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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

ICELAND

OPINION

ON FOUR CONSTITUTIONAL DRAFT BILLS ON THE PROTECTION OF THE ENVIRONMENT, ON NATURAL RESOURCES, ON REFERENDUMS AND ON THE PRESIDENT OF ICELAND, THE GOVERNMENT, THE FUNCTIONS OF THE EXECUTIVE AND OTHER INSTITUTIONAL MATTERS

Adopted by the Venice Commission at its 124th online Plenary Session (8-9 October 2020)

on the basis of comments by

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I. Introduction

1. By letter of 31 July 2020, the Prime Minister of Iceland requested an opinion of the Venice Commission on four draft constitutional bills on the protection of the environment[1], on natural resources,[2] on referendums[3] and on the President of Iceland, the government, functions of the executive and other institutional matters.[4]

2. Ms Bazy-Malaurie, Mr Darmanovic, Mr Helgesen, Mr Scholsem and Mr Tănase acted as rapporteurs for this opinion.

3. On 10 September 2020, the rapporteurs and the Secretariat of the Venice Commission held a series of videoconference meetings with the representatives of the Prime Minister's Office and of the Department of Justice of the Ministry of Justice, with the Chairpersons of Parliamentary groups of the Althing, including the opposition parties, a number of national experts who were involved in the process of preparation of the constitutional draft bills and with the representatives of civil society organisations. On 30 September, the authorities submitted written comments on the present draft opinion. The Venice Commission is grateful to the authorities and other stakeholders for their participation to the meetings and their written comments.

4. This opinion was prepared in reliance on the English translation of the draft bills. The translation may not accurately reflect the original version on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the video-conference meetings. It was submitted to the written procedure replacing sub-Commissions. Following an exchange of views with Mr Pall Thorhallsson, Director General of the Office of the Prime Minister of Iceland, it was adopted by the Venice Commission at its 124th online Plenary Session (8-9 October 2020).

II. Background and previous opinion of the Venice Commission

5. The letter of 31 July 2020 by the Prime Minister's Office explains that the four bills have been prepared under the responsibility of the Prime Minister, in light of discussions between all political parties represented in Parliament. It is also noted that at this stage the different political party leaders have not committed themselves to supporting the bills and the four bills are still being processed and may be subject to amendments before being finalised in the light of the conclusions of the Venice Commission in the present opinion.

6. The "explanatory notes" attached to the draft constitutional bills provide information on the background and the purpose of the draft amendments, as well as on the consultation process conducted in their preparation. Following the parliamentary elections in October 2017, the coalition agreement signed in December 2017 between the Progressive Party, the Independence Party and the Left-Green Movement stated that the parties would continue to work on the comprehensive revision of the Constitution with the involvement of the civil society. The final goal of the revision process was an amended Constitution that reflects the common fundamental values of the Icelandic people and lays a solid foundation for a democratic state based on the rule of law and guaranteeing the protection of human rights.

7. According to the plan agreed by the government, the constitutional reform process shall be completed in a period equal to two electoral terms and in the current electoral term, issues

[1] CDL-REF(2020)050.
[2] CDL-REF(2020)049.
[3] CDL-REF(2020)048.
[4] CDL-REF(2020)047.

concerning the national ownership of natural resources, protection of the environment and nature, referendums at the initiative of voters, assignment of powers for the promotion of international cooperation, the President of the Republic and the exercise of the executive power, provisions regarding the Icelandic language and the provisions regarding the amendment of the Constitution should be addressed.

8. The Explanatory Notes place strong emphasis on the consultation process. The Social Science Research Institute at the University of Iceland was charged with conducting a survey to gauge the general public's views on the Constitution, during the summer of 2019. In November 2019, participants in the survey were invited to take part in a deliberative meeting and were sent information about the topics under discussion. The results obtained were used as a reference when drafting the proposals for the current amendments.[5] An online forum was offered by the University of Iceland in September-November 2019, where the public could share their opinion on the issues. The draft bills on institutional matters, the natural resources and the protection of environment were published on the Government's consultation portal in the summer of 2020 and the bill on referendum in 2016. Experts in the field of constitutional law have also been consulted regarding the implementation of the proposals.

9. The current reform process was preceded by a comprehensive reform process initiated by the Parliament of Iceland, the "Althing", in 2010, but which was not completed. In the aftermath of a period of drastic economic and financial crisis, Iceland had been facing a crisis of trust of the population vis-à-vis the political class and the political institutions. It is in this context that emerged the idea of drafting a new Constitution, "a unifying project designed to restore confidence and to lay, in a modern and comprehensive way, new foundations for a more just and more democratic Icelandic society"[6] and the Althing voted in 2010 a resolution initiating an important process of review of the current Constitution, adopted in 1944 and amended several times since then.[7] In the framework of this previous reform process, a wide range of consultation mechanisms had been used throughout the drafting process – organisation of national forum, selection among the population of the members of the Constitutional Council to prepare the draft new Constitution, extensive informal consultations and involvement of the public by way of modern technology means had given this process a broad participatory dimension. Another constitutional committee operated between the years 2013 and 2016 and prepared a draft bill containing provisions regarding the protection of the environment, natural resources and referendums. This draft bill was submitted to Parliament by the then Prime Minister of Iceland in September 2016 but was not adopted.

10. In October 2012, a non-binding, consultative referendum was held in particular on the question of whether the text of the draft constitution prepared by the Constitutional Council should form the basis of a bill for the future constitution.[8] All six questions were approved by the voters.

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[5] See, Summary of conclusions of the deliberative poll - public consultation on revision of the Icelandic Constitution, https://felagsvisindastofnun-verkefni.hi.is/heim_en/

[6] See, Venice Commission, CDL-AD(2013)010, Opinion on the draft new Constitution of Iceland, para. 13.

[7] Since 1944, various amendments have been made to the Constitution, mostly regarding elections and constituency boundaries. The amendment of 1991 provided for major changes to the functioning of Althing, introducing unicameralism and strengthening its position vis-à-vis the executive. In 1995 the whole section on human rights was amended in accordance with international obligations of the ECHR into domestic law in 1994. Later attempts to have a comprehensive review of the Constitution had not proven to be successful (See, CDL-PI(2015)020, Report on the Icelandic Constitutional Experiment, paper presented by Herdis Kjerulf Thorgeirsdóttir at the Conference on constitutional justice as a guarantee of the supremacy of the Constitution, p. 3.)

[8] The referendum consisted of six questions:
Do you wish the Constitution Council's proposals to form the basis of a new draft Constitution?
In the new Constitution, do you want natural resources that are not privately owned to be declared national property?

Concerning the first question, the voter turnout was 48.7% and 66.9% were in favour of the text presented by the Constitutional Council.

11. Following a request, in November 2012, by the Chair of the Constitutional and Supervisory Committee of the Parliament, the Venice Commission provided an opinion on the draft new Constitution[9] in March 2013.[10] In its Opinion, while the Commission welcomed the efforts made in Iceland to consolidate and improve the country's constitutional order, based on the principles of democracy, the rule of law and the protection of fundamental rights, as well as the active involvement of citizens in the constitutional process, it found that the numerous provisions of the bill had been formulated in too vague and broad terms which would lead to serious difficulties of interpretation and application. More particularly, the institutional system in the draft bill was rather complex and marked by lack of consistency, and while the many possibilities of the people's intervention, through referendums, was in principle welcomed, these appeared too complicated and would benefit from a careful review, both from legal and political perspective. The Commission considered in this respect that there were reasons to see the risk of political blockage and instability, which may seriously undermine the country's good governance. The human rights provisions which introduced a wide range of fundamental rights and freedoms, including socio-economic rights, would need increased precision and substantiation as to the scope and nature of the protected rights and related obligations. Provisions dealing with the judiciary would also benefit from increased clarity, especially on issues such as the immovability of judges and the independence of prosecutors.

12. In its 2013 Opinion, the Commission also took note of the diverging views in Iceland, including on the question whether it is appropriate to offer Iceland an entirely new Constitution.[11] While it underlined that it was not its role to intervene in such controversies or to take position on political choices inherent in any major constitutional revision, the Commission considered that the alternative would be, in a perspective of giving greater importance to continuity, to adopt only limited constitutional amendments, in relation to matters that could more easily meet a sufficiently broad consensus.

13. In April 2013, general elections resulted in a coalition government of Independence Party and Progressive Party. The coalition government and the two other coalition governments which followed, continued the work on constitutional revision. Neither the draft text prepared by the Constitutional Council and approved in the consultative referendum of October 2012, nor the draft bill prepared in September 2016, were adopted by Althing.

III. Preliminary remarks

14. The request for opinion by the Prime Minister concerns four draft constitutional bills: two bills are devoted to the protection of environment and the status of natural resources; one bill is more technical and is mainly devoted to the status of the executive (president, government) and the fourth proposal concerns the new mechanisms of referenda at the request of a part of the electorate.

Would you like to see provisions in the new Constitution on an established (national) church in Iceland?
Would you like to see a provision in the new Constitution authorising the election of particular individuals to the Althing more than is the case at present?
Would you like to see a provision in the new Constitution giving equal weight to votes cast in all parts of the country?
Would you like to see a provision in the new Constitution stating that a certain proportion of the electorate is able to demand that issues are put to a referendum.

[9] CDL-REF(2013)001 Constitutional Bill for a new Constitution for the Republic of Iceland and Excerpts from the Notes to the Constitutional Bill.

[10] Venice Commission, CDL-AD(2013)010, Opinion on the draft new Constitution of Iceland.

[11] CDL-AD(2013)010, para. 15.

15. After their attempt of drafting a brand new Constitution in 2012-2013, the authorities have modified their approach and have opted for a more cautious, step-by-step way of redrafting their Constitution.

16. During the videoconference meetings held on 10 September, a number of civil society organisations explained that in the 2010 reform process, the idea of moving the task of preparation of a new draft constitution away from the political class to elected councils in the Constitutional Council was based on the public distrust towards politicians which appeared in Iceland following the financial crisis. They considered that the text which was approved in the consultative referendum in 2012 as the basis of a future constitutional bill should be the sole basis of any attempt of amending the Constitution and that the government should put the 2012 draft Constitution to vote in the Icelandic parliament.

