experience.

There have been some recent developments in bipolar cooperation that are promising. The International Arctic Science Committee (IASC) and the Scientific Committee on Antarctic Research (SCAR) have collaborated to form the SCAR/IASC Bipolar Action Group (BipAG), which "explores options for effective cooperation concerning bipolar issues and the development of mechanisms to nurture the International Polar Year legacy" (SCAR/IASC, 2009). Additionally, the first joint session of the ATCM and the Arctic Council was convened at the 32nd ATCM in April 2009 (U.S. State Department, 2009), and this meeting could foretell more collaboration on different levels, thereby strengthening the environmental protection and conservation that we are able to afford to the vulnerable Polar Regions.

26 "Arctic protected areas provide a greater array of global, national, local and community benefits for nature and for people than is generally realized" (CAFF, 2002, pp. 1). The Arctic Human Development Report highlights many of the benefits of natural ecological systems in relation to Arctic indigenous peoples, and many of the maps and graphics of UNEP GRID-Arendal depict the global environmental importance of the Arctic, for example the *Major Global Bird Migration Routes to the Arctic* map found at http://maps.grida.no/go/graphic/major-global-bird-migration-routes-to-the-arctic.

27 For example, in the similar work of the Arctic Council Working Group, Protection of the Arctic Marine Environment (PAME) (http://www.pame.is/ecosystem-approach) and in CAFF's Circumpolar Protected Area Network (http://web.arcticportal.org/en/caff/cpan).

28 For example, in the SCAR Evolution and Biodiversity project (http://www.eba.aq/) and the Census of Antarctic Marine Life project (http://www.caml.aq/).

Flexibility to adapt to new environmental challenges, including climate change and anthropogenic pressures (ACIA, 2004), as well as to dynamic social values (AHDR, 2004) is imperative for effective environmental protection. The threats facing the Polar Regions are immense in scope and require urgent response. As seen in the work of the Arctic Council Working Groups and the ATS, the cooperative and collaborative efforts in each of the Polar Regions have yielded a certain amount of success in addressing some of the challenges through the development of management and conservation techniques. Further cooperation will aid in identifying which "best practices" are applicable to the other Polar Regions as well as increasing the adaptive capacity of the governance platforms to respond to challenges.

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Public Memory and the Rule of Law in the Age of Globalization and the Internet: Lessons from Iceland

In this essay I would like to offer some reflections on the cultural foundations of the liberal rule of law by considering how the economic and constitutional changes associated with globalization are accompanied by changes in popular legal-historical consciousness. I would like to consider, that is, how the public memory of law changes in tandem with the linked processes of market liberalization and the consolidation of national sovereignties into ever-larger units of trans-national governance, such as the European Union. I also would like to consider how our contemporary digital culture, the culture of the internet, both facilitates those changes to public legal memory and offers potential solutions to the challenges they pose to liberal government. To put it simply, I believe that the way the public understands the legal past is changing as a consequence of changes in our economic and constitutional arrangements, and that the internet at once furthers this transformation and provides possible ways to address its dangers. While I will be speaking about these issues partly in an abstract and theoretical way, I would like to focus my discussion on a

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single, vivid example of legal and cultural change, namely contemporary Iceland, where my wife and I lived for five months in 2009, and especially on the relation between Icelanders and the legal history of their harsh, beautiful landscape. Iceland is often seen an outlier in European legal history, as a somewhat unusual case, long severed, even more than other Nordic nations, from some of the main lines of continental development. In contrast, I would like to suggest that the changing relation between Icelanders and their landscape offers an exceptionally clear window onto legal-cultural changes taking place today throughout Europe, indeed throughout the world—and, most important, that these changes reveal the pressing need for liberal constitutionalists to attend even more carefully to the cultural preconditions of their legal aspirations. We often think of modern law as something cut off from culture, a distinct realm of social experience best understood as a strictly formal body of rules, but I think that we do so at our ever-increasing peril, and that the case of contemporary Iceland shows why.

Let me begin by stating a basic proposition about the relation between law and culture, that legal ideas are not simply the province of specialists. As an academic field, law can be esoteric and technical, and because its principles are abstract, they often seem far removed from everyday life. But the technical rules and esoteric ideas one studies in law school or puts into practice as a lawyer are only a part of what creates a legal system, what makes it work, especially for those who live under its formal rules. Alongside the knowledge of specialists, everyday people also possess ideas about the law, and they express those ideas in their daily lives. The American historian Robert Westbrook has written that people *live* political theory.[1] One might equally say that people live a theory of law. In the songs they sing, the games they play, the art they produce, the books and dramas they consume, in the way they gesture and move their bodies, as much as in their explicit attitudes toward courts and legislatures, people express a legal consciousness—and that popular consciousness of law is as important to the maintenance of the legal system as the formal rules and professional institutions on which the system runs.[2] Popular legal consciousness is central to the legitimacy of the legal system as judged from within, it is vital to the consent people offer to its authority, and it lies behind the terms through which people contest its power. I exaggerate only slightly when I say that when historians look back on our era, the television drama *Law & Order* should be seen as in some respects as consequential a legal document as the Lisbon Treaty. That is because law

1 See Robert B. Westbrook, *Why We Fought: Forging American Obligations in World War II* (Washington: Smithsonian Institution Press, 2004).

2 For a discussion of "the interconnectedness of law and things," see John Brigham, *Material Law: A Jurisprudence of What's Real* (Philadelphia: Temple University Press, 2009).

and the state reside, they have palpable existence, not in formal legal texts but in the human heart and in the everyday culture that produces our inner life.[3]

An essential component of popular legal consciousness is the popular consciousness of legal history. Of course, to most people the history of law seems like an arcane field. And, indeed, much of what legal historians do is uncover changes in legal ideas and practices that are quite arcane. How did our principles of contract, they might ask, develop from traditions that allowed a court to award a plaintiff monetary damages for having suffered a physical injury? But, like law, legal history isn't simply the sole possession of specialist academics. This is particularly true of my own country, the United States, where law plays a central role in the construction of national civic identity.[4] Most Americans have a very lively sense, for instance, of how our constitution was created in the late eighteenth century and how it has changed over time. Many Americans, similarly, hold surprisingly complex ideas about the history of the legal profession (usually about its ethical decline). Or consider the case of Germany, where there is a widespread appreciation well beyond the academic world of the constitutional challenges that faced the Weimar Republic. Like Americans, though for different historical reasons, everyday Germans are continually engaged with ideas about how their law has evolved. Significantly, this legal-historical engagement is present not simply in popular political conversation, in analytic discussion, but instead exists throughout German culture. Is there a view of legal history contained, for instance, within the architecture of government buildings, such as the glass dome of the *Bundestag*?[5] Of course there is. The dome of the German parliament is an intentional materialization of legal-historical consciousness. Popular books and magazines, public monuments, courtroom architecture, painting, television, rock music—all of these are potential sources for a *Volkskunde des Rechtsgeschichtlichebewusstseins*, a folklore, and more generally a cultural anthropology, of legal historical consciousness.[6]

Legal historical consciousness itself has a history. The way legal history is understood changes over time, and how everyday people view their legal past is part of a larger historical story of legal, political, and economic transformation. I believe the way popular legal consciousness has changed over time in modern western societies is especially interesting, because in liberal societies popular legal consciousness per-

3 See Mark S. Weiner, *Americans Without Law: The Racial Boundaries of Citizenship* (New York: New York University Press, 2006), 4-5.

4 For my own consideration of the centrality of law to American identity and its significance for minority group inclusion, see Mark S. Weiner, *Black Trials: Citizenship from the Beginnings of Slavery to the End of Caste* (New York: Alfred A. Knopf, 2004), 9-13.

