It is not often that one hears or sees a reference to the colonial past of Icelanders. One such exception is when a segment of the Icelandic people feels that the Danes are treating them somewhat unfairly, by not properly addressing and acknowledging the strong ties of the two nations' common history. A good example of this were the reactions of many when Denmark awarded just one point to the Icelandic contribution and melody in the 2013 Grand Prix Eurovision song contest when, at the same time, Iceland gave the Danish song and performer full house, or 12 points (cf. views on the authors facebook profile on May 18th 2013).

On June 16 2010, *Althingi*, the Parliament of Iceland, passed a revised bill on a Constitutional Assembly to be held in the first half of the year 2011. The idea of some kind of a Constitutional Assembly has been around in Iceland since the early beginning of the struggle for autonomy and self-determination in the middle of the 19th century, when leading figures in public life in Iceland arranged the 'infamous' National Assembly (*Thjódfundurinn*) in 1851 to discuss and put forward constitutional demands of the people, or the Nation of Iceland.[1]

When the world-wide financial crisis of 2008 hit Iceland between late September and the beginning of October, politicians were felt to be slow in their response and insecure about what their immediate reaction should be. In the months to come street protests and popular pressure grew immensely, which resulted in the coalition of the Conservative Party and the Social Democratic Alliance falling apart midterm, though still holding on to a solid majority of seats in Parliament. Late in 2008 and early 2009 the first voices demanding a new constitution were to be heard.[2] On February 1st, 2009 a new minority government came to power, formed by a coalition of the Social Democratic Alliance and the Left-Green Party. The minority government, with the support of the Progressive Party, tried to get a bill on a total revision of the constitution through Parliament before the general elections scheduled for April 2009, but was successfully blocked by members of the Conservative Party. After the elections, the first left-wing majority government was formed in Iceland with a coalition of the Social Democratic Alliance and the Left-Green Party.

On November 13th, 2009 Johanna Sigurdardottir, then a leader of the Social Democratic Alliance and the prime minister of Iceland, tabled a bill in Parliament proposing the setting up of a Constitutional Assembly,[3] which should review the constitution, i.e. a feat that the Parliament, in its role as the constitutional lawmaker, had not managed to do in 65 years, according to many commentators.[4] In June 2010, the Icelandic Parliament finally passed a reviewed act on a Constitutional Assembly, calling for it to be established and held in the first months of 2011.[5] Though no one has succeeded to show any direct connections between the financial crisis, including the collapse of the banking system in Iceland, and the provisions and the function of the constitution, loud voices did claim that Icelanders were fortunately faced with a "constitutional moment" and, subsequently, an opportunity to change the nation's political as well as economic life; something people were ethically obligated to make use of.[6]

Since the founding of the Republic of Iceland in 1944, several parliamentary committees have been formed and specifically tasked with reviewing the constitution, some times successfully so, while at other times without success. Since 1944 all constitutional changes except one have been motioned and carried through with an almost unanimous consent of the *Atlhingi*.[7] Each and every draft bill proposing changes to some of the paragraphs of the constitution or to a constitutional amendment has been limited and backed up with clear and understandable arguments by the vast majority of the members of Parliament.

When reading through the commentaries and report from the majority of the *Althingi* general committee (*allsherjarnefnd*), as attached to the bill on a Constitutional Assembly from June 16th 2010, it is difficult to find other legitimate arguments and/or reasons for a total revision of the constitution than its date of origin, i.e. its age and relative justification because of Iceland's past as a Danish colony and consecutive Danish constitutional heritage. In the committee´s reports and commentaries, it is thus claimed, that due to growing popular demand, which should be taken seriously, a general and total revision of the constitution is

called for and, as such, deemed to be well overdue and therefore in order. With no better justified or defined reasons for such an all-inclusive revision, it is a worth-while undertaking to take a closer look at the notion of a constitutional moment, and see if that can help us to understand why the Republic of Iceland should abolish its founding constitution without a preceding thorough analysis of its functional failures.

When Bruce Ackerman presented his idea of "constitutional moments", these were meant to be irregular and momentous. They are "assumed to be extraordinary occasions on which the nation rethinks its constitutional commitments and, in effect, rewrites them outside the formal constitutional amendment process."[8] From the early start of the constitutional history of the USA in 1787, Ackerman could only identify three such constitutional moments, including the US Founding moment itself.[9]

When analysing this situation and the justifiable responses to the demand of a total constitutional revision by an external body, it is necessary to answer two questions. Firstly: By which legitimate methods can the validity and the functionality of the ruling constitution be questioned? Secondly: What are the necessary preconditions for outsourcing the making of a new constitution?