17. As previously mentioned, the constitutional reform process of 2010 did not succeed, and the new draft constitution which resulted from that process and approved in the consultative referendum of October 2012 never entered into force. Nonetheless, the broad participatory dimension of this process (para. 10 above) undoubtedly stirred interest and participation and created in the Icelandic people high expectations as to the future content of the Constitution and to their role in defining it.

18. The Venice Commission has always advocated that constitutional reforms should be carried out according to the constitution,[12] which in most cases means that the content of the reform is decided and voted by parliament with a higher majority or other special procedure, and is often subsequently submitted to referendum. The decision as to whether to amend the Constitution or write an entirely new one is a political choice, which belongs to parliament. The Commission has also consistently underlined that the adoption of a new and good Constitution should be based on the widest consensus possible within society and that "*a wide and substantive debate involving the various political forces, non-government organisations and citizens associations, the academia and the media is an important prerequisite for adopting a sustainable text, acceptable for the whole of the society and in line with democratic standards. Too rigid time constraints should be avoided and the calendar of the adoption of the new Constitution should follow the progress made in its debate*".[13]

19. During the videoconference meetings, several representatives of the civil society have complained that the constitutional amendments which are currently being proposed do not address the fundamental issues which were identified in the 2012 draft, and when they do, they propose different solutions. For instance, the principle that the government authorities are responsible for the protection of natural resources in Article 34(4) of the 2012 draft[14], does not appear in the current proposed provision on natural resources. Also, contrary to Article 33(5) of the 2012 draft, the current proposal on the environmental protection when stating the right of the public to roam freely in the nature, puts an emphasis on the interests (property rights) of the landowners which is, according to some civil society representatives, an unnecessary addition as the property rights are already guaranteed in Article 72 of the Constitution in force.

20. It is not the task of the Commission to "validate" or "invalidate" the decision of the current authorities to proceed with only partial amendments to the Constitution, nor to arbitrate between different philosophical conceptions of natural resources or of environmental protection. Moreover, the Venice Commission also welcomes the great variety of public consultation mechanisms used

[12] See, for instance, Venice Commission, CDL-AD(2010)001, Report on Constitutional Amendment, para.22 ("as a general principle (…) any major constitutional change should preferably be done according to the prescribed formal amendment procedures.").
[13] CDL-AD(2013)010, para. 17.
[14] CDL-REF(2013)001 Constitutional Bill for a new Constitution for the Republic of Iceland.

in the current constitutional reform process (see, para. 9 above) and takes note of the statement by the authorities during the Plenary Session that the constitutional reform is an ongoing process in Iceland and will not be limited to the amendments currently submitted to the Commission for assessment. The Commission considers that the Icelandic people should be given transparent, clear and convincing explanations for the government's choices, and the underlying reasons for significant departures from the previous 2012 draft approved in the consultative referendum should be explained to the public.

IV. Analysis

A. Draft amendment concerning the President of Iceland, Cabinet, Functions of the Executive and other institutional matters[15]

21. As is explained in the Explanatory Notes, the bill is the result of a revision of the provisions mainly of Chapter II of the Constitution, which primarily concerns the President of Iceland, the Cabinet and the functions of the executive. The main purpose of the bill is, first to bring this chapter of the Constitution closer to current practice. As a result, in cases where the Constitution is silent on important substantive rules which are currently applied in the practice (as the principle of parliamentarism, which is, according to the explanatory notes, implicit in Icelandic law), the bill proposes entirely new provisions. Second, in some cases, it was deemed appropriate to modify the wording of provisions currently in force without introducing significant substantive amendments. Thirdly, the bill proposes a number of substantive amendments where practice, public debate or academic scholarship is considered to have exposed regulatory shortcomings and demonstrated the need for certain reforms.

22. In addition to those three categories of amendments indicated in the Explanatory Notes, the drafters have also taken the opportunity to eliminate a number of obviously old-fashioned provisions, which find their origin in ancient parts of the Danish Constitution, and have replaced these deleted provisions with new rules which do not have any link with the subject matter of the removed provision. One of the best examples of this method is the new draft Article 30. The current provision states that "the President (…) grants exemptions from laws in accordance with established practice." This provision originates from the Danish Constitution of 1849 and has completely lost its meaning. The bill cancels this provision and the proposed new Article 30 shapes a new status for the Director of Public Prosecutions. Although this technique might not be the best solution to lead to a harmonious self-sufficient constitution, it is seemingly the price to be paid for the cautious way now followed by the Icelandic authorities.

1. President of Iceland

23. The Icelandic political system is one which reflects the characteristics of the so-called "parliamentary system with president".[16] This label suggests that, first of all, the country is neither a constitutional parliamentary monarchy, where the head of state is a dynast selected on the basis of a hereditary principle, nor a parliamentary republic, where the head of state is elected by parliament or by some other type of assembly that convenes only for the purpose of electing the President of the Republic. "Parliamentary system with president" means that the head of state is elected by the people. In this system, the constitution does not usually grant the head of state more power than the homologues in hereditary monarchies or classical parliamentary systems. But the fact that the head of state is popularly elected and that s/he is, along with the parliament, the only popularly elected institution in the country, gives him/her certain higher degree of legitimacy which, to some extent, may compensate the lack of strong constitutional powers.

[15] CDL-REF(2020)047.
[16] Following the typology of political systems developed by American political scientist Matthew Shugart.

24. The proposed bill does not significantly modify the parliamentary system with a popularly elected president who is above daily party politics, where the Cabinet of ministers is the centre of the executive power. Important amendments are nevertheless proposed concerning the President's term-limitation, the presidential powers/strengthening of the role of the Cabinet, and the limitation of the presidential immunity.

a. Presidential term-limits

25. The Icelandic Constitution of 1944 combined the popular legitimacy of the president with the rather unusual and rare absence of term-limits for the head of state, which theoretically means that the same person could hold the presidency of the country as long as as/he wins presidential elections every four years.[17] Though Iceland, as an established democracy and so far has not faced troubles with the institution of a popularly elected and potentially long-standing head of state, one of the most significant changes proposed in the bill is the term limitation of the president. By amending Article 6 to provide a maximum of two consecutive terms of six years (cumulatively twelve years), the Icelandic political system is adjusting itself in order to be closer to the predominant practice in the European parliamentary democracies.[18]

26. The Explanatory notes explain that the limitation of the presidential term to two consecutive terms is in line with the results of the deliberative poll conducted during the process of the preparation of the draft amendments and with the term limits commonly applied in other countries which are democratic republics. Concerning the extension of the presidential term by two years, it is justified, according to the explanatory notes, by the fact that the tenure of every president of the republic in Iceland has been longer than one term.

27. In other contexts, this maximum 12-year consecutive tenure could raise concerns. It is not the case in Iceland, where the President is not directly in the fray of day-to-day politics, but enjoys a kind moral and intellectual leadership, leading in some very rare cases to veto a law and to trigger a referendum. In such a context, the maximum 12 years appears reasonable. The limitation of the number of President's mandates is welcome.

b. Presidential powers

28. The current Article 2 of the 1944 Constitution states that "Althing and the President of Iceland jointly exercise legislative power. The President and other governmental authorities (…) exercise executive power. Judges exercise judicial power." Article 1 of the draft amendments proposes changes to the second and third sentences of this provision: "Executive power is vested in the President, Ministers of the Cabinet, and other public authorities pursuant to this Constitution and other provisions of law. Judicial power is vested in the Supreme Court of Iceland and other courts of law". It is striking that the first sentence of this provision concerning the legislative power remains untouched: "Althing and the President jointly exercise legislative power."

29. The Commission observes that the current proposal is different than Article 2 of the 2012 draft, where the legislative power is concentrated in the hands of the Althing ("The Althing holds legislative power"), with no participation by the President. In its 2013 Opinion, the Commission criticised the previous draft, considering that the concentration of legislative power in the hands of Althing in the draft provision was to a certain extent contradicted by the important role granted to the President when it comes to presidential veto power in Article 26. However, it appears from the Explanatory notes to the current draft that the absence of amendment proposal to the first sentence of Article 2 is due to the fact that the current draft amendments primarily concern the

[17] According to current Article 6 of the 1944 Constitution, the President's term of office begins on the 1st of August and ends on the 31st of July four years later. The election of the President takes place in June or July of the year in which a term of office expires.
[18] Venice Commission, CDL-AD(2018)010, Report on Term Limits, Part I, Presidents, p. 3.

President, the Cabinet and the functions of the executive and not legislative powers. This symbolic provision seems to be left unfinished and unbalanced and might cause uncertainty as to the nature of the presidential veto power in the Icelandic Constitution.

30. It appears that a number of amendments regarding the role of the President somewhat restrict his/her powers in relation to the cabinet of ministers or the parliament, as far as the appointment powers and the power of dissolution of the Althing are concerned. Concerning the appointment powers, according to Article 11 of the draft bill (amending Article 20 of the Constitution), the President is not the only authority to appoint public officials as provided by law[19], but s/he shares this competence with "Cabinet of Ministers and other public authorities."[20] The Explanatory Notes highlight that one reason for this amendment is that the last few decades have seen a considerable reduction in the number of officials appointed by the President and the purpose of the amendment is to align the provisions of this Article with the practice. The new draft provision better reflects the common European practice. More importantly, the new draft Article 20 specifies that the rules on appointment are to be governed by the provisions laid down by law and that such rules "are to establish a mechanism to ensure that competence and objective considerations determine appointments to public office and decisions relating to officials' retirement." The Venice Commission welcomes these new provisions.