5 For images, see http://www.bundestag.de/htdocs_e/artandhistory/architecture/index.jsp (German parliament web site).

6 For an early discussion of *rechtliche Volkskunde*, see Hermann Baltl, "Folklore Research and Legal History in the German Language Area," *Journal of the Folklore Institute* 5 (1) (June 1968), 142-151.

forms a unique symbolic role in constructing a *Rechtsgenossenschaft*—community, or a fellowship, of law. We can put the matter in general terms like this. At the heart of modern liberal society lies a deep conflict between the individual and the community, a tension between principles of *Gemeinschaft* and *Gesellschaft*. The legal and constitutional arrangements of liberal societies, especially their principles of individual rights, enable a historically unprecedented degree of individual freedom. And yet this freedom not only lies in tension with the demands of the larger community but, as anyone who has read Dostoyevsky knows, freedom itself can be felt as a kind of unfreedom. This is a tension which, among other things, fuels popular anti-Americanism, because the United States is so closely associated with liberalizing social and economic development and its principles of meritocratic competition. Popular legal consciousness helps resolve this conflict by linking the individualistic order of the present with the stable community and traditions of the legal past. It provides a sense of unwavering and persistent value within a world of flux. Put in anthropological terms drawn from the work of Claude Lévi-Strauss, popular legal-historical consciousness provides a symbolic resolution to an actual social contradiction.[7] It is one element of the cultural resolution of tensions that cannot be resolved in the material world of social relations.

The Landscape of Icelandic Legal Memory: At Once Empty and Full

With that in mind, let me turn now to the case of modern Iceland. I would like to focus specifically on the changes taking place in the way Icelanders remember the law of the middle ages, which has tremendous symbolic importance for the country, and especially the way they relate to that history as it is embodied in their landscape. It would be easy to drive around Iceland and see simply a pristine world of natural beauty. That may be how the valleys and hills and geothermal pools are typically viewed from the outside. But from the inside, within Iceland itself, the landscape doesn't stand outside of culture—it isn't simply Nature with a capital *N*—but instead is filled with rich historical, and especially legal-historical, associations. The Icelandic landscape is a popular book about the legal past, or at least it has been.

Let me explain, first by providing a bit of background. Iceland was settled in about the year 870 by people from western Norway.[8] This was the same Germanic group who gave the world the Vikings, those fierce maritime raiders who entered the historical stage in the late eighth century as they pillaged Europe in their swift,

7 Claude Lévi-Strauss, *Structural Anthropology* (New York: Doubleday, 1967). See also Fredric Jameson, *The Political Unconscious: Narrative as a Socially Symbolic Act* (Ithaca: Cornell University Press, 1981).

8 For a general survey of Icelandic history in English, see Gunnar Karlsson, *The History of Iceland* (Minneapolis: The University of Minnesota Press, 2000).

deadly longboats. On their way north, many of the Norwegian settlers stopped in Scotland and Ireland to gather wives and slaves, and so the genetic inheritance of modern Icelanders is also partly Celtic. Before the settlement, Iceland had been uninhabited except by a few hardy Irish monks, but the *landnám* or, roughly, "land grab," was quite rapid, and most of the arable land on the island was claimed within sixty years. When the settlement era closed in about 930, Iceland had a population of between twenty- and thirty-five thousand people. Nearly all modern Icelanders (there are about 320,000 of them) are descended from these first settlers, and this is a source of great pride. Indeed, pride in medieval history generally is one of the leitmotivs of contemporary Icelandic culture.[9]

At the center of Icelandic historical memory is the extraordinary national park known as Þingvellir, or the assembly (*þing*) plains (*vellir*)—a materialization of legal-historical consciousness just as much as the glass dome of the *Bundestag*. The government of medieval Iceland was quite unusual. It centered around the leadership of about three dozen chieftains, known as *goðar* or, in the singular, *goði* (the term comes from the Norse *goð*, or god).[10] Each *goði* was the leader of a group of yeoman farmers, or *bóndi*, under whom lived various dependents, including women and slaves. Beginning in 930, the chieftains began to gather together for two weeks each year in a grand assembly and social and cultural event known as the Alþingi. If you're looking for a contemporary analogy, the gathering can be compared to the various tribal *jirgas* or the *loya jirga* of Pashtun Afghanistan (which, like medieval Iceland, is a remote, ethnically homogeneous culture with a proud warrior tradition and a society governed by principles of honor and shame). The Alþingi was a gathering of leading men and their followers. In addition to the extraordinary splendor of its surroundings, what is exceptional about the Alþingi from the perspective of medieval Europe is that it boasted a complex legislative and judicial apparatus, and it offered an occasion for the island's great leaders to engage in very sophisticated feats of legal arbitration and dispute resolution, but the Alþingi entirely lacked an executive office. There was no king (or, in modern terms, no president—no single

9 For brief overviews of the post-war political context of that pride, see Gísli Sigurðsson et. al., "'Bring the manuscripts home!'," in Gísli Sigurðsson and Vésteiin Ólason, eds., *The Manuscripts of Iceland* (Reykjavik: Árni Magnússon Institute in Iceland, 2004), 171-77; Jón Karl Helgason, "Parliament, sagas and the twentieth century," in Sigurðsson and Ólason, *The Manuscripts of Iceland*, 145-55; and Helgi Þorlákkson, "Myth," in Byndís Sverrisdóttir, ed., *Reykjavík* 871 +/- 2: *Landnámssýningin, The Settlement Exhibition*, 68-85 (Reykjavik: Reykjavik City Museum, n.d.). For a more general historical and anthropological perspective, see Kirsten Hastrup, "Creating a nation: nationalist trends in 18th and 19th century Iceland," *Island of Anthropology: studies in past and present Iceland* (Odense: Odense University Press, 1990), 103-22 and "Finding oneself in history: the cultural construction of Icelandic identity," *Island of Anthropology*, 123-35.

10 For the best discussion in English of the settlement and "commonwealth" era, see the classic Jón Jóhannesson, *Íslendinga Saga: A History of the Old Icelandic Commonewalth*, trans. Haraldur Bessason (Winnipeg: The University of Manitoba Press, 2006 [1974]). On the legal background, see also William Ian Miller, *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland* (Chicago: The University of Chicago Press, 1990) and Lester Bernhardt Orfield, *The Growth of Scandinavian Law* (Philadelphia: The University of Pennsylvania Press, 1953), 89-100.

leader of the government). It is in this respect that Icelandic legal history differs critically from that of the western Germanic societies that emerged from the bands of warriors described by the great Roman historian Tacitus to develop strong, centralized authority, as we see for instance under the Merovingian Franks or, in England, under great Anglo-Saxon leaders such as King Alfred. (The Icelanders, descended from Norwegians, are a northern Germanic people, whereas the English, or Anglo-Saxons, are a western Germanic people; in historical perspective, they share a cultural lineage.)

The Alþingi lasted for well over three hundred years, disbanding only in the wake of the bloody civil war known as the Sturlunga Era, which ended in 1262/4, when Iceland came under the authority of the Norwegian crown. But while the Alþingi as a gathering of medieval Germanic chieftains may have come to an end in practice, it remained very much alive in memory. When the Icelandic independence movement began to flower in the nineteenth century, its leaders looked back to the Alþingi as the symbolic heart of their identity as a nation. This institution of law and the extraordinary landscape in which it convened became the central icon for an independent Icelandic national consciousness. Naturally, the Alþingi wasn't celebrated for its specifically medieval character. In the political context of the independence movement, this gathering of Germanic chieftains came to be described as a "national parliament" or, still more misleadingly, as an early democratic government. It was neither, of course (those are fantasies of the nineteenth century), but the structure of the Alþingi as an assembly without an executive paved the way for the popular misinterpretation—and for the continued significance of the site for Icelanders today. An image of Þingvellir appeared on some of the earliest notes of the National Bank of Iceland, and its cliffs are intentionally echoed in the architecture of its modern supreme court.[11] Icelanders are surrounded by icons celebrating a nineteenth-century vision of their medieval past.