When Iceland became a republic in June 1944, the world did not look like a promising place for a one of the smallest nation states to test out a new form of constitution. With the Second World War reaching its closing phase, politicians in Iceland believed that the country might be losing its chance to leave the union with Denmark and hence to become a fully independent state, if its declaration of independence had not been issued timely, in order to gain acceptance and support from the leading foreign powers, and before the international community became too occupied with wheeling and dealing its way to acceptable peace terms once the war was over. The Icelanders, originally inspired by the tide of national freedom and the rise of the nation state in the late 18th century and the beginning of the 19th century, started a battle for their autonomy and self-determination shortly after the turmoil in Europe around 1830. The turning point in this struggle came when they got a limited

constitution ‘presented’ to them by their Danish regent in 1874, based on the provisions of the Danish Constitution from 1849/1866 (*Grundloven*). In 1904, Iceland was accorded home rule, and with a 1918 treaty called the Union Act, Iceland became a sovereign state in a monarchical union with Denmark. In 1920 Iceland was then awarded its first full-fledged constitution, which was based on Danish and European constitutional tradition and heritage.

According to the Union Act, either or both Iceland and Denmark could require revision of the Act after 25 years and, if there was no agreement about prolonging the treaty, the Union as such would have outlived its purpose. When the German army invaded and occupied Denmark in April 1940, Iceland took control over all matters previously handled by Denmark on behalf of Iceland. It was soon made clear by the Icelandic politicians that the Union Act with Denmark would not be renewed when expiring in 1943. The problems facing the Icelanders at this stage in their struggle for independence did mainly concern a republican concept, which the big majority of the nation would support, and a method to leave the Danish monarch without provoking those who felt that it was a betrayal to take this dramatic step in the middle of the war, when the Icelandic–Danish king was a *de facto* prisoner of Germany and its occupation forces. Moreover, taking such a step was also legally questionable. Partly for these reasons, the years of preparation for the founding of an independent state were used to discuss technicalities about bringing the monarchic union to an end, instead of a pragmatic debate on the constitutional framework needed for the incumbent republic to be.

In 1941 the Icelandic Parliament did agree that the only provisions of the constitution (i.e. the Constitution of the Icelandic Monarchy of 1920) to be subjected to amendments would be those deemed absolutely necessary to further pave the way for the new republic. This meant basically that the changes needed to be made were to the provisions in which the king and his powers were mentioned, to be replaced with provisions for a democratically chosen head of state, i.e. president of the republic. It can be said that the only issue concerning the future institutions of the state was the one about the role and status of the coming president. According to the recorded minutes of the Parliament, the parliamentarians were almost in

unanimous agreement about this method of preference, the reason given being that if the politicians should initiate a debate on various and different subjects and provisions for a future constitution, they would never be able to find a mutual ground upon which the majority of the parliamentarians as well as the majority of the electorate would be in agreement too. This fact was clearly the reason for some politicians' big words about a total revision of the Icelandic constitution when the new republic had attained its status as an independent nation state among other free nations. When reading the minutes on the constitutional debate in Parliament, it is not always easy to say how genuine the concerning speeches were, or if some of them were mainly tactical moves made for the sake of strategy and similar political manoeuvres.

It is no question that before the foundation of the republic, Iceland had had at least two so-called constitutional moments, i.e. when getting its first constitution in 1874 and when becoming a sovereign state in 1918 (The Monarchy of Iceland obtaining its own constitution in1920). Some Icelandic scholars claim that what happened in 1944 was nothing of the kind. Rather, it may be described as a necessary step in the country´s constitutional way to total statehood.[10] If that is so, it is difficult to see how the foundation of the republic of Iceland could be said to be a constitutional moment (moment of constitutionality). If one is to counter those claims with some solid arguments, it is necessary to look at the draft bill for a new constitution in 1944 and analyse what happened in Parliament during the advent of the foundation of the republic of Iceland. In this connection, the question begging to be asked is: Did the Parliament of Iceland stay on its original course of making only minimal, necessary changes to the text of the constitutions provisions, for it to be able to found the republic, or did it go further than planned, and present the incumbent republic with a totally new type of constitutional framework as tailored for the head of state, i.e. the president?