31. Concerning the right of dissolution of the Althing by the President, Article 24 of the Constitution which provides that "the President of the Republic may dissolve Althing (…)" has been amended by introducing a provision which is rather typical in many European countries that the head of state, before deciding whether to assent to the Prime Minister's proposal to dissolve the parliament, shall consult the Speaker of the Althing and the leaders of the parliamentary groups. Though the "consultation" itself may not have any obligatory consequences for the President and the decision ultimately lays in his/her hands, the amendment to Article 24 obviously strengthens the role of the parliament in this process and gives to its officials at least some counterweight to the presidential powers in this matter. The Explanatory Notes indicate that given that the dissolution of parliament is highly consequential for the work of the Althing and the government, it is considered appropriate to stipulate the obligation of the President to consult the Speaker and the leaders of the parliamentary groups before accepting the Prime Minister's proposal to dissolve the parliament and call for new elections. This ensures that all doubt is removed as to whether the sitting cabinet still has the confidence of parliament, as well as whether the formation of a new cabinet would be possible without a new general election. The Venice Commission welcomes this new provision, as the Prime Minister is not a neutral voice, and depends on the political environment. Asking the advice of the Speaker of the Althing and the leaders of the parliamentary groups may be of use to level the playing field.

32. Article 26 of the Constitution provides for one of the major powers of the President: vetoing a bill. According to this provision, "If the Althing has passed a bill, it shall be submitted to the President for confirmation not later than two weeks after it has been passed. Such confirmation gives it force of law. If the President rejects a bill, it shall nevertheless become valid but shall, as soon as the circumstances permit, be submitted to a vote by secret ballot of all those eligible to vote, for approval or rejection. The law shall become void if rejected, but otherwise retains its force." In Iceland, this power seems to be put in use very rarely but remains important, not only by its use but also by the mere possibility that it could be used.

33. The draft bill proposes to introduce a new sentence at the end of the provision that "(…) no vote is to take place if the Althing repeals the act of law within five days of the President's rejection." It appears from the Explanatory Notes that this draft provision puts an end to a

[19] According to Article 20(1) currently in force, "the President appoints public officials as provided by law".

[20] According to draft Article 20(1), "The President of Iceland, Cabinet Ministers, and other public authorities appoint public officials as provided by law."

controversy in the political and legal circles about the possibility for the Althing of repealing the law after a presidential veto, and whether this repeal results in the cancellation of the popular referendum provided in Article 26.[21] The draft amendments aims therefore at removing all doubt on this issue and the solution adopted seems quite efficient and fair.

34. Lastly, draft Article 8 (amending Article 15 of the Constitution) aims at describing as exactly as possible the real functioning of the political system. The President can have an important active role in the formation of the new Cabinet: the President determines, without ministerial advice, who is to be charged with forming a new Cabinet. S/he appoints the Prime Minister and other Cabinet ministers and accepts their resignations. This is not dissimilar to the systems in countries which have kept a monarchy, but where the real power of the monarch is the most evident when it comes to forming a new government (e.g. Belgium).

c. Presidential immunity

35. Article 11(1) of the 1944 Constitution limits the President's immunity to official acts, as it provides that "the President of the Republic may not be held accountable for executive acts." According to the Explanatory Notes, the 1944 Constitution limited the President's immunity under this provision to official actions, it being understood that such actions were always performed on the advice and potential liability of a minister.[22] In contrast, it was not considered justified to make the President immune in the event that s/he were to commit a criminal offence outside the limits of his/her office.

36. It is further explained, however, that the possibility cannot be excluded that the President could become guilty of a punishable offence or liable for damages in relation to conduct in office not based on ministerial advice for which the latter could not be held liable under Article 14 of the Constitution. For this reason, it is considered appropriate to state unequivocally that the immunity of the President is limited to acts performed on the advice and responsibility of a minister and that the President will no longer be formally exempt from legal liability with respect to any act performed in office, i.e. those which might conceivably performed without ministerial involvement. Therefore, according to the new draft Article 11(1): "the President of the Republic may not be held accountable for executive acts *which are countersigned by a Minister*."

37. However, the new provision still allows lingering uncertainty. In principle, all the acts of the President must receive the countersignature of a minister. During the meetings, the Venice Commission did not receive an exhaustive answer concerning the content of the category of presidential "executive acts" which are "not countersigned by a minister", which would allow determining the precise scope of the presidential immunity in draft Article 11. Concerning the veto power of the President in Article 26 of the Constitution, for instance, one must believe that the veto is a personal capacity of the President and does not require any consent of the government, nor a ministerial countersignature. Even if this assertion is correct, it is still not clear whether the veto power of the President is considered as "executive act" or whether, by virtue of the unamended first sentence of Article 2 of the Constitution, it is rather considered as "legislative act", in which case, following the strict wording of draft Article 11, the criminal liability should apply. In their written comments, the authorities explained that Article 26 is by most scholars seen as the President's participation in the legislative process and hence, Article 11 is not relevant since it only concerns acts pertaining to the Executive. The explanation is welcome. However, in view of the principle that an individual must know from the wording of the relevant provisions what acts and omissions will make him/her criminally liable, the Commission considers that the category of acts which falls under the scope of Article 11 should be determined with certainty.

[21] This controversy appeared following the President's decision to reject the so-called Media Act of 2004.

[22] By virtue of Article 14 which provides that « Ministers are accountable for all executive acts."

38. The Explanatory Notes also indicate that the presidential immunity does not apply in the event that s/he were to commit a criminal offence outside the limits of his/her office. At the same time, the second paragraph of Article 11 is not amended and "the President may not be prosecuted on a criminal charge except with the consent of the Althing." Therefore, even in case of offences committed by the President outside the limits of his/her office, it is not the common procedural law which applies ("generally applicable rules of law" according to the Explanatory Notes), but a special regime where the content of the Althing is required for the President's prosecution for crimes unrelated to the office. This ensures, according to the Explanatory Notes, that the President is "shielded from undue disruption".

39. The third and fourth paragraphs of Article 11 provide that the President may be removed from office before his term expires if the removal is approved by a majority in a plebiscite called pursuant to a resolution adopted by three-fourths of the members of the Parliament. If the resolution by the Althing is not approved in the plebiscite, Althing shall be immediately dissolved, and new elections called. Those provisions, which were never invoked during the republican area,[23] are not proposed to be amended. In its 2013 Opinion,[24] the Commission examined a similar provision (Article 84 of the 2012 draft constitution) which did not provide for the dissolution of Althing in case the parliamentary resolution is not approved in the plebiscite and criticised in particular that placing the call for the referendum solely in the hands of parliament and excluding the people completely from this stage of proceedings somewhat spoils the idea of a direct responsibility of the president to the people. The Commission wonders whether the procedure in Article 11(3 and 4) of the Constitution is still justified in the context of currently proposed parliamentary system, as it seems to be completely out of track with the real relationship between the President and the Althing. Although it is understood that presently there is no compelling reason to amend these provisions since they were never applied in the republican area, it would be advisable to reconsider them in light of the Icelandic parliamentary system and the relationship between the Parliament and the President.

2. Cabinet of ministers

40. One of the aims of the current constitutional reform is to codify the customary rules for the formation of a new cabinet, including by explicitly stating the principle of parliamentarism implicit in Icelandic law.[25] Therefore, the new draft Article 23 stipulates now the arrangement to be followed when the Althing has passed a motion of no confidence against a cabinet as a whole, or against an individual minister.[26] According to the Explanatory Notes, the provision has the main purpose of codifying written and unwritten rules regarding the significance and consequences of the loss of parliamentary confidence by the cabinet or an individual minister.

41. Indeed, the Venice Commission observes that there is no provision in the 1944 Constitution which clearly states the principle of parliamentarism and the collective political liability of the cabinet and individual political liability of ministers, including the consequences of the loss of parliamentary confidence for the cabinet and individual ministers, which are rather based on constitutional practice or conventions. Some of these unwritten rules are codified in legislative provisions. For instances, Article 1(2) of the Government Act No 115/2011 clearly states that in case the Althing adopts a motion of no confidence against a minister, the Prime Minister is obliged to make a proposal to the President that the relevant minister be removed from office.

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[23] CDL-REF(2020)047, Explanatory Notes, p. 11.
[24] CDL-AD(2013)010, para. 94-95.
[25] CDL-REF(2020)047, Explanatory Notes, p. 16.
[26] Draft Article 23 (1 and 2) states that « No Cabinet Minister may remain in office after the Althing has adopted a motion of no confidence. In the event that the Althing adopts a motion of no confidence against the Prime Minister, he shall submit his personal resignation as well as the resignation of the Cabinet (…)."

42. The draft Article 23, together with draft Article 15(2) which states that "the Cabinet, as well as individual Cabinet Ministers, must have the support or the tolerance of a majority in the Althing (…)", is central in describing the essence of parliamentarism: no Cabinet Minister may remain in office after the Althing has adopted a motion of no confidence. In the event, the Althing has adopted a motion of no confidence against the Prime Minister, s/he shall submit his/her personal resignation as well as the resignation of his/her entire Cabinet. These provisions are welcome.

43. However, once again, the draft amendments use the technique described in para. 23 above, which consists of deleting some unnecessary provisions and replacing them with new rules without any link to the subject matter previously treated in the Article. In order to introduce the above-mentioned rules of parliamentarism, the amendments use simply the old Article 23 of the Constitution concerning the adjournment of the session of Althing and replace it with a new provision on the political liability of the Cabinet and individual ministers (see. para. 23 above).

44. Under draft Article 23(3), "A Prime Minister and a Cabinet, for whom a resignation has been submitted, remain in office as a Caretaker Cabinet until a new one has been appointed, the Ministers of a Caretaker Cabinet having the obligation to limit their decisions to what is necessary." The provision ensures therefore that the country always has an operating cabinet.[27] The Explanatory Notes also explains the meaning of the criteria "necessary" in the draft provision, which would include decisions that for some reason cannot be postponed until a new cabinet has been appointed.