Þingvellir is the most important historical monument in Iceland, and because of its overwhelming symbolic significance, it would be easy to miss something that distinguishes it from legal heritage sites in most other modern nations: it is almost entirely devoid of human structures or artifacts. It is simply an empty piece of land on a wind-swept landscape. That's because in Iceland's punishing climate, built structures don't last long. It is this fact about Þingvellir, however, that makes it entirely characteristic of Icelandic legal memory, because Icelandic legal history is contained within the landscape itself. Let me describe three other monuments to the

11 On bank notes, see *Opinber gjaldmiðill á Íslandi: Útfáfa og auðkenni íslenskra seðla og myntar* [*The Currency of Iceland: Issues and features of Icelandic notes and coins*] (Rejkjavík: Myntsafn, Seðlabanka Og Þóðminjasafns, 2002 [1997]), 39, 45; on Supreme Court architecture, see http://www.haestirettur.is/baeklingur/page3 (Supreme Court web site).

Icelandic legal past—three other places that seem empty but are, in fact, filled with legal memory—to explain what I mean.[12]

In the middle ages, the great assembly plain at Þingvellir was not the only place where Icelanders gathered to discuss and administer their laws. The island was divided into districts, each of which had a local assembly with its own meeting site.[13] Consider, for example, the site near the charming village of Stykkishólmur, on the western coast, close as well to the mountain of Helgafell, a site sacred to medieval Icelanders. This place also is called Þingvellir: the former *regional* assembly plain. It is an important, well-known historical place, yet unlike the national assembly site it is not preserved or even signed for what it is. There is no historical marker there at all. It is simply a sheep farm. But the site is highlighted in the *Icelandic Road Atlas,* a popular driving guide for Icelanders, which in its description of the place draws special attention to a rock said to be where criminals were "broken"—and where, supposedly, blood can still be seen in the stone—so this wasn't a place to miss.[14] My wife and I found the place by driving down a long gravel road at the tip of a bucolic peninsula, finally coming upon a small, unassuming one-story house. Our knock at the door was cheerily answered by the owner's granddaughter, who told us that she grew up with stories of what had happened at her grandmother's home "in ancient times." She gave us permission to wander about the farm, and she pointed out the execution stone in question, making sure that we didn't confuse it with another rock that usually distracts the attention of visiting tourists. For the visitor, the place has a powerful atmosphere of apparent remoteness (I say apparent, because it may be physically remote, but it is not so in a cultural sense, though it would be easy as a foreign tourist to conflate the two).

More seemingly remote still is a site in the north of the country, on the spectacular peninsula of Vatnsnes. The place is called Breiðabólsstaður, and it contains a horse farm, a small, beautiful church, and a parsonage. We found it by driving about twenty miles down a narrow gravel road and then following a long, even narrower gravel driveway about half a mile toward some imposing hills. The owner of the youth hostel in which we stayed that night, which also was a working farm, described

12 For a recent effort to make the presence of the past visible in the Icelandic landscape to outsiders, see the work of the Iceland Saga Trail Association: http://www.sagatrail.is/ (Saga Trail Association web site). For notable regional efforts, see the Settlement Center in Borgarnes, www.landnam.is (Settlement Center web site), and the Saga Center in Hvolsvöllur, http://www.njala.is/en/default.asp (Saga Center web site; see "Surrounding Sites" under "Njáls Saga"). For a discussion of the ritual features of Icelandic tourism, see Magnús Einarsson, "The Wandering Semioticians: Tourism and the Image of Modern Iceland," in Gísli Pálsson and E. Paul Durrenberger, eds., *Images of Contemporary Iceland: Everyday Lives and Global Contexts* (Iowa City: University of Iowa Press, 1996), 215-35.

13 For a helpful map, see "Assembly Sites," in *The Sagas of Icelanders: A Selection*, pref. Jane Smiley, intro. Robert Kellogg (New York: Penguin Books, 2001), 727.

14 *Icelandic Road Atlas*, Eleventh Edition, orig. text Steindór Steindórsson frá Hlöðum, eds. Eva Hálfdanardóttir and Örlygur Hálfdanarson (Icelandic Geological Survey and Vegahandbókin Ehf., 2007), 263.

Breiðabólsstaður in respectful, if not indeed hushed, reverential tones as a pilgrimage site for Icelandic lawyers, who regularly travel there to picnic and commune with the spirit of one of its former residents. That resident is Hafliði Másson, the great law-speaker who played a central role in producing the first written collection of Icelandic law in 1117, which we know through a thirteenth-century collection of laws known as the *Grágás*, or Grey Goose. A stone pillar placed at the bottom of the driveway in 1974 indicates the existence of the site, but one could very easily overlook the marker, as we did the first time, and we were looking for the farm! Otherwise, the farm and church and parsonage seem to be merely what they are, without any further historical reference. Breiðabólsstaður is just a part of the landscape—and yet it is a landscape whose importance for the history of Icelandic law that people know well.

A final example can be found in the imposing waterfalls of Goðafoss, among the greatest waterfalls of the country. The historical significance of the falls lies plainly in their name, which means roughly "falls of the gods." In 999/1000, Iceland peaceably converted to Christianity through a grand legal arbitration among the chieftains at the Alþingi. (The link between the assembly site and Christianity is embodied in a diorama at a popular museum called the Saga Center, where the assembly activities of Þingvellir are depicted taking place beneath a large crucifix on the wall.) The law of the country was said to be splitting into two—in part, as suggested by Jón Jóhannesson's great work *Íslendinga Saga,* because rival Christian and heathen chieftains repudiated the institutional ceremonies of the other group, refusing to recognize that their adversaries exercised lawful authority—thereby creating a deep rift in the country's legal and political apparatus.[15] A compromise was reached through the leadership of a lawspeaker named Þorgeir, who, though himself a pagan, decided that the people of the island would collectively convert to Christianity.[16] This was a legal decision that lay the course for all of Iceland's political and cultural history. After it was made, Þorgeir returned to his farm and, to demonstrate his commitment to the new order he had announced, threw his own statutes of pagan gods into the great falls near his home, to show that he would abide by the edict he had announced—hence the name of this extraordinary natural feature. Goðafoss, then, is not simply a site of powerful natural beauty. The falls are touchstones of legal memory.

In all these legal historical sites, then, what one finds is a near-total lack of material artifacts alongside a very rich tradition of popular remembrance. The girl who grew up with memories of what happened at this Þingvellir in olden times, the hushed and

15 Jóhannesson, *Íslendiga Saga*, 131.

16 For the classic original accounts, see *Njáls Saga* (New York: Penguin Books, 2001), sec. 104-5, and Ari Þorgilsson (fróði), *Book of the Icelanders (Íslendingabók)*, ed. and trans. Halldór Hermannsson (New York: Kraus Reprint, 1966).

reverential tones of a farmer describing the farm of Hafliði Másson, the very name *Goðafoss*—all exhibit the characteristic way legal memory is held in Iceland, where legal-historical consciousness is as pervasive as it is in the United States or Germany, but rooted in the landscape itself through the folk memory of law. It is this memory, I believe, that is about to change in Iceland under the pressures of globalization and its new constitutional arrangements. And because how liberal societies remember their legal past is an essential element of the cultural foundation of the rule of law in the present, the reconfiguration of the relationship between Icelanders and their landscape of legal memory is something I believe is worth carefully observing. Let me now describe one way in which Icelandic memory is changing in response to contemporary economic and constitutional developments, and then consider the role the internet might play in addressing the challenges posed by this transformation in consciousness.