The original draft of the new constitution clearly shows that the Parliament was expected to choose the president. In the explanatory comments to the draft, the reasons for this were said to be possible social disturbances, which could be kept to a minimum by this method, as compared to a general election, and that by organizing the election in this way, the

Parliament would keep its hand over the powers of the state in its affairs, 'as planned', whilst the president would be similarly dependent on the nation's Parliament as the king had been in practice since 1918.[11] It looks also quite obvious that prominent and leading politicians wanted to copy and keep the form of government that had been in place since the Parliament elected Sveinn Björnsson as the regent of Iceland (*Ríkisstjóri Íslands*) on June 17th, 1941.[12] This would have been in the constitutional tradition of Denmark, Norway and Sweden, i.e., to make their titular head of state powerless by claiming the respective constitutional provisions to be without substantive meaning. The draft was signed on April 7th, 1943 but did not become a bill in Parliament until January 1944. In the intervening period it had become evident that the idea of letting the Parliament choose the president would cause much greater disturbances than general elections. The compromise solution was that the Parliament would choose the first president on the very same day as the republic was founded on June 17th, 1944 and he would then sit in office for only one year. Then there would be general elections and the nation could make its own choice. Thereafter, the regular period between presidential elections would be four years.

Though it may in retrospect seem strange that no attempt was made, one way or another, to further flesh out and elaborate on the chosen constitutional form of a republic, there may be different reasons for this lack of conceptual framework. The most obvious explanation had to do with the precarious constitutional, political and social situation in which most western societies found themselves in the aftermath of the Second World War. Another reason may have been the lack of academically trained law-makers, studies and research in Iceland in both legal and political science. Even though no thorough definition of the republican idea as such is to be found in writings from this period in Iceland, when going through what was said and written about the future constitution, it is clear that for the majority of the Icelandic nation a republican concept had its own personal value. The fact that almost every elector in Iceland voted for the new constitution showed that the nation believed this event to be of major importance for the political soundness of Iceland as a sovereign state, as well as its constitutional future. As compared to other recognised constitutional moments in recent and recorded history, it is the view of this researcher that the national referendum of May 1944 on the constitution of the Icelandic republic was, without any doubt, a constitutional moment.

The Concept of a Constitutional Assembly in the Icelandic Context

In the period between the first and second World War, voices were to be heard, mainly from the organized youth movement (UMFÍ), that a National Assembly in the tradition of '*Thjodfundurinn'* should be reconvened to readdress and seriously discuss a future constitutional framework for the Icelandic state. In 1948, a bill was brought up for the Parliament, proposing the establishment of a Constitutional Assembly, but without much response neither from the public nor from politicians. Although a few similar ideas may be traced back in history, it is not until Jóhanna Sigurdardóttir, the prime minister of Iceland 2009–2013 and a long-time parliamentarian (1978–2013), made a proposal in Parliament in 1995, the same year that the bill on a new human rights chapter of the Constitution was passed, that such a proposal gained any serious momentum. Thus a new proposal for a Constitutional Assembly that came about just some weeks before the general elections in spring 2009, as headed by Ms Sigurdardóttir and supported by the Social Democratic Alliance, the Left–Green Party, The Progressive Party and a small Liberal Party, was close to becoming a reality. The bill was blocked however by the parliamentarian members of the Liberal Conservative Party, who argued that the general rule of constitutional change in Iceland since 1944 had been one of consensus or unanimity.

According to art. 3 of the bill passed on June 16^{th,}, 2010 the Constitutional Assembly was supposed to address specifically the following issues:

1. 1.The foundations of the Icelandic constitution and its fundamental concepts;
2. 2.The organization of the legislative and executive checks and balances over their powers;
3. 3.The role and status of the President of the Republic;
4. 4.The independence of the judiciary and the supervision of other holders of governmental powers.
5. 5.Provisions on elections and electoral districts;
6. 6.Public participation in the democratic process and the timing and organization of a

referendum, including a referendum on a legislative bill for a constitutional act;
7. 7.Transfer of sovereign powers to international organizations and the conduct of foreign affairs and
8. 8.Environmental matters, including the ownership and utilization of natural resources.

The Constitutional Assembly could then deal freely with other matters than those listed in 1-8.