45. This theory of caretaker cabinets is very well known in all parliamentary regimes, mainly when there are multiple political crisis. The legal response to such a situation is of course to find a way to annul or revoke as soon as possible the acts that go beyond the "necessary". In Iceland, the way of thinking seems to be different, as the explanatory notes refer to Article 14 of the Constitution (liability of ministers including their impeachment) and statutory provisions on ministerial liability. In other words, it is not the act itself which is challenged, but the criminal liability of the Ministers which can only enter into account, as explained in the Explanatory Notes, when a "flagrant breach" of the necessity principle occurs.[28]

46. Another important change worth noting is the focus put on the Cabinet. This new emphasis goes throughout the bill[29]. In particular, the new draft Article 17 stresses once again the role of the "Cabinet" and no longer "ministerial meetings", which, according to the Explanatory notes has become obsolete. At the same time, the coordinating role of the Prime Minister is strengthened as s/he presides over Cabinet meetings and "supervises government activities and policies and coordinates the actions of different Ministries as required." (draft Article 17). Two of the main criticisms of the Commission in its 2013 Opinion were precisely the ambiguous nature of the Cabinet[30] and the weak and ambiguous role of the Prime Minister. These criticisms seem to be now fully overcome.

47. The criminal liability of ministers[31] is regulated currently in Article 14 of the Constitution: Althing may impeach ministers on account of their official acts and the Court of impeachment has competence in such cases. Under the draft amendments, the first sentence of Article 14, i.e.

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[27] CDL-REF(2020)047, Explanatory Notes, p. 16.
[28] Ibid., p. 16.
[29] See, for instance, Article 6 of the draft bill.
[30] The Commission considered in its 2013 Opinion that the provisions of the 2012 bill concerning the Cabinet seem to oscillate between two conceptions: on the one hand, that of an old-style "cabinet" composed of individualities with a Prime Minister confined to the role of "primus inter pares"; on the other hand, a collegial "cabinet", welded around its Prime Minister, seen as a chancellor-type team leader (para. 97).
[31] Concerning the criminal liability of ministers, see, Venice Commission, CDL-AD(2013)001 Report on the relationship between political and criminal ministerial responsibility.

"ministers are accountable for all executive acts", remain untouched and the rest of the provision is replaced by new rules, or more precisely *planning for new rules.* Under the draft provision, the Althing may indict Cabinet Ministers for their conduct in office, or delegate prosecutorial powers to the Director of Public Prosecutions. Although this does not clearly stem from the wording of the draft provision, it is explained in the Explanatory Notes that this delegation can be made in individual cases (following a specific parliamentary investigation) or can be delegated permanently by an act of law. The second sentence of the draft provision provides that ministerial liability, as well as investigations, indictments, and judicial proceedings in cases of alleged misconduct in office by ministers, are to be governed by provisions laid down by law. It follows that the Althing should decide through legislation whether to preserve the State Court, in one form or another, as a specialized court for ministerial liability, or whether such cases better placed within the judiciary.[32]

48. The Commission observes that there is actually no fixed rule in the proposed draft Article 14. As underlined by the Explanatory Notes, "thus, on these considerations, the proposed provisions are intended to create the necessary platform for a thorough revision by the legislature of both ministerial liability in material terms and procedural aspects."[33] For the Commission, the Bill seems to go too far in delegating so much power to the lawmaker, without any real constitutional rule or principle. This seems not to be the proper role of the Constitution.

3. Director of public prosecutions

49. Article 18 of the bill repeals the old-fashioned provision of Article 30 (granting of exemptions from laws by the President) and replaces it with a brand-new regime for the Director of Public Prosecutions. This new regime goes very far in favour of the independence of the public prosecution, as it assimilates its status to the protection given to judges ("The Director of Public Prosecutions is to enjoy, in the exercise of official functions, the same protection as judges").

50. In many countries, the status of prosecution is shaped by the concept of autonomy, but prosecution itself does not enjoy the independence that is the core of the judicial function.[34] As the Commission considered in its 2013 Opinion, under the European standards, the issue of independence is not the same for prosecutors as for judges. It is commonly accepted that different approaches and specific standards of independence are applicable to the two professions. Thus, to lay down a constitutional principle of independence of the prosecution service, a more careful drafting would be needed than simply applying to prosecutors, regulations and standards that are relevant to judges.[35] This criticism is valid also in the current context. In their written comments, the authorities explained that the proposed amendment only applies to the State prosecutor (Director of public prosecutions in the draft amendments) and not every office entrusted with prosecution powers. However, it results from those explanations that the Director of public prosecutors has a completely different status than other prosecutors. In the absence of any other constitutional provision regulating the status of the prosecution service, the draft provision might create uncertainty as the status of the prosecution service and the scope of guarantees it benefits.

[32] CDL-REF(2020)047, Explanatory Notes, p. 11.
[33] *Ibid*., p. 12.
[34] See, Venice Commission, CDL-AD(2010)040 Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service.
[35] CDL-AD(2013)010, para. 153.

B. Draft amendment to the Constitution concerning referendums[36]

51. The draft bill proposes to introduce a legislative optional abrogative referendum at the request of 15% of the electorate (negative people's legislation). It seems that this referendum is abrogative for internal law and suspensive for international treaties, but this should be addressed clearly (see below IV.B.7). The new clause provides for three kinds of referendums: (1) on legislation which has been approved by the Althing and confirmed by the President (with the exception of the budget act, the supplementary budget act, laws on tax matters and laws which are enacted to implement international obligations); (2) on resolutions of the Althing that relate to the approval of international treaties; (3) on other parliamentary resolutions, that have legal effect and represent an important policy decision (to be set out by law, adopted with a 2/3 majority).

52. The intellectual and political context in Iceland is not *per se* hostile to referenda. The 1944 Constitution was adopted following a referendum. The current Constitution contains three well-known cases of binding referenda. First, the President of the Republic may be removed from office before his/her term expires pursuant to the third paragraph of Article 11 if approved by a 3/4 supermajority of the members of the Parliament and in a referendum. Second, the President may refuse to confirm a bill pursuant to Article 26, in which case the law will become void if rejected in a referendum. Third, if the Parliament passes an amendment to the status of the Church, such amendment shall be submitted to a referendum pursuant to the second paragraph of Article 79 of the Constitution.

53. Moreover, the Althing may set up non-binding referenda. This is not provided as such by the Constitution but is provided by Article 1 of the Act on the Conduct of Referendums. These advisory referenda have been used before the establishment of the Republic (in 1908, 1936 and 1933).[37] More recently an advisory referendum was held in 2012 on the Constitutional Council's proposal for a new Constitution.

1. General remarks

54. Provisions on the direct participation of the electorate in the legislative and decision-making process on important issues of public concern exist in various countries, though the way in which this has been implemented varies greatly.

55. The Venice Commission does not intend to determine whether and under which circumstances recourse to referendums is desirable as such. The answer to this question varies according to the nature of the constitutional system and tradition. It belongs to national constitutional law to establish whether referendums are at all foreseen, what their scope is, and what procedure must be followed to hold them. However, a number of guarantees are necessary to ensure that they genuinely express the wishes of the electorate and do not go against international standards in the field of human rights, democracy and the rule of law.[38]

56. In the constitutional systems of Council of Europe Member States, decision-making ordinarily occurs through mechanisms of representative democracy, whereas recourse to referendums may complement such decision-making processes. In view of the foregoing,

[36] CDL-REF(2020)048,draft amendments to the Constitution concerning referendums and draft amendments to the Act on the Conduct of Referendum, No. 91, 25 June 2010 (potential changes to facilitate the implementation of the bill for a constitutional act).

[37] CDL-REF(2020)048, p. 3.
[38] CDL(2020)030, Draft guidelines on the holding of referendums, para. 8.

referendums and representative democracy should be harmoniously combined. In particular, recourse to a referendum should not be used to upset constitutional checks and balances.[39]

57. Therefore, countries should be cautious in their approach, in order not to weaken the pillars of representative democracy and mitigate the risk of populism or decisions that do not take into sufficient account the overall interest or the right of minorities.

58. In this Opinion, the Venice Commission will restrict itself to some general observations and some technical remarks on the concerned provisions of the Bill.

2. Scope of referendums

59. In order to directly involve the people in the decision-making, extensive use of -abrogative or negative- referendums is provided by the Bill relating to matters of legislation. The aspiration to have a more extensive use of direct democracy was well reflected in the 2012 draft Constitution.[40] These proposals went very far in organising various types of binding referenda, not only negative ones, but also positive ones allowing people to suggest new legislative bills (legislative initiative, Article 66 of the 2012 draft Constitution)[41]. The current proposals do not go that far. They seem to have been mainly modelled on the presidential veto, i.e. they have negative force.

60. After examining the various types of referendums provided in the 2012 draft Constitution, including the people's right to annul an adopted law and people's legislative initiative, the 2013 Opinion concluded that the referendum mechanisms in the bill appear too complicated and there might be a risk of political blockage and instability, which may seriously undermine the country's good governance.[42] The current bill seems to accommodate, at least in some ways, the recommendations contained in the 2013 Opinion. However, a number of problems remain.

61. First, as previously mentioned, the current proposal seems to have been modelled on the referendum provided in Article 26 of the Constitution following a presidential veto. However, despite the similarities, it is striking that no effort of harmonisation has been made between the provisions concerning the referendum triggered by a veto of the President and the abrogative referendum provided in the bill. For instance, a popular referendum under the bill cannot seek the annulment of the budget act, supplementary budget act and laws on tax matters as well as laws that are passed to implement international obligations, whereas the President, when refusing to confirm laws, is not subject to such limitations and might oppose this category of acts. In this case, popular pressure could be exerted on the President to veto and trigger a referendum in areas a priori excepted from the popular referendums under the proposed provision. Moreover, it does not seem to be coherent with the current proposal to give the President the power to veto "'laws to implement international obligations". The Explanatory Notes state that permitting the electorate to do so would cause significant problems in dealings with other states. This rationale is broad and general and might be applicable also to the President.