One Challenge to Traditional Memory: Modern Archeology

There are three key moments in the history of Icelandic legal memory, each of which is associated with a new or emerging economic and constitutional arrangement and a historically distinctive communications technology. The first moment is the early to mid-thirteenth century. This was the period of civil war in Iceland, a struggle for preeminent authority between the chieftains which ultimately transformed Iceland's constitutional arrangements by bringing it under the formal power of the Norwegian crown. Ironically, this also was the age of the greatest literary output in Icelandic history, and it saw the writing of a variety of histories and historical fictions about the age of Viking settlement some three centuries earlier. These include, especially, the sagas, the greatest body of European vernacular prose literature of the era, through which we possess a great deal of what we know about the workings of early Icelandic law. These texts were powerfully shaped by the context of the fraught social and political relations between Icelanders and Norway, including the desire of Icelanders to establish a proud and noble ancestry as their own independent society broke down and was incorporated into the kingdom they had left generations before. The production of those texts was made possible by the distinctive manuscript culture of thirteenth-century Europe, that now-romantic world in which monks and scribes wrote in common workshops in Latin script on illuminated parchments—and which understood both the nature of authorship and the relation between fact and fiction very differently from how we do today.[17]

17 For a discussion of the sagas, legal texts, and manuscript culture, see Patricia Pires Boulhosa, *Kings of Norway: Mediaeval Sagas and Legal Texts* (Leiden: Brill, 2005).

The second key moment in the history of Icelandic legal memory is the nineteenth century. This was the period of the Icelandic independence movement, when Icelanders sought a new relation with the Danish kingdom which had succeeded the Norwegian crown in its authority over the island, a search that ultimately resulted in the new constitutional arrangements created haltingly in 1918, when Iceland was declared a sovereign state within the Danish kingdom, and then finally in 1944, when Iceland became fully independent. The independence movement was characterized by a tremendous interest in the medieval past, and its greatest figure, Jón Sigurðsson, was an editor of medieval texts and friend of the great German scholar Konrad Maurer. Of special interest within the independence movement was the desire, both in scholarship and in popular culture, to establish the historical authenticity of the thirteenth-century saga literature and to reveal its traces in the contemporary Icelandic landscape.[18] The intellectual technology of this cultural and intellectual effort was the cheaply printed book and pamphlet.

Today we are witnessing a third key moment in Icelandic legal historical memory, and it is shaped by the economic forces of globalization and the culture of the digital age as much as the writing of the sagas was rooted in the changing relations between Iceland and Norway in the thirteenth century and in the culture of medieval manuscript production. This emerging historical consciousness, I believe, is fundamentally changing the relation between Icelanders and their landscape by destroying many of the folk myths about the past which served as the cultural foundation of the Icelandic state. This isn't the place to dwell upon how and in what way Iceland has entered the global economic system, but as with so much in Iceland, the cause probably can ultimately be traced to fish. The modern Icelandic economy was built on the growth of fisheries in the early twentieth century, but the fishing market is notoriously volatile and subject to external shocks, which is why the country long experienced hyperinflation. It was the effort to combat this volatility which guided the nation's recent liberalizing market reforms; which drove the nation to join the European Economic Area in 1992, thereby integrating Iceland more tightly into continental economic and intellectual networks; and which eventually—though this is in great dispute in Iceland today—may cause it to become a player in European constitutional integration by becoming a member of the EU.[19]

In this economic and constitutional context, there are two forms of memory charac-

18 See Adolf Friðriksson, *Sagas and Popular Antiquarianism in Icelandic Archeology* (Brookfield, VT: Ashgate Publishing Company, 1994).

19 For the Icelandic constitutional background, including the nation's continuing deferral of constitutional reform, see Ágúst Þór Árnason, "The History of the Icelandic Constitution and Some Economic Issues," in Lise Lyck, ed., *Constitutional and Economic Space of the Small Nordic Jurisdictions: The Aaland Islands, the Faroe Islands, Greenland, Iceland* (Stockholm: NordREFO, 1997), 48-72.

teristic of the country today, and at first glance they would seem to stand in opposition to each other: on one hand, international, critical scientific knowledge and, on the other, ironic tourist kitsch. Here I would like to consider only the first, focusing especially on modern archeology, leaving a discussion of tourism for another occasion, though I think it is equally important. Both are part of the same historical moment, two sides of a coin, together transforming the relation between Icelanders, the landscape, and their past.[20] Modern archeology is revising that relationship by supplanting folk knowledge with academic knowledge created by specialists.[21] Consider, for instance, one of the foundational legal stories about Icelandic nationhood, the settlement of the island in the ninth century. There is a popular view, widely-held among Icelanders, of the settlement as a rather neat, orderly legal process. That view is drawn from the thirteenth-century *Landnámabók*, or *Book of Settlements*, which describes in extraordinary detail who the original settlers of Iceland were and where on the island they made their homes.[22] The depiction of the settlement as a rational process of immigration and land-claiming served the interests of powerful thirteenth-century chieftains who sought to legitimate their rule through legal history, and the myth they created stuck—and it stuck not simply regarding specific land claims made during the settlement, but more generally in the view of the settlement as almost deliberative in nature. A well-known statue in Akureyri of the first settlers of the area, Helgi the Lean and Thorunn Hyrna, is one of many images that put this view into pictorial form: a happy Viking nuclear family in a ship, smiling merrily on their way to a new land.

What archaeologists find when they examine the earliest farms in Iceland, however—what the young archeologists revolutionizing their field, with extensive training abroad, find—suggests a very different story about the history of property in medieval Iceland. Consider this example. At present, Icelandic archeologists have uncovered about 330 burial sites in about 160 separate places across the island. The majority of these burials are located a good distance away from settlement-era farmsteads, at the edge of ancient property lines between farms and near well-worn medieval paths. Individuals in these graves are taller than those in the other graves archeologists have found on the island, and the graves include more women and children. Then there are graves of a somewhat different type, a minority of the finds,

20 For a telling musical document of the transformation of the relation between Icelanders and their economic past whose gentle, loving humor is driven by a culture of market liberalization, see "Sonur hafsins" [The Song of the Sea], words and music, Arngrímur Arnarsson, performed by Ljótu Hálfvitarnir: http://www.ljotuhalfvitarnir.is/video (band web site).

21 See generally Friðriksson, *Sagas and Popular Antiquarianism*. On the Archeological Heritage Agency, established in 2001, see http://www.fornleifavernd.is. For a popular documentation of some archeological finds whose bold design highlights how the Icelandic cultural negotiation of the relation between the present and the past is undertaken through a symbolic encounter with death, see *Dauðir rísa ... Úr Gröfum Skriðuklaustrus* (Egilsstaðir: Minjasafn Austurlands [East Iceland Heritage Museum], 2009).

22 *Landnámabók: The Book of Settlements*, trans. and intro. Hermann Pálsson and Paul Edwards (Manitoba: University of Manitoba Press, 2006 [1972]). The following discussion is drawn from the author's conversation with Adolf Friðriksson, 5 August 2009.

which are located quite near the main farm activity areas and away from ancient paths. Analysis of bones suggests that individuals in these graves were poorer, and that they lived a much more difficult life. What explains the difference? The settlement myth would suggest that the more distant burials, those along property-line boundaries, were older. Popular memory would reason from the account in the *Landnámabók* that when a family settled in a new place they buried their kin at the border of the property they claimed, in part to assert their ownership of the land. Graves would serve as markers of possession. What modern archaeologists have found, however, is in fact contrary to this hypothesis: the distant graves are more recent—the graves containing smaller, poor men were dug earlier during Icelandic colonization. And this fact about burial sites points to a very different view of the settlement: not the neat, orderly process depicted both in *Landnámubók* and in popular culture, but rather something potentially "savage."[23] Picture not a smiling Viking family on a boat making its new home, but instead a group of hard men living in deep anxiety, huddled near their farmsteads, not wishing to venture far beyond the immediate area where they had settled. Imagine the settling of land as guided by force, uncertainty, and fear. This was a place, after all, where every social institution had to be established anew. Only later, once property was secure, could graves be put at its margins. A similar process surely took place not only regarding property but regarding law more generally. Iceland is a remote, harsh land, and law didn't emerge there under rational, deliberative conditions.