When reading through the mandate of the Constitutional Assembly, no matters of possible consequence for constitutional changes seem to have been left out. The reason given in the respective committee report for such a broad and deap approach in reviewing the constitution being as follows:

*Changes of the constitution have been on the political agenda for a long time and many attempts being made by Parliament with out much result, as can be read in the explanatory comments. Further, in the situtation which came about in the society when the banks crashed and the voluminous effects it had on society as such, its government, economy, state finances, and other things, which need to be straightened out in the afthermath, the demand for constitutional changes has become ever louder.**[13]***

The question arises here concerning whether this idea of a total review or a new constitution was created by a general panic in the political body of the Parliament, or perhaps a sign of a popular move away from professional politicians *qua* ruse meant to keep the public split in disagreement. The question arises due to the lack of explanations as to the motives. Any answers to such questions however are and will be difficult to obtain, but given that the parliamentarians' intentions were straightforward. i.e. to give the nation the chance and

opportunity to create its own constitution, they would be fulfilling a promise reneged on and made in the fervour and advent of the foundation of the republic, but never really kept. Subsequently, we have to examine the possible flaws of the constitution from 1944 and which legitimate reasons there could be to change it in such a dramatic manner as would seem better fit for a failed state or a newly-sovereign and emancipated state shaking off the shackles and burden of colonial power.

Here we need to start by looking at the so-called 'promise' that the Parliament was supposed to have made about a total review of the constitution. In 1944, it was foreseen that a more thorough constitutional revision would take place in due time, i.e. when external conditions had improved. Recently, in relation to the current revision process, it has been claimed that this premise entailed a plan for a 'fresh start', wherewith the old constitution was to be wholly replaced. This theory as put forward, however, sits uncomfortably with the fact that in 1944 there was no political consensus concerning which further aspects in the constitution needed to be addressed. Furthermore, proposals for constitutional amendments after 1944 did not foresee a radical overturning of the constitution, but rather certain amendments within its existing structure.

Returning back to and trying to answer the questions put forward at the beginning of this paper, it would appear self-evident that a societal and stable western democratic state, known for respecting human rights and the concept of rule of law, should not allow itself to be cornered into nullifying its constitution on the basis of street riots and loud protests against said state's response, credible or not a remedy this could be in countering and balancing its gigantic financial and economic difficulties. On the other hand it may also be assumed, that were academic and political analyses to show and come to the conclusion that the root of said state's momentous financial crisis could be traced back to the content and/or legal interpretation of the constitution, a logical next step would be to question its validity and functionality as the cornerstone for a nation in its past, present and future.

When looking for the answers, which are the preconditions for outsourcing the making of a new constitution, one needs to begin by making a thorough study of historical facts of the times in which the constitution was being drafted. Firstly, we need to look for the traces of any justification and/or idea, which could be viewed as to form a logical base for taking the revision of the constitution out of the hands of the constitutional law-maker, i.e. the Althingi itself. From a reading of the minutes of the Parliament from the time when the constitution of the Republic of Iceland was in the making, it becomes clear that the parliamentarians of the day were well aware of each other's different opinions about any major changes to its fabric and content. There is therefore no reason to act upon the assumption that the constitutional law-makers had expectations for it to be an easy task to muster up a majority for its consecutive approval in two parliaments with general elections to be held in between, if a radical revision of the provisions of the constitutional charter was on the table as well.

In his seminal work on the constitution of Iceland, Olafur Johannesson claims that the method required for making any changes to its content foresaw a way that, when applied to constitutional law-making, made it solid and fundamental and, as such, of higher quality than ordinary law-making.

On the other hand, as mentioned before, an idea of some kind of a Constitutional Assembly had been around in Iceland since the early beginning of the struggle for autonomy and self-determination in the middle of the 19th century. It cannot however be detected that this idea was ever developed any further than the notion of a meeting that should be held to discuss the constitutional framework of the republic of Iceland.

In light of this, the minimal preconditions for outsourcing the making of a new constitution should therefore be on the same level of difficulty as any change of the constitution itself, opening up for the way to a revision of the constitution as its original signatories saw fit. Especially, and in light of the overwhelming majority of support that the constitution of the Republic of Iceland received in the national referendum of 1944, it may be seen as crucial that a general vote or a referendum held to take stock of the nation's support for any or all

radical changes as proposed to be made to the basic content, as well as diverse paragraphs of the constitution, should be seen to be mandatory and maintained without exception. Of course it should not be forgotten that according to the laws on the constitutional assembly, its proposals were only to be looked at as advisory and that the Althingi should take this under consideration when formulating the bill on a revised constitution.

The history of the constitutional adventure through which the Icelandic people have gone over the past couple of years goes to show that taking the road of entrusting its decision and approval process to an assembly of laymen as the result of a populist momentum, is the equivalent of opening up Pandora's proverbial box. Thus, a promise to the nation of a new constitution, made for the people by the people, can in itself be more of a risk than it can be justified, if there is neither a clear majority amongst the electorate in favour of such a proposal, nor if such a proposal fails to gain the majority of votes in two separate Parliaments, the latter of which having been formed moreover as the result of general elections held between the former and the latter.