62. Further, the provisions of the draft Bill have been formulated in too vague and broad terms, which, despite the clarifications that are provided by the Explanatory Memorandum, may lead to serious difficulties of interpretation and application, including in the context of the adoption of the implementing laws. It is not clear in the draft bill which are the laws that are passed to implement international obligations, since there are practical difficulties in interpreting international obligations and their relevance for some laws, or if provisions implementing international

[39] CDL-AD(2010)001, Report on Constitutional Amendment, para. 189; Resolution 2251(2019), Guidelines to ensure fair referendum in Council of Europe member States, paras. 3.1-3.3; CDL(2020)030.
[40] CDL-AD(2013)010, paras. 116-130.
[41] CDL-REF(2013)001.
[42] CDL-AD(2013)010, para. 183.

obligations might make up only a part of the legislation that principally pertains to other matters. The exclusion must be interpreted narrowly so as to avoid its use as a means for obstructing the referendum as such.

63. Also, "laws on tax matters" are not always easy to define. Is a provision pertaining to taxes, making part of a wider law treating other matters, an impassable obstacle to popular referendum? The problem is that the possibility of this popular initiative asking for referendum will always depend on the formulation of the legislation and it is easy for the Althing to manipulate laws in order to escape a referendum. Initiatives to trigger a referendum just to cancel a part of a law or just a few words are not envisaged in the draft bill. These restrictions entail the risk of litigation and legal uncertainty as well as a great responsibility for the courts when it comes to ensuring that the people's right to force an abrogative referendum is consistent with the Constitution. It is therefore recommended that either the draft provision should provide a precise definition of "tax matters" or it should give a clear reference to the legislation providing such definition.

64. The draft bill does not supply further criteria to guide a parliamentary decision on defining the "resolutions that have legal effect or represent important policy decisions".[43] This choice to leave it to the Althing may seem surprising. Although the 2/3 supermajority required could be a safeguard, it is regrettable that details that may be seen as technical, but which are essential for ensuring genuine popular participation in law-making, are left to the secondary legislation. It is neither clear in the draft bill, whether the decision by the Althing in this respect is a general one covering also future "resolutions that have legal effect or represent important policy decisions" or whether there should be a separate decision for each particular resolution.

65. The option offered to the Althing (Paragraph 4) to repeal the legislation/resolution at issue in advance of a referendum is to be welcomed. At the same time, the possibility for the Althing to repeal the law or revoke a resolution might create a sort of competition between Parliament and electorate which is an intrinsic part of a referendum and this has to be carefully designed so that it does not create chronic instability in the legislative work.

66. As previously stated[44] and in accordance with the Code of Good Practice in Referendums[45], to ensure that the Althing does not re-enact the same legislation after the referendum has taken place or after the act has been repealed under Paragraph 4, it would be advisable for the Bill to clearly state that the Althing may not adopt - for the running election period at least - an essentially identical piece of legislation. More generally, the Icelandic authorities might wish to consider whether the envisaged mechanism is actually workable and, if not, leave to the secondary legislation the definition of practical arrangements.

3. Thresholds and criteria for referendums

67. Under the draft bill, fifteen percent of those who are eligible to vote can demand that a new law passed by the Althing should be put before the people in a general, secret and binding referendum. It is difficult to comment on the appropriateness of the 15% threshold in the absence of sufficient knowledge of the specific political context of the country. This threshold may be satisfactory or on the contrary obstruct a referendum. What might be important, especially in a country like Iceland, where the Internet has played a decisive role in political life, is the way of collecting signatures (to be organized under a legislation approved by a 2/3

[43] Under paragraph 3 of the draft bill, "fifteen percent of those who are eligible to vote can also demand that a parliamentary resolution passed under Article 21 (international treaties) should be put before the people in a general, secret and binding referendum. It is permitted, by means of legislation which is approved by 2/3 of the votes in the Althing, to decide that the same apply to resolutions that have legal effect or represent an important policy decision (…)."
[44] CDL-AD(2013)01, para 120.
[45] CDL-AD(2007)008, Chapter III. Specific rules, section 5, a.i.;

supermajority).[46] It must be reminded that, if authorisation is required in order to gather signatures for a referendum on public thoroughfares, such authorisation may be refused only in specific cases provided for by law, on the basis of overriding public interest for public safety and in accordance with the principle of equality.

4. Approval Quorum

68. The fourth paragraph provides that in order to strike down a law or resolution in a referendum, the majority of those voting, and at least one-fourth of the entire electorate, must reject it. It is advisable not to provide for an approval quorum (approval by a minimum percentage of registered voters)[47]. An approval quorum or a specific majority requirement are acceptable for referendums only on matters of fundamental constitutional significance.

69. It may be noted that the other referendums, as provided by Articles 11, 26 and 79 of the Constitution, are not subject to such approval quorums (including the abrogative referendum forced by the President) which affect only abrogative referendums called by people's initiative. Therefore, there is a lack of coherence in the system, between the abrogative referendum called upon President's legislative veto (Article 26) and the abrogative referendum provided by the new draft Bill. Since the Bill already provides for citizens' negative legislation triggered by the President's veto under Article 26, a different rule related to an approval quorum for the referendum initiated by citizens seems to be unjustified. Therefore, it is advisable to remove the approval quorum.

5. Date of the referendum

70. Both paragraphs 1 and 2 of the draft bill provide that the demand must be submitted within six weeks from the publication of the law/adoption of the resolution, and that the referendum shall be held not earlier than six weeks and not later than four months after the demand has been received and confirmed. As the deadlines are the same, it would be recommended to make the text simpler and to avoid repetitions.

71. As regards the date of the deadline for submitting the demand, the provision seems clear in the case of a law, as under Article 27 of the Constitution all laws shall be published. Nevertheless, it is not clear why in the case of resolutions the criteria for the date is the adoption and not the publication, and how the public has access to the information on the adoption, especially taking into consideration the short deadline (six weeks) for the demand to be received already by the minister. The authorities explained in their written comments that following their adoption, the resolutions are published without delay on the website of the Althing. This explanation is welcome.

72. Moreover, according to the potential draft changes to the Act on the Conduct of Referendums, No. 91 25 June 2010, to facilitate the implementation of the bill for a constitutional act,[48] the minister shall be notified of the intention to collect signatures within two weeks after the adoption of the resolution[49]. The collection of the signature may

[46] Under paragraph 6 of the draft bill, "further provisions on the commencement and organisation of the collection of signatures, the form and collection of signatures, the dissemination of information, the conduct of referendums and dispute resolution by the courts, shall be set out in legislation approved by 2/3 of the votes in the Althing.

[47] The Explanatory Notes (CDL-REF(2020)048, p.4) are well aware of the position of the Venice Commission in that matter as they state that: "in fact, the Venice Commission has warned countries against imposing any thresholds as they may have a negative effect."

[48] Attached to the draft bill on referendums, CDL-REF(2020)048, Act on the Conduct of Referendums, No. 91, 25 June 2010 (potential changes to facilitate the implementation of the bill for a constitutional act), p. 12.

[49] See new draft Articles 13b and 13d of the Act on the Conduct of Referendums.

commence only once a notification has been received by the minister. These provisions may affect the practical implementation of the constitutional provisions.

73. Lastly, the lack of harmonization between the different types of referenda is apparent concerning the time periods and dates of the referendums and the underlying reasons of these differences are not explained. The referendum regulated in Article 11 concerning the removal of the President before the expiry of his/her term shall be held within two months from the date of adoption by the Althing of the resolution calling to referendum. The referendum following a presidential veto in Article 26, shall be held "as soon as circumstances permit" and the referendum in the current draft proposal shall be held not earlier than six weeks and not later than four months after the request has been received and confirmed.

6. Procedural issues and appeal rights

74. The draft Bill provides that the demand for the referendum must be submitted to a minister. Since political frontiers in referendums do not always run along party lines but may involve other political players, consideration could be given to referring rather to an impartial and independent body, with a balanced representation of supporters and opponents of the proposal submitted. Decisions of such a Commission will gain more legitimacy on both sides and would avoid conflict of interests.

75. Procedural issues of people's right to provoke an abrogative referendum, including the procedure on the commencement and organisation of the collection of signatures, the form and collection of signatures, the dissemination of information, the conduct of referendums and dispute resolution by the courts, shall be set out in legislation and are subject to regulation by an act of Parliament approved by a supermajority of 2/3 of the votes. It is welcome that a final appeal to a court of law will be possible.

76. The draft Bill does not supply further criteria to guide a parliamentary decision. This choice to leave it to the Althing may seem surprising. Although the 2/3 supermajority required could be a safeguard, it is regrettable that details that may be seen as technical, but which are essential for ensuring genuine popular participation in law-making, are left to the secondary legislation. The Bill does not provide for any criteria with respect to the substance of the envisaged regulation. The Venice Commission would like to draw attention to its Code of Good Practice on Referendums which could serve as a source of inspiration when drafting the law.[50]

7. Effects of the referendums

77. Under the draft amendments, the request for referendum must be submitted to a minister within six weeks from the publication of the law (following its approval by the President according to Article 26 which leads to its entry into force). It follows that the request for referendum is made for a law already in force and therefore the referendum is abrogative. The draft bill does not shed light on whether or not the law adopted by the Althing but put to the referendum under the current bill, will be implemented during the period between the publication and the vote itself. The answers given during the videoconference meetings are not conclusive. The abrogative character does not appear consistent with the rather short deadline for asking for a referendum and holding it, which would be more appropriate for a suspensive referendum. Having a piece of legislation in force and applied for a few months only could be problematic from the point of view of legal certainty.

78. Also, as regards international treaties, in the Explanatory Memorandum it is mentioned that it is expected that the government authorities will wait to ratify a treaty until the time limit for demanding a referendum on the Althing's resolution has expired and if such a demand is

[50] CDL(2020)030 Draft Revised Guidelines on the Holding of Referendums.

made and confirmed, ratification should be delayed pending the outcome of the referendum.[51] So the referendum would be suspensive. Nevertheless, the Venice Commission is not in a position to assess whether the Explanatory Notes as a whole provide sufficient guidance for the interpretation of the Bill's provisions. Therefore in order to avoid any contradiction with international law, it would be recommendable to include specific provisions in the Constitution ensuring that referendums concerning international treaties are suspensive, in the sense that the authorities are not allowed to ratify the treaty before the referendum.