The story of archeology and settlement-era land claims suggests how modern, scientific knowledge promises to overturn folkloric conceptions of the legal meaning of the land, including the legal meaning of the assembly sites we visited on our trip. Icelanders have long told each other stories about the landscape they so intimately inhabit—a landscape which, because of the austere environment, contains almost no historic, man-made structures with which to verify historical facts. But under scientific scrutiny, much vernacular understanding of the landscape will break down. Popular stories about the landscape will be shown to be but an echo of some thirteenth-century need as voiced through nineteenth-century nationalist history. To echo Nietzsche, science historicizes with a hammer. In time, the hammer of science will sever many of the bands of memory that for generations have linked Icelanders to their environment. The landscape of Iceland will be emptied of old legal memories, to be replaced by facts ascertained by specialists. Icelanders' relation to their land will be mediated by the knowledge of an international class of academic historians.

From the perspective of scientific knowledge, this is all well and good, and there

23 Adolf Friðriksson, conversation with the author (5 August 2009).

is no need to be nostalgic for the world of popular legal history that will vanish. But it is helpful to recognize that science is not acting in an intellectual vacuum. Just as today we view the work of *nineteenth-century* archeologists within the context of an Icelandic nationalism that partook of a larger European moment, so too the transformation of popular legal memory in Iceland today is but one component of the engine of economic and political integration of trans-national Europe. The idea that blood can still be seen on the execution-block stone near an ancient assembly site will disappear in the face of the cultural and intellectual forces that ground the young constitutional entity Iceland is under pressure to join. Academic science will demystify the cultural basis of the nationalism which Europe seeks to overcome politically through its Kantian aspirations, at the same time that the popular memory of law will change as a consequence of the new European legal order being created here through the slow force of political will.

As this process moves forward, it is vital to appreciate that the historical disenchantment of the landscape will come with some troubling cultural consequences—especially changes in the culture of our *Rechtsgenossenschaft*. There are, for instance, certain revealing trends within elements of popular culture consumed by Icelanders that celebrate hyperviolence or, more pointedly, the subversion of law. One recent incarnation of that tendency is a controversial music video, "Supertime" by Berndsen, which involves a carnivalesque overturning of law, and life, in the symbolically charged setting of the Icelandic countryside. In the video, a group of young people come upon the scene of a car crash and play bloody and perverted games with the bodies of the victims.[24] The video expresses a deep cultural anxiety about the association of land, law, and community that has defined Iceland for generations. Here we are a long way from a landscape knit together by the common legal identity established at Þingvellir in 999/1000; we are in a subculture whose ironic self-consciousness is characteristic of a nation torn within a generation from its communitarian folk roots and the law that sustained it. Like new efforts in academic history, the video responds to circumstances that are putting pressure on the link between legal memory and the environment in an age of global capital flows and European integration. And in doing so, it draws us to ask whether Iceland can develop a new form of historical consciousness which will safely ground the liberal, trans-national constitutional arrangements it may join on a firm cultural foundation.

Prospects for Legal Memory in a Digital Age

One way the country might do so, ironically, is through the very medium that is fa-

24 See http://www.youtube.com/watch?v=jtYD1vmUqCU (YouTube video linked to band MySpace page).

cilitating the economic, political, and intellectual changes driving the transformation of its popular legal-historical consciousness. I mean, specifically, the internet. That the web is an essential building block of globalization hardly needs elaborating to an audience composed largely of students. The internet fuels global economic integration and enables otherwise costly intellectual ties between nations, most pertinently between Iceland and the rest of Europe. But what may not be so readily apparent, perhaps especially to a younger generation that grew up with the latest information technology, is that the digital age is not just knitting people and nations together but also is changing the very substance of communication. It is changing the nature of speech and knowledge. Within a specifically legal context, for example, the existence of legal search engines like Lexis/Nexis is doing much more than simply making judicial precedents or statutes or comparative legal texts easier to find. By making them easier to find, Lexis/Nexis provides the technological infrastructure for the global harmonization of law and so is changing the very nature of law itself. Legal search engines are altering the nature of law today just as much as the nature of law in Europe was changed when, in the wake of Christianization, the law was written down with the newly available, extraordinary technology of the Latin alphabet and its material infrastructure, the Church and its scribes.

The internet is changing the nature of speech and knowledge by changing the social conditions of its production, and these new social conditions create the opportunity to address the alienation of people from legal-historical consciousness that threatens the stability of the rule of law. Let me mention three features of the web as a new structure or environment for speech and, thus, for legal-historical consciousness. I draw my discussion from the work of the legal scholar Jack Balkin.[25] The first way the internet alters the social conditions of speech is by making mass distribution of information essentially costless. This is a fundamental change from the traditional mass media of the twentieth century, which required substantial investment of time and resources for information to be distributed on a grand scale. One no longer needs access to a room full of video equipment and a financial fortune to broadcast a video to millions of people. You can create your movie at your kitchen table using equipment that costs as little as a few hundred euros and that you probably own already, and you can post it on YouTube or send it to people directly via email for free. The negligible cost of information distribution on the internet radically democratizes the speech environment. Second, the internet allows individuals to bypass traditional broadcast media or, in Balkin's words, to "route around" traditional cen-

25 Jack M. Balkin, "Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society," 79 *New York University Law Review* 1 (2004), 9-12.

ters of information distribution and control. The structure of the web makes information distribution radically decentralized, enabling individuals to reach audiences directly, without the meditation of major centers of media power. The mass speech environment is no longer defined largely by asymmetrical imbalances of authority. Third, and most important, the internet allows individuals easily to comment on or appropriate the information or messages generated by others, a phenomenon Balkin calls "gloming on" ("glom" is a colloquial synonym for "attach"). What are many blogs, for instance, but someone cutting, pasting, linking, and commenting on information generated elsewhere? The culture of the internet in this respect bears some similarity to the manuscript culture of the middle ages in that it is a culture in which the notion of individual authorship is substantially complicated; in which a unit of knowledge expressed in a single text is viewed as part of a larger, global knowledge on which all can draw and share; and in which annotation assumes a central place—with the critical difference that in the digital age the activity of appropriation and annotation is not fixed within a single institution, the church, but instead is distributed throughout society.

These features of the internet make our new speech environment anti-elitist, interactive, and multidirectional, allowing everyday people to participate in the making of public culture in unprecedented ways. Balkin has explored how this new technological environment should change the nature of our theory of the freedom of speech. I would like to suggest that it also should change the way we think about culture and legal-historical consciousness. Specifically, the internet may offer a new way for individuals to connect with their legal past, and in particular to relate to the legal history of their environment. How it will do so will be a matter, in part, of the structures for interpersonal interaction created by information technology entrepreneurs—and the young thinkers in other fields, including law and legal history, who collaborate with them. The vague outlines for a new relation of citizens to legal historical knowledge may already exist, for instance, in the various sites for social networking such as Facebook. Social networking sites offer a glimpse into a future in which the technological infrastructure of information distribution will enable discrete communities to appropriate and use for their own local ends historical knowledge created by an international academic class. Such sites enable us to imagine a multidirectional historical body of knowledge which can be local and global at the same time, and in which individuals can take active control in forging their own legal historical knowledge alongside that of critical, academic approaches to the past. In Iceland in particular, where ninety percent of the population has internet access and over forty-six percent are members of Facebook (the highest per capita ratio in the world), contemporary social networking

might serve as a template through which the dynamic, interactive features of the web could be used to provide a new structure for mediating the relation between citizens and their landscape.[26] Picture, for instance, a rich body of legal-historical information and stories linked both to the GPS device in your phone (a geocache app, in iPhone terms) and to a social networking application enabling sophisticated public annotation and commentary. The web might thereby become a tool through which the people themselves generate a public culture that provides the symbolic resolutions to the social contradictions of liberal society—it might, that is, enable citizens themselves to create the cultural foundations for the rule of law.

