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To the People of Iceland:

As we showed in earlier articles, the 2011 draft constitution makes many salutary changes and additions to the 1944 constitution that remains in force. But there is at least one area where the new draft makes no progress at all: the rights of those accused of crimes. Obviously, this is not an argument that the 2011 draft is worse than the 1944 constitution. The only claims we make here are that in this area the 2011 draft does not improve upon the current constitution, and that changes can be made to improve the draft.

Legal procedural rights are among the oldest rights in the world, and they are a classic example of negative rights—protecting citizens from the state. Negative rights are protected in constitutions because of their fundamentally counter-majoritarian nature. Legal procedural rights are very important in this respect, because protecting the right of a person accused of a heinous act to have a fair trial is likely to be unpopular. The greater difficulty in amending the constitution as compared with passing regular legislation offers legal procedural rights protection from popular impulses of the moment. The idea of preventing the majority from executing its will has certainly been controversial, but we argue that protecting the legal procedural rights of even the most heinous criminals is a core element of a free and democratic society. Given the increased power of citizen majorities under the 2011 draft constitution, negative rights take on even greater significance.

We are mostly concerned in these articles with constitutional law, yet we should note that it is certainly not the case that omitting a group of rights from the constitution means that those rights do not exist in practice. Iceland's current legal system provides for some basic rights in the constitution, others in domestic law. And several legal procedural rights became part of Icelandic law when Iceland incorporated the European Convention on Human Rights (ECHR) into domestic law in 1994. Yet the ECHR is not comprehensive, and the lack of constitutional entrenchment may lead to variation in enforcing these rights, and create additional barriers to access these rights. Additionally, Iceland's legal procedural rights will develop little or not at all through case law: since Iceland has a civil law system, precedents created through judicial decisions have little authority. Whereas important legal procedural rights have developed through case law in such prominent common law systems as the United States and United Kingdom, this is unlikely to happen in the Icelandic legal system.

Legal procedural rights come into action in many aspects of law enforcement and criminal trials. In the first instance, there are rights beyond those considered to be legal procedural rights that may limit law enforcement agencies' ability to conduct investigations. For example, the right to privacy may prevent police officers from searching an individual's car or mobile telephone without a warrant. Both the 1944 constitution and the 2011 draft protect Icelanders from searches of their person and possessions without proper legal procedures.¹ Legal procedural

¹ Stjórnarskrá lýðveldisins Íslands 1944 nr. 33 17. júní [Constitution], Art. 71; Stjórnlagaráð 2011, Frumvarp til stjórnarskipunarlaga, 29. júlí 2011 [Draft Constitution], Art. 11.

rights have their most obvious application when a person has been accused of a criminal offence, and is taken into custody by law enforcement personnel. Does this arrested individual have the right to avoid self-incrimination; to have a lawyer present during interrogation; to have that lawyer provided at state expense; or to be released if not charged within 24 hours? In some jurisdictions, rights like these have been created over time through judicial decisions. But it has increasingly been the trend to secure these rights through explicit constitutional text.

Both the 1944 constitution and the 2011 draft include some important legal procedural rights: to be informed of the reason for arrest, the presumption of innocence, a public trial, a speedy trial, and pretrial release. Some of the rights that are not included in the Icelandic constitution are a simple matter of legal culture. For example, there is no right to a jury trial in Iceland, and it would be a substantial change to the legal system to implement such a thing. Similarly, while the right to trial in the native language of the accused (or to have an interpreter at court expense) is included in 83 other national constitutions currently in force, it does not seem like a pressing concern in Iceland.

The 2011 draft's most glaring omission in this area is its failure to require government-provided legal counsel to those accused of committing a criminal offense. In current Icelandic law, there is a basic right to counsel—even if it is not in the constitution. The state will pay for the accused's legal counsel at trial; however, if the accused is found guilty, they are obligated to repay the state for the cost of their defense. In civil proceedings, a similar process permits an individual to apply for the state to pay for their court fees and the cost of engaging counsel. But those are only statutory provisions, which are at Althingi's mercy. It is a widely held view that the right to counsel (and especially to state support for those unable to pay) is a fundamental human right, and one that should be constitutionally entrenched. As of 2017, almost 80 percent of national constitutions include this right. The lack of a constitutionally guaranteed right to counsel is one area of the text that Althingi may wish to reconsider when moving forward with the constitutional reform project.

Relatedly, there is no constitutional protection against self-incrimination in Iceland. Here again, the ECHR provides Icelanders with a claim to the right to remain silent when questioned by police. For the same reasons discussed above, this is the kind of right that should be guaranteed in the Icelandic constitution, as it is in more than half of the national constitutions currently in force. Also missing is a prohibition against what is called double jeopardy in US law. Again, more than half of the constitutions currently in force protect accused persons from standing trial twice for the same offense. Neither the 1944 constitution nor the 2011 draft contain these rights.

The legal procedural rights discussed here are not included in some of the constitutions closest to Iceland's, such as those of Denmark, Norway, and Sweden. And there is little of serious concern in terms of the criminal justice system in Iceland. For these reasons it is quite natural that the authors of the 2011 draft constitution left these rights out. Yet it is notable that a draft constitution that made such big strides in areas like direct democracy and equality rights neglected the opportunity to make advances in this area.

Skeptics might argue at this point that given the reasonably robust legal procedural rights contained in the ECHR, it would be superfluous or even confusing to add these rights to the Icelandic constitution. But there are at least three important reasons to guarantee these rights in the domestic constitution. First, it has long been the case that international covenants have

inspired changes in national constitutions to make new rights part of domestic law.² There has been no apparent problem with constitutionalizing rights from international agreements. Second, reliance on the ECHR or the European Court of Human Rights (ECtHR) requires a certain amount of sovereignty over legal procedural rights to be moved from Iceland to Strasbourg. While we would not suggest that the ECtHR lacks competence or has infringed on Iceland's sovereignty, reliance on these international sources of rights protection removes these issues from domestic control. Finally and relatedly, reliance on the ECHR and ECtHR could be seen to create a democratic deficit. Beyond the sovereignty issue, the added step between the people and the law reduces its democratic bona fides. Given the ambitious steps taken in the 2011 draft constitution toward ensuring greater citizen control over policy, it is incongruent with the nature of the draft constitution to leave these matters to an international agreement and international court, where the power of the Icelandic citizens reaches with less effect.

As the debate on ratifying the 2011 draft continues, more attention should be paid to this subject.

—CIVIS

² Zachary Elkins, Tom Ginsburg, and Beth Simmons. "Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice." *Harvard International Law Journal* 54 (2013): 61–96.