C. Draft amendments to the Constitution on Natural Resources[52] and on the protection of the Environment[53]

1. General remarks

79. Upon gaining their independence, many countries did not include natural resource provisions in their constitutions, except usually countries, where the struggle for independence involved a significant fight over natural resources. Depending on the importance of the role that natural resources play in every country's economic and political history, it might be inevitable that natural resources are addressed in the Constitution. To what extent the constitutional provisions on natural resources provide for accountability and effective public participation in resource transactions and the ensuing benefits varies across countries.

80. Environmental constitutionalism is a relatively recent phenomenon at the confluence of constitutional law, international law, human rights and environmental law. It embodies the recognition that the environment is a proper subject for protection in constitutional texts and for vindication by constitutional courts worldwide. In recent times, environmental issues have evolved into a pressing global concern, which can no longer be disregarded or overlooked by states and policy-makers. As a response, many constitutions now incorporate provisions concerning the protection of their nation's environment. Additionally, states are obligated by national and sometimes international laws to protect the environment and to consider the responsibility of the current nation and people to its future generations. The extent and scope of a constitution's environmental protection will vary depending on the country with some nations emphasizing certain issues more than others.

81. Environmental constitutionalism is variable, manifesting into substantive rights, procedural rights, directive policies, reciprocal duties, or combinations of these and other attributes. Some countries incorporate most or all of environmental constitutionalism,[54] while others eschew it

[51] CDL-AD(2020)048, p. 10.
[52] CDL-REF(2020)049.
[53] CDL-REF(2020)050.
[54] Some aspects are fairly common. For example, about one-half of the countries of the world expressly or impliedly recognize a constitutional right to a quality environment. About the same number impart a corresponding duty on individuals to protect the environment.
Some provisions are quite specific, such as those that provide for rights of nature, or rights to potable water or other natural resources. Some are more ephemeral, recognizing trust responsibilities over natural resources or toward future generations, or addressing related subjects like sustainability or climate change. Some recognize environmental stewardship as a matter of national policy.
The Constitution of Ukraine enshrines a right to an environment that is "safe for life and health". Hungary, Turkey, Indonesia, and Nicaragua entrench a right to a "healthy" environment, while South Africa specifies "an environment that is not harmful to...health or wellbeing". South Korea uses the adjectival descriptor of "pleasant", and the Philippines guarantees a "balanced and healthful ecology in accord with the rhythm and harmony of nature". In Chile, the right is to an environment "free from contamination". Some constitutions, including those of Kenya, Bolivia, South Sudan, and South Africa, explicitly extend substantive rights to future generations. While most constitutional provisions addressing environmental concerns are narrative, some incorporate numerical outcomes, such as

entirely. Most countries fall somewhere in between. The different legal traditions of nations have influenced the development of constitutional environmental provisions and will likely influence their implementation in each country.

82. The proper drafting of constitutional environmental rights is important to maximise their beneficial operation. If the rights are ambiguous, their content uncertain or vague, or if they are not sufficiently adapted to local conditions, enforcement is likely to be more difficult. Further, in the absence of appropriate enforcement mechanisms, the policy incentives created by constitutional environmental rights will be undermined.

Constitutional provisions that relate to natural resources and environment protection

83 The experience of other countries suggests several options for the constitutional entrenchment of the preservation and protection of the natural environment: (a) Affirming the rights of nature itself, for example by placing obligations on the State and citizens to protect Mother Nature (the ecocentric approach[55]); (b) Affirming a human right to a clean and healthy environment (the anthropocentric approach[56]); and (c) Referring to environmental protection as part of a right to intergenerational equity. In some countries constitutional environmental rights have been construed as including a duty to ensure that natural resources are responsibly managed.

84. Constitutional provisions on natural resources can be categorized into four main groups:

- Provisions that are found in human rights chapters or sections of constitutions, particularly the right to property,

- Provisions that directly and specifically relate to institutional control and transparency in the allocation of resources,

- Provisions that relate to environmental protection,

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maintaining a percentage of prescribed tree cover, including Bhutan (60 percent) and Kenya (10 percent).

[55] The ecocentric approach is based on the understanding that all life forms have equal worth independent of their value to human interests and that they should be recognised and protected as rights-holders alongside humans.
See generally Christopher Stone "Should Trees Have Standing? - Towards Legal Rights for Natural Objects" (1972) 45 Southern California L Rev 450., at 456. See also, Joshua Bruckerhoff "Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights" (2007) 86 Tex L Rev 615 at 618.

[56] An anthropocentric approach, in its strictest form, conceptualises humanity's relationship with nature according to nature's aesthetic, economic or social value to human beings. It is a perspective centered exclusively on the human needs and finds other modes to be inferior. This attitude results in unlimited plunder and exploitation of other life forms. Other life forms are given no intrinsic value of their own: they only have value through their use by the human.
See William Aitken "Human Rights in an Ecologica lEra"(1992)1 EnvtlValues 191, at196 and Tim Hayward "Ecological Thoughts: An Introduction" (Polity Press, Cambridge, 1995) at 58-62.
The dominant rationale for environmental protection is the main difference between the two approaches. These rationales are not always in conflict since environmental harms often go hand in hand with human rights abuses.
See Catherine Redgwell "Life, the Universe and Everything: A Critique of Anthropocentric Rights" in Alan Boyle and Michael Anderson (eds) Human Rights Approaches to Environmental Protection (Clarendon Press, Oxford, 1996) 71 at 87 and Dinah Shelton "Human Rights, Environmental Rights, and the Right to Environment" (1991) 28 Stan J Int'l L 103 at 117.
There are competing rights in every field of law, but it should be recognised that both approaches ultimately contribute to a shared objective: environmental protection. For this reason, working alongside each other, both approaches can combine to achieve their shared objective.

- Miscellaneous constitutional sources that form the basis of resource legislation, enforcement.

The key elements under miscellaneous provisions are those that place the government in the position of trustee for the management of natural resources and those that evince a range of international obligations including resource management.

85. Many countries have included explicit environmental rights in their constitutions.[57] Alternatively, such rights are implied through the construction of human rights already contained in a constitution. A third approach is to include constitutional policy directives mandating specific environmental outcomes.

86. While there remains no international treaty, which contains a right to a clean and healthy environment, as of January 2019, 150 countries have constitutionally recognised environmental protections.[58] Domestic constitutional protection of environmental rights has distinct advantages over international protection beyond those of enforcement, because such protections are likely to be more locally adapted, and therefore, more readily perceived and acceptable.[59] Constitutional recognition of environmental rights also has powerful normative and symbolic value. By framing environmental harm as a violation of fundamental constitutional rights, the legal legitimacy of these rights is augmented and reinforced.[60] Moreover, the existence of constitutional environmental rights is a powerful incentive to develop sound environmental policy.[61]

2. Draft amendment to the Constitution on natural resources[62]

87. Over preceding decades, there have been many discussions in Iceland and several drafts on the inclusion of a specific provision regarding natural resources in the Constitution of the Republic of Iceland. The general public has repeatedly shown support for such intentions, such as in the advisory referendum in the autumn of 2012[63] and the poll conducted in the summer of 2019.[64]

88. Article 34 of the 2012 draft Constitution concerning natural resources was also commented upon by the Venice Commission in its 2013 Opinion.[65] The Commission welcomed the efforts

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[57] See, for instance, Constitution of Portugal (Article 66); Constitution of Azerbaijan (Article 39); Constitution of Belgium (Article 23(4)); Constitution of the Russian Federation (Article 42); Constitution of the Slovak Republic (Article 44); Constitution of Spain (Article 45); Constitution of Croatia (Article 69); Constitution of Norway (Article 110 b).

[58] See United Nations Environment Programme, Environmental Rule of Law First Global Report (January 2019) viii; United Nations Environment Programme, Judicial Handbook on Environmental Constitutionalism (March 2017), 1. See, also, CODICES, database on constitutional provisions and case-law of the Venice Commission, www.codices.coe.int

[59] United Nations Environment Programme, Judicial Handbook on Environmental Constitutionalism (March 2017) 10.

[60] David R Boyd, The Environmental Rights Evolution: A Global Study of Constitutions, Human Rights, and the Environment (UBC Press, 2012), 8.

[61] Chris Jeffords and Lanse Minkler, 'Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes' (2016) 69(2) Kyklos 294, 295.

[62] CDL-REF(2020)049.

[63] In the advisory referendum, held on 20 October 2012, 74% of participants, based on valid votes (83% if blank and invalid responses are not taken into account, see *Hagtíðindi* 2013:1), declared that they were in favour of natural resources not in private ownership being made the property of the nation.

[64] In the poll conducted in 2019 by the Social Science Research Institute of the University of Iceland, 90% of respondents were of the opinion that it was somewhat important or very important that a provision regarding natural resources was added to the Constitution.

[65] CDL-AD(2013)010, paras. 60-62.

made in Iceland to set out effective guarantees and provide guiding principles for the use of country's natural resources and to regulate government action and responsibilities in this sphere.[66] However, the Commission considered that the wording of the draft provision needed to be reconsidered, since some of its provisions opened the way to different and sometimes opposite interpretations. It also considered that the approach to private property rights in relation to the country's natural resources needed to be clarified and made more explicit.[67]

89. According to the Explanatory Memorandum, very minor material alterations have been made to the text of the Bills compared to previous drafts and it has been endeavoured to make it simpler and to avoid repetitions.

a. The draft bill

90. The draft Bill addresses the natural resources of Iceland in general, with an emphasis on sustainable utilisation for the benefit of the Icelandic people, and also focuses specifically on natural resources over which the state has authority.