As I suggested at the outset of my remarks, I believe the opportunity that information technology provides for building and maintaining the cultural foundations of law is important not simply for Iceland, where the tensions of globalization and liberal constitutional integration are felt with special force, but for Europe and the west in general. As multi-national institutions such as the Group of 20 gain new authority to review national fiscal policies, as international treaties on issues from polar law to climate change seem likely to curtail the sovereignty of individual states, and, especially, as EU integration proceeds—how will legal-historical consciousness change under the pressures of these new legal and constitutional arrangements?[27] Will the relation between individuals and the legal past become unstable? Will this instability pose a substantial challenge to the cultural foundations of institutions such as the EU at the very moment they have been consolidated as a matter of formal legal rules? Can we provide new ways for our culture to foster the rule of law on a trans-national scale? Can we generate a culture, and a legal-historical consciousness, that will link individuals to trans-national legal arrangements with the same type of personal force with which communities in the past, most famously in the middle ages, identified with their own legal orders? The internet may facilitate the cultural foundations for modern liberal government in a global era just as it facilitates globalization itself. But whether it will, and if so, how, remains to be seen. In sum, then, how might our technology allow us to shape the cultural foundation of the rule of law by allowing us to refigure the popular relation to the legal past? That is a large question, but it is a question that, I believe, a school such as this one—dedicated not only to the study of legal doctrine but also to the development of the cultural and philosophical competence of its students—puts one in an excellent position to address.

26 Kristján Már Hauksson, "92% of Icelandic households with Internet access," *Multilingual Search: World Edition* (7 October 2009), at http://www.multilingual-search.com/92-of-icelandic-households-with-internet-access/07/10/2009 (citing survey by Statistics Iceland); "Army of Iceland on Facebook," *IceNews* (12 September 2009), at http://www.icenews.is/index.php/2009/09/12/army-of-iceland-on-facebook/.

27 On the University of Akureyri's unique program in polar law, see www.polarlaw.com.

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The Tradition and the State – Sámi Reindeer Husbandry and the Forestry Challenge in Northern Finland

Introduction

The Sámi are Europe's only indigenous people, traditionally inhabiting their homeland, Sápmi, in northern Sweden, Norway, Finland and northwestern Russia on the Kola Peninsula. The Sámi population in the whole of Sápmi ranges between 70.000-100.000. Approximately 7.500 Sámi live in Finland. Reindeer husbandry plays an important role for the Sámi self-identification as an indigenous people. Although not many Sámi are engaged in reindeer husbandry, it is symbolic for and representative of their indigenousness (Lehtola Undated).[1] This article deals with traditional Sámi reindeer husbandry in the early 21st century and the challenges to its continued existence alongside the modern forest industry. The focus of the article will be on the dispute in the northern Finnish community of Nellim, which is marked by complex discourses on traditional and modern land use, the rights of the Sámi population in international law, and the legal regulation of a traditional activity within the modern construct of a nation state. It is argued that reindeer husbandry as a government-re-

* *„Greinin hefur verið yfirfarin og samþykkt af ritrýninefnd Lögfræðings – This article has been peer-reviewed and approved by the editorial committee of Lögfræðingur".*

1 In this article, the western term 'Lapland' will not be used to describe the Sámi homeland; rather it will be referred to as 'Sápmi', the Sámi name for their traditional lands. 'Lapland' will be used to describe the northernmost administrative region in Finland.

gulated agricultural activity contradicts traditional reindeer herding, inevitably leading to the dissolution of the latter due to the fact that, despite the legal protection of reindeer husbandry as a Sámi cultural heritage, economic interests – for example, in the form of forestry considerations – prevail. Moreover, the article proposes the hypothesis that despite the recognition of the Sámi as an indigenous people, the rhetoric, discourses and practice dealing with Sámi rights show assimilatory tendencies.

This article is divided into seven parts. The next part will provide a short overview of the legislation dealing with reindeer husbandry and forestry. This is followed by a presentation of the conflict in Nellim, which has a multilayered complex structure. The utilization of international law to solve the conflict – notwithstanding the existence of protective provisions for reindeer husbandry in national law – constitutes the fifth part of the article. Finally, it is argued in part six that the political will in Finland is not sufficient in order to guarantee a sustainable, stronger degree of Sámi rights. The last part will briefly summarize the findings of this article.

Reindeer Husbandry and Forestry in Finland

State-lands in Finland, which constitute about 90% of all lands in northern Finnish Sápmi, have been administered by the 'Finnish Forest and Park Service', *Metsähallitus*, since the mid-1800s. In addition to being a government agency, *Metsähallitus* is also a state-owned corporation. Reindeer husbandry and forestry are both controlled by *Metsähallitus*, but differ significantly from an economic or quantitative perspective: while about 90.000 people are primarily employed in forestry[2], merely 4.800 people in Finland own reindeer.[3] In 2008, only 323 people were primarily reindeer herders.[4]

Since reindeer husbandry is very prone to externalities such as climatic or natural conditions or the (world) market for reindeer meat, the annual income is hard to predict. Therefore, Finnish reindeer herders are dependent on subsidies from the EU, which are based on three criteria: eligibility for subsidies is restricted to herders between 18-66 years of age with other income of less than 26.000€ and possessing herds containing at least 80 animals.[5]

The Act on Reindeer Husbandry 1990 is the legal basis for reindeer husbandry. In contrast to Sweden and Norway, where reindeer husbandry is an exclusive Sámi right, every EU citizen living permanently in the reindeer husbandry area is eligible

2 Finnish Forest Association Undated.

3 Paliskuntain Yhdistys 2009.

4 Statistics Finland 2009.

5 Myrvoll 2004: 100, 104, 108, 109.

to own and herd reindeer. The reindeer husbandry area is constituted of the two regions Lappi/Lapland and Oulu, comprising about 1/3 of the Finnish land area.

The reindeer husbandry area is divided into 56 districts or cooperatives, one of which a reindeer herder is entitled to be a member. As a member of a cooperative, certain pasture areas are ascribed to a herder, often being separated from pastures in the neighboring cooperatives by fences, etc. Every ten years, the Finnish Ministry for Agriculture and Forestry sets the maximum number of animals for the entire reindeer husbandry area as well as for each cooperative. If a herder strives to expand his herd, the other herders are forced to reduce their herds in order not to exceed the maximum number of animals.[6] In several articles of the Finnish legislation the protection of reindeer and compensation for damages leading to a restraint of reindeer husbandry is regulated, especially as regards forestry.[7] The legal regulations for reindeer husbandry do not recognize the migratory behavior of the animals, which is of fundamental importance for the sustainable aspects of traditional reindeer herding. The contemporary system regards reindeer husbandry rather as one amongst many economic activities on Finnish soil. Sámi customary law, which was a basic feature of traditional reindeer herding, is not recognized in the Finnish legislation.

Forestry in Finland is regulated by several laws, which are based on international conventions and decrees. In pursuance of the 1992 Rio Declaration on Sustainable Development, the forestry legislation was completely revised in the 1990s. The concept of 'sustainable development' as well as socio-ecological factors was included in the Act on *Metsähallitus* 1994 (revised 2004) and the Forest Act 1996. Although both acts include provisions for the protection of reindeer husbandry[8], a special mandate in Section 2.1 for the activities carried out by *Metsähallitus* to be "[…] sustainable and profitable […]" can be found. Despite the legal obligations to protect reindeer husbandry and the rights of the Sámi, the disputes over land rights and land tenure create the impression that employment and profitability prevail over socio-ecological factors. Lawrence[9] observes that issues regarding employment "trump the recognition of indigenous claims".

