Transcript

From the record of minutes of the Supreme Court, 25 January 2011

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Complaints by

Odin Sigthorsson

(representing himself)

Skafti Hardarson

(representing himself)

Thorgrímur S. Thorgrímsson

(Esther Hermannsdóttir, attorney at law)

relating to the election to the Constitutional Assembly

Decision of the Supreme Court

In accordance with Section 7.4 of Act No. 15/1998 on the judiciary, the above complaints were addressed by the Supreme Court judges Gardar Gíslason, Árni Kolbeinsson, Gunnlaugur Claessen, Jón Steinar Gunnlaugsson, Páll Hreinsson and Vidar Már Matthíasson.

Ódinn Sigthorsson, Skafti Hardarson and Thorgrimur S. Thorgrimsson protested the election to the Constitutional Assembly, held on 27 November 2010, by complaints submitted to the Court dated 8, 9, 16 and 27 December, received by the Court on 10, 13, 15 and 27 December 2010. The applicants call for invalidation of the election. Permission for the referral is grounded in Article 15 of Act No. 90/2010 on a Constitutional Assembly.

The cases of the applicants were joined by a decision of the Supreme Court on 6 January 2011, as they all concern the general conduct of the election and do not relate to their personal interests under the law.

According to the first paragraph of Article 15 of Act No. 90/2001 the deadline for the submission of complaints to the Supreme Court expired two weeks after the names of the elected delegates were announced in the Official Journal (*Stjornartidindi*); this was done by Notice No. 929/2010 in Section B of *Stjornartidindi* on 3 December 2010. The Supreme Court received two applications from Skafti Hardarson; one of them, received by the Court on 27 December 2010, concerned the qualifications for eligibility of Andrés Magnússon. Since the deadline for protests had then expired under the first paragraph of Article 15 of Act No. 90/2010, that protest will not be admitted to process before the Supreme Court.

I

The election to the Constitutional Assembly was conducted on the basis of Act No. 90/2010. The general notes to the legislative bill that became Act No. 90/2010 state the intention that the Constitutional Assembly should have a temporary and circumscribed role, i.e. to review and submit proposals on amendments to the Constitution of the Republic. This is said to be in response to the situation that it has not proven possible, despite repeated attempts over the past decades and declarations by virtually all political parties to the effect that amendments are needed, to finish the comprehensive review of the Constitution that has been contemplated since 1944. According to the notes, the proposals of the Assembly are intended to advise the Althing and a draft approved by the Assembly is to be submitted to the Althing for deliberation.

The notes also state that the legislative bill provides for the election of delegates by direct personal election, with proposals made for detailed rules relating to the conduct of direct personal elections designed to reflect the will of the voting public to the extent possible, with measures also taken to promote an equal representation of the genders, to the extent possible, among the Assembly delegates. The notes state that the bill includes special rules on the eligibility of delegates to the Assembly, with the same conditions applying as the conditions for eligibility to the Althing, with the exception that the President of Iceland, Members of Parliament, their alternates and cabinet ministers are ineligible. The rationale for this, according to the Notes, is to ensure the independence of the Assembly from the Althing and other bodies exercising State powers by excluding any direct participation by

representatives of such bodies. The reason for the organisation of a Constitutional Assembly to work in this manner at the side of the Althing, according to the notes, is precisely to create a new forum to review the Constitution at a certain distance from political parties and their representatives in the Althing.

II

The election to the Constitutional Assembly was held on 27 November 2010. In Notice No. 929/2010 from the National Electoral Commission on the results of the election to the Constitutional Assembly of 27 November 2001, posted in Section B of *Stjornartidindi* on 3 December 2010, the Commission announced that 25 delegates had been nationally elected as delegates to the Constitutional Assembly in the election. These were: Andrés Magnússon, Ari Teitsson, Arnfrídur Gudmundsdóttir, Ástrós Gunnlaugsdóttir, Dögg Hardardóttir, Eiríkur Bergmann Einarsson, Erlingur Sigurdarson, Freyja Haraldsdóttir, Gísli Tryggvason, Gudmundur Gunnarsson, Illugi Jökulsson, Inga Lind Karlsdóttir, Katrín Fjeldsted, Katrín Oddsdóttir, Lýdur Árnason, Ómar Thorfinnur Ragnarsson, Pawel Bartoszek, Pétur Gunnlaugsson, Salvör Nordal, Silja Bára Ómarsdóttir, Vilhjálmur Thorsteinsson, Thorkell Helgason, Thorvaldur Gylfason, Thórhildur Thorleifsdóttir and Örn Bárdur Jónsson.

As mentioned earlier, the protests lodged by Skafti Hardarson, Ódinn Sigthórsson and Thorgrímur S. Thorgrímsson are grounded in Article 15 of Act No. 90/2010. The Article states that if a voter is of the opinion that a delegate at the Constitutional Assembly does not meet eligibility criteria, his or her candidacy did not comply with legal requirements or his or her election is for other reasons unlawful, the election may be protested to the Supreme Court, which will rule on the lawfulness of the election. The Court understands the arguments of the applicants as constituting a call for an invalidation of the election of all the above delegates to the Constitutional Assembly on grounds which will be explained further below and which the applicants believe to have the effect that the election of the delegates was unlawful.

By a letter dated 20 December 2010, the Supreme Court called for comments from the National Electoral Commission and the Ministry of Justice and Human Rights regarding the complaints submitted. Their responses were received on 22 December 2010, and the applicants and the delegates elected to the Constitutional Assembly were invited to express their views on the matter. Responses were received from Ódinn Sigthórsson and Thorgrímur

S. Thorgrímson on 3 and 4 January 2011. On the part of delegates elected to the Constitutional Assembly, only Gísli Tryggvason responded, and his responses were received on 3 January 2011. The applicants were notified of his views on 4 January 2011. The National Electoral Commission and the Ministry of the Interior, which had taken over these affairs as of 1 January 2011, were then notified of the responses of the applicants to their submission by a letter dated 4 January 2011.