91. The content of the Bill is in three parts. The provision of paragraph 1 regards the natural resources of Iceland in general and therein are established principal concerns that shall be the basis for their utilisation. Furthermore, the State is assigned the role of supervising the utilisation of natural resources. Paragraph 2 addresses natural resources and land rights that are in the ownership of the nation, and the legal implications that arise from declaring that the nation shall be the owner of common assets. There is also a provision regarding the State's role of authority with regard to national ownership. The provision of paragraph 3 addresses the granting of authorisations for the utilisation of natural resources and land rights that are owned by the nation or by the state, and it is provided that there are basic conditions that must be met for the granting of such authorisation.

b. Relationship with property rights

92. The draft amendments provide that "the natural resources of Iceland belong to the Icelandic nation" (Para.1). The Venice Commission interprets this very general statement more as a statement of policy principle, rather than a legal norm. This is a far-reaching provision on natural resources. It is broad enough to cover any conceivable natural resource, including genetic and solar resources. However, according to the Explanatory Notes, that wording does not refer to property rights but to the idea that the natural resources of Iceland are assets from which the entire nation benefits greatly. The rest of the draft provision deals with concrete legal notions.

93. The second paragraph of the draft Bill uses a negative definition to the extent that resources and land rights that are not demonstrably subject to private property rights shall be regarded as the property of the nation. In the second sentence of Paragraph 2, there is a description of the characteristics of national property rights: no-one can acquire assets that are considered the property of the nation or any rights pertaining to them as ownership or for permanent use.

94. Thus, the draft Bill introduces two different categories of entitlement to land/resources: a) private property belonging to individuals and legal entities b)natural resources and rights to land 'belonging to the nation'.

[66] *Ibid*., para. 60.
[67] *Ibid*., para. 62.

95. This raises the important general question of the relationship between private ownership and use and the resources belonging to the nation, of which the legal regime has to be designed by the legislative and executive powers as provided by the draft amendment.

96. It is yet not clear what the scope of the judicial review by the courts will be (see para. 101 below) in case the natural resources are not used "in a self-sustaining manner for the benefit of all the people of Iceland" as provided in the second sentence of the first paragraph of the draft provision.

97. It is assumed that natural resources and land rights owned by the nation, as well as the concept of national ownership, will be defined in detail in legislation. During the meetings, the delegation did not receive a precise answer as to the question on the number of existing laws or dispositions that have to be revised to meet the requirement level of the new constitutional provision and the new laws that will have to be enacted. Clarity on fundamental principles, notions and definitions in the draft provision might help and provide guidence to the future legislator when preparing and enacting/amending implementing legislation.

c. Relationship with environmental protection

98. The environmental provisions in the draft amendments, which are examined below, are very important to the natural resources sector because there is no resource exploitation without environmental consequences. The two are inextricably connected. Most importantly, a constitutional environmental right will help guarantee that short-term political pressure and economic considerations of external actors will not trump long-term environmental concerns. Also, companies involved in resource exploitation must comply with the environmental provisions in the Constitution and should be held accountable by way of suits and other actions if their actions affect the environment in an unsustainable manner. The proposed draft (para. 1), second sentence, states that the natural resources belonging to the Icelandic nation "shall be utilized in a self-sustaining manner for the benefit of all people of Iceland." The provision therefore creates an obvious, strong relationship between the bill on natural resources and the bill on environmental protection. However, regrettably, neither the draft provision, nor the Explanatory notes, shed light on this relationship. Thus, it is recommended that the relationship between the two bills be clarified and be made more explicit.

d. Institutional oversight and judicial control

99. The draft amendments appear to have made significant strides in the area of institutional oversight and accountability for resource exploitation. Although they go much further than many other constitutions in incorporating resource management provisions, they fall short of incorporating adequate safeguards on enforceability and justiciability. The draft does not establish a body independent of the legislature and the executive to assess the fairness of the resources' exploitation.

100. Nothing in the provision, nor in the Explanatory notes, indicates that the new article is subject to control by the judiciary. Paragraph 3 of the bill regulates moreover extremely important economic issues, inter alia fees for commercial exploitation. Such issues must be covered by judicial control. The Commission reiterates the importance of appropriate enforcement mechanisms, including judicial control, which would engage the people through judicial redress in the management of their natural resources. Therefore, the Commission recommends to clarify in the draft provision whether Article 60 of the Constitution which provides that "judges settle all disputes regarding the competence of the authorities" is also applicable in the context of natural resources. In their written comments, the authorities underlined that general rules on judicial review would apply to the draft provision like any other article in the Constitution and that, in addition, the Icelandic courts are competent to review the constitutionality of laws which would apply also to the legislation in this area. The Commission acknowledges, in the light of the

explanations by the authorities, that referring explicitly to the provisions on judicial review when it is clear that they apply, is contrary to the Icelandic legislative technique. It considers, however, that mentioning specifically the judicial review in relation to the protection of rights guaranteed under this provision, would establish a clear link with Article 60 considering the great novelty that the rights involved represent.

3. Draft amendment to the Constitution on environmental protection[68]

101. Iceland has chosen to lift into the Constitution a provision on environmental protection, following the example of other increasingly numerous constitutions. The Venice Commission welcomes the draft provision and underlines the importance of the recognition of environment as a proper subject for protection in constitutional texts.[69] The subject is both topical and highly controversial, not only because of the confrontation of individual and collective interests that the object implies, but also because the very dimension of the field thus covered is not the subject to consensus, as evidenced by the climate discussions. The difficulties and challenges stemming from the flexible nature of environmental constitutionalism, which are examined in the following paragraphs, are common in many countries, where the appropriate solutions to those difficulties are found over time.

102. The proposed bill contains, technically, four norms: the first norm (paragraph 1) contain a declaration of principles and provides for the "shared responsibility" for the protection of nature and environment.[70] The second norm (para. 2, first sentence) is an extremely important new norm in the constitutional life of Iceland concerning the right to a healthy environment.[71] The third norm (para. 2, second to fourth sentence) concerns the public's right to roam freely in the nature.[72] And the fourth norm (para. 3) concerns the right to accessible information regarding the state of the environment and the effects that developments have on it, as well as participation in the preparation of decision-making concerning the environment.[73]

a. First norm

103. The basic standards and principles in the *first norm*, shall guide the protection of Iceland's environment and the policy and legal norms shall be in conformity with one supra-standard: "precaution and long-term vision guided by sustainable development." For the Commission, it is very important that definitions as precise as possible are given concerning the principles and notions used in the draft provision. It appeared, during the videoconference meetings, that there is no important background in Iceland in public policies and no abundant case-law to give an official interpretation of many principles and notions used in the provision. It is true that some of the notions, such as "sustainable development", have been defined in international texts[74], but they might have very different applications in different countries. Another example is the "principle

[68] CDL-REF(2020)050.
[69] See, footnote 57, and para. 81.
[70] « Iceland's nature is the foundation of all life in the country. Responsibility for protecting nature and the environment is shared collectively by all and that protection shall be based on precaution and long-term vision guided by sustainable development. The maintenance of natural diversity shall be promoted and the growth and development of the biota ensured."
[71] "Everyone has the right to a healthy environment".
[72] "The public may roam freely and stay on the land for legitimate purposes. Nature shall be well treated and the interests of landowners and other right holders respected. More detailed provisions on the content and extent of the right to roam shall be provided by law."
[73] "The right of the public to access information on the environment and the effects of any developments thereon, and to participate in the preparation of decisions affecting the environment, shall be provided by law."
[74] Brundtland report from 1987, which the Explanatory Notes refer to, defines "sustainable development" as development that meets the need of the present without compromising the ability of future generations to meet their own needs.

of precaution", where the dimension of "risk management" is perceived in various ways in different countries and the scope of the principle is dissimilar in different sectors; as for instance, the principle of "precaution" in health law is different than "precaution" in environmental law.

104. The first paragraph of the provision establishes a "shared responsibility" and the duty to protect the nature lies both with the State and the individuals. Individuals in this relation would also include legal subjects, i.e. private companies. The rights enunciated in the draft amendments are therefore both vertical and horizontal. The state has obligations and private individuals also have obligations that can be challenged *inter se.* This is commendable and call for public policies. However, the provision does not provide for any clarification as to the scope of "individual responsibility" which is an important and controversial issue about environmental protection. Also, the duty of the state and its overall responsibility for the protection of the environment and nature could be further emphasised.

b. Second norm: "everyone has right to a healthy environment"

105. As to the second norm (para. 2, first sentence), "Everyone has the right to a healthy environment", the first question is whether this provision provides for an objective norm only, governing the duties of the authorities, or whether it is a subjective norm, providing the individuals a right vis-à-vis the authorities, connected with the right to apply for protection by a court. It appears from the Explanatory notes that the "right to healthy environment" is conceived in the provision as a subjective, individual human right.

106. However, the Venice Commission would like to point to some issues which are not clearly settled in the draft text itself nor in the Explanatory notes.

107. First, it is not clear in the provision, whether the right to a healthy environment is exclusively a positive right, which gives the individual nothing more than the right to ask for positive steps to be taken by the authorities to protect the environment, or also a negative right, which confers the individual the right to prevent intervention and attacks into the nature. The Commission would interpret this provision to cover both aspects. This is the general implication of human rights norms: the state shall *secure* and *respect* a specific human right.

108. Secondly, it is not clear either whether this -subjective- right is an "absolute" or a "relative" right. If the individual exercises the subjective right to challenge a specific intervention into the nature/environment, should the specific intervention be seen in "isolation" (an absolute right) or should the specific intervention be seen in relation to previous, present and future interventions into the Icelandic nature/environment (a relative right)? The Explanatory notes do not address this issue clearly.

109. The question also arises whether or not the protection against a specific intervention into the Icelandic nature stops at the borders of Iceland. If, for instance, specific intervention relates to climate issues, as global warming, should then the subjective right to block or prevent the intervention be seen also in relation to the ongoing "global warming" produced by foreign states or entities?

110. The Explanatory Notes do not clarify where in the present Constitution the new provision is to be included and what are the fundamental differences between different categories of rights, civil and political rights, socio-economic rights and collective or third generation rights, concerning for instance the limitations and restrictions which would apply to the different categories. Currently, the Constitution has no limitation clause. Moreover, the draft provision does not provide sufficient clarity on whether and which concrete rights and obligations can be derived from them, and the Commission sees a risk that that the public takes them as promises to ensure high living conditions. The provision mainly states a goal, but do not deal with the means to reach it.