Since about 2005 the profitability of forestry has decreased. Due to reduced marketing related to overproduction in Europe, increased usage of the internet and inflationary prices, several wood processing plants and pulp mills were closed down in Lapland. Primary investments have been relocated to Asia and South Africa in order

6 Myrvoll 2004: 100, 101, 109.

7 Cf. Reindeer Husbandry Act, Chapter 1, Section 2.1. or Chapter 7, Section 42.3.

8 Cf. Act on *Metsähallitus* 1994/2004 Section 4.2.; Forest Act 1996 Section 6.1.

9 2007: 164.

to reduce costs. This practice was especially prominent during the economic crisis of 2008/2009.[10] The downturn of the Finnish forest economy has been accompanied by increasing unemployment and migration from the rural areas into the larger cities, itself contributing to a weakening of the economic importance of forestry.[11]

Since the 1950s the strategies of the forest economy have been manifested in the *National Forest Programmes*. *The National Forest Programme 2015* from 2008 focuses on biodiversity, sustainability and manifold usage of the Finnish forests, accompanied by projected growing revenues and "social acceptability, economic viability and ecological, social and cultural sustainability", as well as on market-oriented forestry operations.[12]

The Nellim Dispute

Resistance to forestry from reindeer herders is based on the negative effects of felling operations on the pasture areas for reindeer. Primary forage for reindeer, especially in the winter, is comprised of lichens, which grow on trees or on the forest ground. Forestry adversely effects or destroys old-growth forests when especially thick trees are felled. These forests however are preferred reindeer pasture grounds due to the high abundance of decade-old arboreal lichens. Moreover, forestry machines destroy the fragile lichen cover, and residue covers the lichens, therefore cutting off their access to sunlight. Additionally, forested areas are more severely affected by changes in the weather patterns, which in times of global climate change, leads to a hardening of the snow cover which the reindeer are no longer able to dig through in order to reach the ground lichens.[13]

The weak position of traditional Sámi livelihoods in Finland arises because of (i) the appropriation of lands by Finnish and Scandinavian settlers; (ii) the assimilation of the Sámi into Finnish society; and (iii) the introduction of new political and economic systems which negate customary principles of traditional Sámi society. This has led to a conflict in Nellim, a village of 200 in the municipality of Inari in north-eastern Finland. This conflict can be directly related to the above-mentioned three points.

The conflict in Nellim was characterized by the interplay of three different disputes: first, a dispute over land use; secondly, a dispute over land tenure and associated rights of the Sámi as an indigenous people in the international law context; and

10 Hänninen and Sevola 2008.

11 Pohjanpalo and ben-Aron 2009.

12 Finnish Ministry of Agriculture and Forestry 2008: 11, 12.

13 Kumpula et al. 2007: 172.

thirdly, a dispute over the reindeer husbandry legislation itself. Central to the dispute were three reindeer herding Sámi brothers, the Paadar brothers, or the 'Nellim Group', who counteracted forestry operations on their pasture grounds. The Paadar brothers were supported by their cooperative, by the Finnish Sámi Parliament and by the Sámi Council. Article 27 of the International Covenant on Civil and Political Rights (ICCPR)[14] served as a legal basis for their protest, strengthening their position by the assertion of reindeer husbandry as part of Sámi cultural heritage. The Nellim Group also protested against provisions in the reindeer husbandry legislation, which in turn led to resentments within the cooperative itself.[15]

The first and underlying dispute concerned land use. Valuable old-growth forest pasture grounds of the Nellim Group were disrupted by forestry activities in 2004, having a detrimental impact on the health and integrity of the herd. Therefore, after non-recognition of their expressed unwillingness to accept the forestry activities, in 2005 the Paadar brothers called in help from the Sámi Council and *Greenpeace*, who set up a camp in the forests to demonstrate against the felling. Irrespective of the international attention, which arose through the inclusion of *Greenpeace*, *Metsähallitus* continued the forestry activities. Only in August 2009 did the Nellim Group and *Metsähallitus* come to an agreement, which limited the forestry operations on the Paadar's pasture areas to a great extent.[16] It is important to note, however, that while *Metsähallitus* complied in Nellim, other areas, especially the Inari municipality, are still in the focus for future forestry activities (Inarin Paliskunnat 2009).

The second dimension of the conflict refers to international law, especially Article 27 of the ICCPR[17], which Finland has ratified. After a complaint of the Paadars at the UN Human Rights Committee (now the Human Rights Council [HRC]), *Metsähallitus* followed the request of the Human Rights Committee to cease felling in November 2005.[18] Since the usual interpretation of Article 27 includes the protection of indigenous livelihoods, the Comittee was confronted with another complaint: Sámi forest workers considered the stopping of forestry activity as a violation of their right to use the forests and accused the Committee of contributing to human rights violations with its rulings. However, the Committee's decision to endorse the ceasing of the felling was not withdrawn.[19]

14 Article 27. In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

15 Helsingin Sanomat 2008.

16 Saami Council 2009.

17 Helsingin Sanomat 2008.

18 *Metsähallitus* 2005a.

19 *Metsähallitus* 2005b.

By the end of 2007, the legislation for reindeer husbandry triggered a conflict within the Ivalo reindeer cooperative, to which the Paadar brothers belong. This dispute can be considered the third dimension of the Nellim dispute. In order not to exceed the maximum permitted number of 6.000 for individual reindeer herders and to avoid high penalties for the whole cooperative, the Nellim group was ordered by the cooperative leaders to slaughter their surplus animals. Although the slaughter followed the legislation for reindeer husbandry, the Nellim Group and the Sámi Council considered the forced slaughter only as a means to come to a quick end to the forestry dispute.[20] The Nellim Group took legal action to halt the slaughter and the Supreme Court of Finland issued an order to halt the slaughter on October 23, 2007.[21] Interestingly, the already-weak reindeer herding Sámi community weakened itself by referring to an existing legal framework. Consequently, this did not contribute to an overall strengthening of reindeer husbandry or Sámi rights in the Finnish legal system.

The Protection of Sámi Rights in International Law

In Finnish law the right of the Sámi to linguistic and cultural self-determination in relation to traditional reindeer herding is weakened by economic conditions, adverse land use, prevailing land tenure practices and the associated jurisprudence. Therefore, the Sámi reindeer herders' claims of protection for their culture and self-determination – as well as their equal participation claims – using the Finnish legal system are undermined. Since on an international level Finland values the protection of human rights, international law provides tools for the protection of indigenous rights, which can strengthen the position of the Sámi in Finland. In this context, three instruments of international law are relevant, which in the internationalization of the Nellim Dispute contributed to increase the political pressure on Finland to find a long-term resolution to the land rights issue. These three instruments are the ICCPR and especially Article 27; ILO Convention No. 169 "concerning tribal and indigenous peoples in independent countries" 1989; and the UN Declaration on the Rights of Indigenous Peoples 2007.

Although Article 27 of the ICCPR does not explicitly mention indigenous people, in common practice it can nevertheless be considered as a standard-setting provision for the protection of indigenous peoples since they constitute a minority in most countries.[22] The collective dimensions of indigenous cultures that are protected un-

20 Reindeer Blog 2007a.

21 Helsingin Sanomat 2007.

22 UNDG 2008: 10.

der this article are especially emphasized. The Human Rights Committee stipulated that indigenous cultures as protected under Article 27 have a very close relationship to their traditional lands and natural resources.[23] With this recognition those states that have ratified the Covenant are legally bound to protect traditional activities of indigenous peoples. Ratifying states such as Finland are obliged to implement the provisions of the ICCPR into their legislation. Subjected to international pressure, Finland must now find means to meet their obligations to find a solution to the question of land use and land tenure in the traditional Sámi lands. Otherwise the country would be breaking provisions of international law as well as international human rights standards.

Another reference-point in international law in the context of the dispute in Finnish Sápmi is the UN Declaration on the Rights of Indigenous Peoples, whose adoption in 2007 was endorsed by Finland.[24] Despite the Declaration not being legally binding, it nevertheless reflects international norms in the protection of indigenous cultures.[25] A special feature of the Declaration is that it grants indigenous peoples the right to conclude treaties, which in international law is a privilege for nation states. Moreover, it identifies indigenous peoples as the owners of their traditional lands, a tenet which nation states are obliged to respect and protect. This underlines the recognition of the special relationship between indigenous peoples and their lands as well as the respect towards indigenous land tenure systems under international law. The common practice in Finland of the state being the sole proprietor of all lands within its borders is weakened in the Declaration. Additionally, Åhrén[26] emphasizes that judicial practice in the institutions of the UN decreasingly recognizes the state as the sole proprietor of non-private lands. Furthermore, restitution and compensation for the loss of lands and resources through colonization is mentioned in the Declaration for the first time and therefore corresponds to international judicial standards.

International Law as a Tool for Dispute Settlement?