With those preliminary conclusions in mind, we should take a closer look at the notion of constitutional moments. As P. Horowitz points out, such moments are "assumed to be extraordinary occasions on which the nation rethinks its constitutional commitments and, in effect, rewrites them outside the formal constitutional amendment process."[14] As we have seen, there is no question that the constitutional process in Iceland since 2008 is in every aspect extraordinary, and a relatively large group of people tried to rethink the constitutional commitments of the nation in the shape and context of a National Forum (Þjóðfundur 2010) and subsequently, the Constitutional Council, which managed to draft a bill for a new constitution that, in accordance with the laws no. 90 / 25th June 2010, was handed to the president of the Althingi on 31st of July, 2011. These features, as mentioned above, can definitely be identified and defined as to carry with them the contours of a constitutional moment. Still, it remains to be seen if these elaborate exercises bode that there will be some or any constitutional changes made in relationship with them or, as the outcome of this process, they should be made later on and whether they should be traced back to the the

aforementioned exercise and process of constitutional revision as carried out in the period between 2010-2013.

Even though we may see an abrupt end of the constitutional process, which started with the bill from 16th June 2010, in which the foundation for a National Forum was laid down, there was a constitutional moment of a kind woven into the process itself, as caused by the ensuing and intense debates on various aspects of constitutional ideas and reasons given for and against a total revision.

Correspondingly, one may wonder if the Icelandic people needed almost 70 years from the dawn of the foundation of their Republic, to be able to look their colonial past in the eye, and ask themselves if their West-European constitutionalism as achieved by way of heritage and colonial inheritance through 19th and 20th century constitutional changes made in the Monarchy of Denmark and later in both Denmark and Iceland, was but some kind of relics of colonial oppression or rather and more ideally, a European legal/political cultural heritage and, as such, something worth-while conserving in and at its core and hence, a solid foundation for further constitutional development in an independent and sovereign nation state. If the above-mentioned process serves to stimulate research and if the resulting studies will help us in answering that question, then the post-crisis turbulence of 2008-2013 has more than paid off and if not, we at least know what we should be doing before we take off on yet another constitutional adventure in the future.

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[1] Many other similar meetings were held in Iceland around the middle of the 19th century.

[2] Speech of Þorvaldar Gylfason at a public meeting held at Háskólabíó, 24th November 2008: http://www.youtube.com/watch?v=ByGaF595uNk See also Njörður P Njarðvík in the tv talk show *Silfur Egils,* 11th January 2009: http://www.youtube.com/watch?v=vkKWXgOKHZE

[3] See:. http://www.forsaetisraduneyti.is/frettir/nr/4058

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[4] See: http://www.althingi.is/altext/137/s/pdf/0302.pdf

[5] Law on constitutional assembly nr. 90/2010.

[6] See, *inter alia*: Njörður P. Njarðvík in his article New Republic *(Nýtt lýðveldi);* Aðalheiður Ámundadóttir in her speaches in early 2009, talking about a constitutional assembly; *Stjórnarskrá fólksins*, a speach held at a citizens' meeting in Háskólabíó on 16th February 2009; *Lýðræði og mannréttindi í kjölfar hruns*, a speach held on an open-air meeting at Austurvöll ON 14th March 2009. See also http://www.svipan.is/?p=2520

[7] Only once did the majority carry through a bill with a strong resistance of one of the political parties and that was in 1959, when the electoral system was changed in favour of the more populated area around Reykjavík, the capital of Iceland.

[8] Paul Horowitz, 2009.

[9] Ackerman, B., sets out in *We the People: Foundations* (1991) and *We the People:Transformations* (1998) his theory of "constitutional moments" in the history of the United States of America.

[10] Guðmundur Hálfdanarson: *Íslenska Þjóðríkið*, Híb and RA, Reykjavík 2001, p. 145.

[11] Alþingistíðindi 1944 A, þskj. 1, p. 12 (art. 1 comment).

[12] Sveinn Björnsson was elected as a regent of Iceland twice again, on May 9th, 1942 and April 17th, 1943. He was than elected as the first president of Iceland by the Parliament reunited at Thingvellir on June 17th, 1944.

[13] Nefndarálit um frv. Til l. um stjórnlagaþing. Frá meirihluta allsherjarnefndar. Þskj. 1208 – 152 mál. 136. löggjafarþing 2008–2009. Þskj. 648, 385. mál.

[14] *Supra* note 8.