111. Lastly, as previously stated, in the absence of appropriate enforcement mechanisms, the policy incentives created by constitutional environmental rights will be undermined. Under the draft bill, provision is made for the protection of the environment and sustainable development. However, courts often hold that the rights are not self-executing, but they require implementing legislation to set the scope of rights and the means for exercising them. This means that citizens might be unable to realise their fundamental rights should the government fail to enact implementing legislation or should it enact very restrictive legislation. The Commission therefore draws the attention of the authorities to the importance of implementing legislation.

112. Moreover, it is recommended to add at constitutional level provisions to authorise the public to defer decisions that concern the environment and nature to an objective adjudicating entity (although they exist in statutory laws[75]). It is important to make this right enforceable and justiciable by providing that if a person alleges that a right to a healthy environment recognized and protected under the bill has been denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect of the same matter. It is welcome that the Explanatory Notes and the written comments by the authorities indicate that it will be up to the courts to decide whether or not the laws, administrative acts, actions or lack of action, are contrary to the protection the provision is intended to confer[76], which is in line not only with the basic and fundamental position of the Venice Commission on the implications of the principle of the rule of law[77], but also with the constitutional situation on the protection of the environment in many European countries, and beyond. However, this should be clearly stated in the draft provision, since this would establish a clear link with Article 60 considering the great novelty that the rights involved represent.

113. The Venice Commission is aware of the problems of judicial control in the area of protection of the environment. Critics or sceptics will claim that this area is not suitable for judicial control, as it will take the courts into sophisticated discussions on natural sciences. They might also claim that as the environmental protection is an area for discretion and political compromises, in case a parliament or government made a political compromise on the protection of the environment, the judicial branch should not intervene. However, an important argument to counter such a conclusion is that the protection of the environment is not like the traditional human rights conflict, where the minority needs protection against the majority. In the area of protection of the environment, there is a totally new dimension: the protection of the rights of future generations. As the future generations do not take part in present day democracy and do not vote in present day elections, the judicial branch appears to be best placed to protect the future generations against the decisions of present-day politicians.

c. Third norm: “right to roam freely”

114. The second sentence of paragraph 2 of this draft provision provides for another right: the right to roam freely and stay on the land for legitimate purposes. It is not clear to the Venice Commission why this right is provided in the Constitution, as part of a provision concerning rights and obligations related to the environmental protection. The authorities clarified that in Iceland, it is traditional to link the right to roam with environmental protection.

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[75] Act on the Appeals Committee for Environmental and Natural Resource Matters, No 130/2011, cf. Act No 89/2018. That Act includes general rules regarding procedures and who can make a complaint, and a special complaint authorisation for nature conservation, outdoor activity and special interest organisations that fulfil certain conditions.

[76] CDL-REF(2020)050, ap. 10.

[77] Venice Commission, CDL-AD(2016)007, Rule of Law Check-List.

d. Fourth norm: right to access to information and to participate in the preparation of decisions

115. The third paragraph of the draft provision concerns the right of the public to access information on the environment and to participate in the preparation of decisions affecting the environment.

116. The Commission reminds that procedural rights are essential to the enforcement of substantive environmental rights.[78] The ECHR protects procedural environmental rights such as the right to freedom of expression, the right to freedom of assembly and association, and the right to an effective remedy.[79] The rights of freedom of expression and association are of special importance in relation to public participation in environmental decision-making. In addition, without the right to information, there can be no meaningful participation in environmental decision-making. The right to information is recognised in many environmental treaties and instruments, most notably Europe's 1998 Aarhus Convention, and the Universal Declaration of Human Rights. The provision concerning the right to information on the environment is therefore welcome.

117. The right to public participation is another important procedural environmental right.[80] It enables stakeholders to be involved in environmental decision-making by, for example, being entitled to make submissions, ask questions, and attend public meetings. This participation improves the quality and legitimacy of decision-making.[81]

118. However, the wording of the provision of paragraph 3 seems to restrain the scope of the right of the public to participate in decision-making only to the "preparation" of decisions affecting the environment. Although this right, as well as the right to information, shall be regulated by law, it is advisable to use the participation in decision-making, and not only in the preparation of decisions.

V. Conclusion

119. The Venice Commission welcomes the efforts currently being made in Iceland to consolidate and improve the Constitution in order to reflect the common fundamental values of the Icelandic people and to lay a solid foundation for a democratic state based on the rule of law and guaranteeing the protection of human rights.

120. After their attempt of drafting a brand-new Constitution in the aftermath of the economic crisis in Iceland, the authorities have changed their approach to the constitutional reform and have opted for a more cautious method by introducing, in a period equal to two electoral terms, partial amendments to the Icelandic Constitution.

121. The Commission reiterates that it is not its role to intervene in a controversy on whether it is appropriate to offer Iceland an entirely new Constitution, or to adopt only limited constitutional amendments in a perspective of giving greater importance to constitutional continuity in the country. However, it reminds that the 2012 draft, which the Commission examined in its 2013

[78] United Nations Environment Programme, Judicial Handbook on Environmental Constitutionalism (March 2017), 1.
[79] See, for instance, ECtHR, *Vides Aizsardzības Klubs v. Latvia,* no. 57829/00, 27 May 2004; *Costel Popa v. Romania*, no. 47558/10, 26 April 2016; *Kolvadenko and others v. Russian Federation*, no. 17423/05, 28 February 2012.
[80] ECtHR, *Vides Aizsardzības Klubs v. Latvia; Guerra and others v. Italy* [GC], No. 14967/89, 19 February 1998.
[81] United Nations Environment Programme, Judicial Handbook on Environmental Constitutionalism (March 2017), 83.

Opinion on the draft new constitution of Iceland, was submitted to a -consultative- referendum and the draft was approved by the people as a basis of a new Constitution of Iceland. Therefore, the Commission considers that the Icelandic people should be given transparent, clear and convincing explanations for the government's choices, and the underlying reasons for any substantive departure from the previous 2012 draft should be explained to the public. At the same time, the Venice Commission welcomes the great variety of public consultation mechanisms used in the current constitutional reform process.

122. The request for opinion by the Prime Minister concerns four draft constitutional bills: (1) Draft amendments concerning the President of Iceland, Cabinet, functions of the executive and other institutional matters; (2) draft amendments concerning referendum; (3) draft amendments concerning the natural resources and (4) draft amendments on environmental protection.

123. The draft bill concerning the President and functions of the executive aims at bringing this chapter of the Constitution closer to current practice. The bill proposes entirely new provisions in cases where the Constitution is silent on important substantive rules which are currently applied in the practice. It also proposes to modify the wording of provisions currently in force without introducing significant substantive amendments. The bill also proposes a number of substantive amendments where practice, public debate or academic scholarship is considered to have exposed regulatory shortcomings. Although the bill does not significantly modify in principle the parliamentary system with a popularly elected president who is above daily party politics, where the Cabinet of ministers is the centre of the executive power, important amendments are proposed concerning the President's term-limitation, presidential powers, and the presidential immunity.

124. The amendments are generally positive and in line with the international standards. At the same time, some of the provisions seem to be left unfinished which might cause uncertainty in their interpretation and application. In addition, it appears that the drafters have sometimes also taken the opportunity to eliminate a number of obviously old-fashioned provisions and have used these deleted provisions to introduce new rules without any link to the subject matter previously treated.

125. The following main recommendations are made concerning the draft bill the President and functions of the executive:

- A procedure of revocation of an act by the Caretaker Cabinet which is in breach of the principle of "necessity" in draft Article 23(3) should be envisaged in the Constitution;

- Concerning the criminal liability of the ministers, draft Article 14 delegates too much power to the future legislation. The constitutional provision should provide rules as to the investigations, indictments, and judicial proceedings in cases of alleged misconduct in office by ministers;

- Concerning the status of director of public prosecutions, draft Article 30 goes too far in favour his/her independence, as it assimilates its status to the protection given to judges. A more careful wording is needed based on the notion of "autonomy" of public prosecution.

126. Concerning the draft amendments on referendums, the clear intention to enhance citizens' opportunities to influence legislation and more generally the decision-making on issues of key interest for the public is welcome. This aim appears to be entirely legitimate and understandable in the specific socio-economic and political context of Iceland. The following main recommendations are made:

- Harmonisation should be made between the provisions concerning the referendum triggered by a veto of the President and the abrogative referendum provided in the bill;

- The meaning of the expressions “laws that are passed to implement international obligations” and “resolutions that have legal effect or represent an important policy issue” should be determined in a clearer manner;

- A provision should be introduced to the effect that the Althing may not adopt, for the running election period at least, an essentially identical piece of legislation after the referendum has taken place or after the act has been repealed by the Althing;

- The approval quorum should be removed.

127. The draft bills on natural resources and on the environmental protection are welcome as they aim to constitutionally entrench the use and protection of natural resources, as well as the protection of the environment. The amendments are generally positive and in line with the applicable standards. The following main recommendations are made:

- the relationship of the bill on natural resources with the bill on environmental protection should be clarified;

Concerning the draft bill on natural resources:

- the meaning of the notion “national ownership” and its relation to the right to property should be determined in a clear manner;

- issues related to the natural resources, including the economic issues in the draft provision such as fees and commercial exploitation should be covered by judicial control.

Concerning the draft bill on environmental protection:

- The meaning of the notions used in the draft provision, “precaution” and “long-term vision guided by sustainable development” should be clarified;

- The scope of “individual responsibility” for environment protection and its relationship to “shared responsibility” should be clarified; the duty of the state and its overall responsibility for the protection of the environment and nature could be further emphasised;

- The scope and the nature of the right to a healthy environment, as well as the rights and obligations which derive from this right should be clarified;

- The enforcement mechanisms, including the judicial control of the rights and obligations related to the environment protection should be provided explicitly in the text of the Constitution.

128. The Venice Commission remains at the disposal of the Icelandic authorities for further assistance in this matter.