ILO Convention No. 169 could potentially serve in the resolution of the land rights disputes in Finnish Sápmi, despite the Finnish non-ratification of this convention.[27] However, due to the alleged effective protection of human rights in Finland, the

23 OHCHR 1994: Section 3.2.

24 Tesar Undated

25 Åhrén (2007b: 126) stipulates that despite the non-binding character of the Declaration, the rights in it are, since they reflect legally-binding human rights applied to indigenous peoples.

26 Åhrén 2007b: 125.

27 The Convention, which can be considered the most important binding document for indigenous peoples to date, has been ratified by 20 states, including Norway and Denmark. Ratification obligates states to implement the provisions of the Convention as applicable law in their legislation.

international community expects Finnish ratification of the Convention.[28] The underlying principles of the Convention aim at creating at least minimal human rights standards for indigenous peoples in order to ensure the unhindered conduct of their culture, effective participation in governance and self-determination, as well as to provide effective protection against discrimination.[29] The land rights provisions in ILO Convention No. 169 strive for the creation of a solid base for the sustainability of indigenous cultures. Moreover, the Convention recognizes indigenous peoples as the proprietors of their traditional lands with all associated rights. Although the vague formulation of the articles does not provide sufficient insight into how far this recognition extends, it is generally presumed that an equal say of indigenous peoples over decisions affecting the use of their traditional lands is ensured.[30]

The legally binding status of the Convention would significantly strengthen the position of the Sámi in Finland in terms of land use and tenure. Finland's reservations towards a ratification of the Convention – which, following the disputes in northern Sápmi, have attracted international attention – are primarily on the land rights provisions. Before ratification, Finnish legislation must take a step forward and must adjust its provisions corresponding to the protection of Sámi livelihoods and traditional land use. Moreover, there is an apparent need for increasing self-determination and effective participation.[31] Despite several attempts to modify Finnish legislation with the aim of possible ratification of the Convention, Finland has to date been unsuccessful in answering three fundamental questions:

1. Who is protected under ILO Convention No. 169?[32]
2. Which are the lands the Sámi have traditionally occupied?[33]
3. Does the mere 'usage' of lands correspond to the provisions of the Convention that refer to 'ownership' and 'possession'?[34]

The international pressure to quickly find answers to these questions in order to enable a ratification of the Convention has drastically increased since Finland's entry into the Human Rights Council (HRC) in 2006. However, success is yet to be achieved.

28 Joona 2008: 123.

29 Thornberry 1998: 17; Joona, T. 2006: 176.

30 Ulfstein 2004: 25-27.

31 Joona 2003: 42.

32 Discourses on the definition of the term 'Sámi'.

33 The definition of the Sami Homeland in the Finnish legislation is artificial without a real connection to the traditionally inhabited lands. Historical land rights are of central importance in this context.

34 In Finland, propriety rights have not been assessed in the context of the ILO Convention No. 169; Joona 2006: 182.

Although the rights in the UN Declaration go beyond those of the ILO Convention No. 169, Sámi organizations and the Sámi Council demand a ratification of the Convention because of its legally binding status. Notwithstanding this, the beginning of negotiations over the ratification of the Nordic Sámi Convention is expected.[35]

The first draft of a Nordic Sámi Convention was presented to the Nordic parliaments in November 2005. While using contemporary legal language, the draft Nordic Sámi Convention regards customary Sámi law as a trans-boundary law in Finland, Norway and Sweden; at the same time, it does not strive for secession from the nation states, i.e. an independent Sámi state. However, the draft Convention calls for increased self-determination, including the right to represent the Sámi in international forums, thus adding an external dimension to their internal self-determination.

The draft Nordic Sámi Convention ascribes the Sámi Council and the Sámi Parliaments near-equal footing in questions regarding resources – almost on the same level as the nation states. The land and resource rights as well as the right to self-determination and cultural rights unite the provisions of the ICCPR, the ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples. In cases of a disagreement over land use the Sámi position supersedes non-Sámi claims. A special emphasis is placed on strengthening Sámi reindeer husbandry, the cultural significance of which is the base on which Finland is encouraged to designate reindeer husbandry as an exclusive Sámi activity in perpetuity[36].

The negotiations regarding ratification of the Nordic Sámi Convention have not started at the time of writing. Of special significance is that Finland is in the process of assessing the possible impacts of the provisions set out in the Nordic Sámi Convention on the Finnish legislative framework.[37] In Spring 2009 the Finnish Ministry of Justice indicated that negotiations would start in late 2009.[38] However, the meeting was postponed and is set to be rescheduled for late May 2010.[39]

Finland and the Implementation of Sámi Rights

Despite the recognition of indigenous cultures in international law based on their different status as well as their equality before the law, Finnish legislation puts an emphasis on language as a defining trait for a Sámi person.[40] Tuulentie[41] stresses

35 Saami Council 2007.

36 Åhrén 2007a: 27, 28, 30.

37 Koivurova 2008: 292.

38 Finnish Ministry of Justice 2009.

39 Finnish Ministry of Justice 2010.

40 Act on the Sámi Parliament, Section 3.1.

41 2002: 352.

that the inert implementation of Sámi rights can be related to the perception of the Finnish nation as a unity, i.e. *one* people based on the same culture and same livelihoods. This rhetoric justifies an assimilation of the Sámi and their culture in the past, present and future, and it breaks with the principle of a people's right to its own culture. An argument based on *one* Finnish people therefore compromises the right of the individual and an indigenous minority to effective and viable cultural self-determination.

Similarly, the reference to a legislative system which works for the majority of the Finnish people – and which it is not considered should be changed for a small minority – is based on quantitative rather than qualitative considerations. Tuulentie[42] claims that a reference to demographic and economic statistics is reason enough to acquiesce in assimilating the Sámi into Finnish society and to the loss of their culture.

The Sámi claims for recognition and implementation of their rights moreover challenges the ideology of the Finnish Constitution – and indeed the representative democratic system itself – as being merely based on numeric and western characteristics, leaving out the customary or cultural dimension of the Sámi. Regarding the Sámi as only one stakeholder amongst many strengthens cultural disadvantages, because the benefit for the societal majority (quantitative economic gain) outweighs considerateness for qualitative aspects of culture for the Sámi. This implies the neglect of Sámi history, emphasizing the recognition of only *one* Finnish history, which underlines the colonialist perception of the Sámi culture as inferior to the dominant Finnish.

The Sámi culture and Sámi customary law are still regarded as backward despite official recognition of the Sámi as an indigenous people and the common practice in international law to value indigenous knowledge and culture highly. Consequently, perceptions of a colonial past are embedded into legislation and lines of argumentation. Moreover, recognition of Sámi customary rights would undermine Finland's hegemonic powers in Sápmi, negating the governance system of exclusive possession of lands by the state and the Westphalian system of the nation state.

The reasons why Finland holds on to the above mentioned tendencies are not clear and can only be speculated upon. Especially in regards to the declining economic importance of the forest industry in northern Finland – which should strengthen a sustainable reindeer economy even more – it becomes clear that the interest and inclination of the Finnish state to foster reindeer husbandry or reindeer herding is

42 2002: 349, 350.

weak. Economic integrity in Finnish Sápmi based on forestry can no longer serve as an argument when taking relocation of production and investment to Asia and South Africa into account.

Conclusion

This article shows the complexity of the land rights situation in Finnish Sápmi, exemplified by a conflict in the municipality of Inari. Newly introduced administrative and land use systems have weakened the Sámi culture and especially reindeer husbandry while economic feasibility (forestry) emerged to trump indigenous culture. In the municipality of Inari this has led to conflict between Sámi reindeer herders and the Finnish Forest and Park Service, *Metsähallitus*, which, due to the complexity of international law and associated land rights and rights to self-determination, has taken several years to reach settlement.

Since Finland has failed to take effective measures to implement international norms into its legislation, the ratification of the Nordic Sámi Convention remains an open question. This is in part due to its land rights provisions, which are more sophisticated than those in ILO Convention No. 169, yet to be ratified.

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