The applicants were invited to express their views in the course of oral proceedings that were held on 12 January 2011. Ódinn Sigthórsson and Skafti Hardarson accepted the invitation. Also, the National Electoral Commission and the Ministry of the Interior explained their views in the case. The delegates elected to the Constitutional Assembly were also invited to express their views, and Gísli Tryggvason and Thorkell Helgason accepted the invitation.

A letter was received from the Chairman of the National Electoral Commission on 13 January 2011 where a misunderstanding that had come up in the course of oral proceedings was corrected, and it was expressly stated in the letter that ballot papers had been numbered in a continuous and consecutive sequence. The applicants, the Ministry of the Interior and delegates elected to the Constitutional Assembly were invited to comment on this letter. Responses were received from all the parties involved in the proceedings before the Supreme Court, and viewpoints were also expressed with regard to other evidence in the case.

An on-site visit was made to Laugardalshöll on 14 January 2011 to inspect the facilities used by the National Electoral Commission in the tallying of ballots. A review was conducted of the procedure used in counting the votes and it was explained who had been permitted to be present at the count.

III

The following is a brief account of the merits and legal reasoning that in the applicants' opinion should result in the invalidation of the election to the Constitutional Assembly held on 27 November 2010.

1. The protest lodged by Thorgrímur S. Thorgrímsson complains that ballot papers had been identified by a bar code and a number on the reverse side, and it was contended that this

was contrary to both written and unwritten rules on secret ballots. In a letter to the Supreme Court of 3 January 2011 the applicant's counsel notes that the ballots were identified by a bar code and also numbered. He contends that the ballots were distributed to precincts in numerical order and that therefore it was possible to trace the ballots back to their precincts. Presumably, they were also handed to voters in numerical order. Furthermore, the letter says: "It is also known that in some precincts electoral commissions entered the names of voters in a list as they cast their votes. With this list in hand, and the numerical sequence, it would be possible, e.g., to trace ballots back to individual voters." It is also maintained that the permission granted under the second paragraph of Article 10 of Act No. 90/2010 extends only to the bar coding of ballots, not their numbering.

On 5 January 2011 Thorgrimur was asked to specify more precisely in which precincts the names of voters and numbers of ballots handed over had been recorded. A letter from his counsel of 10 January 2011 revealed that Mr. Thorgrímsson had said he knew that this procedure had been employed, but that he did not possess information as to which precincts or electoral commissions were involved. In a letter from Mr. Thorgrímsson's counsel to the Supreme Court dated 11 January 2011 it is noted that it was not correct that voters were handed ballot papers in random order; they were handed out in consecutive numerical order. In his opinion it was illogical to assume that the local electoral commissions had "shuffled" the ballot papers, as no instructions had been given to such effect. This means that if any member of an electoral commission, or anyone else, had preserved information on the order in which voters arrived, it would be possible to trace ballots to individual voters. Mr. Thorgrímsson, who held a seat in an polling station in the election, maintains that it is a known procedure in elections for two commission members to mark the electoral register while the third prepared a list of names which is then used to reconcile the entries in the electoral register; this list is then discarded and is not among the formal documents forwarded to district electoral commissions. This, according to Mr. Thorgrímsson, should be known to anyone who has worked in polling stations.

2. Thorgrímur S. Thorgrímsson also complains that voters were deprived of their right to vote in another polling station. According to subsection 2 of the second paragraph of Article 80 of Act No. 24/2000 on elections to the Althing, cited in the first paragraph of Article 11 of Act No. 90/2010 on a Constitutional Assembly, a voter is permitted to renounce his right to vote in the polling station of his place of residence and obtain

permission to vote in the polling station where he is located. However, instructions had been received from the National Electoral Commission or the Ministry that this option was not available in the election to the Constitutional Assembly.

3. Both Thorgrímur S. Thorgrímsson and Ódinn Sigthórsson complain that traditional voting booths were not used in the election; instead each voter sat at a table in an open space and voted together with other voters; the tables were fitted with cardboard partitions, 60 cm in height, which were placed on three sides of the table to separate voters. These partitions were then arranged side by side. It would have been impossible, it is contended, to prevent voters from glancing at the ballots of the nearest voter, e.g. when standing up from the table after filling out their own ballots or when walking past another voter and looking over his shoulder. The applicants argue that his arrangement is a clear violation of the first paragraph of Article 69 of Act No. 24/2000, cited in the first paragraph of Article 11 of Act No. 90/2010, which provides that a voting booth should be equipped so that a vote can be cast without others being able to see how the voter is casting his vote. The applicants contend that for this reason the election was not by secret ballot. Also, the applicants cite Article 81 of Act No. 24/2000, cf. the first paragraph of Article 11 of Act No. 90/2010, which states that when a voter has been handed a ballot, the voter shall take the ballot into the voting booth, where he alone is permitted to be present, and to a table located in the booth.

In a letter to the Supreme Court dated 3 January 2011, Thorgrímur S. Thorgrímsson's counsel reiterates that the provisions of Act No. 24/2000, which concern voting booths, state that a voter should enter a voting booth, that only the voter is allowed in the booth, that the booth should contain a table where votes can be cast in private and that if a voter needs assistance this shall be provided inside the voting booth. The explanations of the Ministry of the Interior and the National Electoral Commission as to why traditional voting booths could not be used are rejected. Even though the nature of the election required an increased number of booths, the number could have been increased with little difficulty, as they are simple and inexpensive constructions.

A letter from Ódinn Sigthórsson to the Supreme Court dated 29 December 2010 reiterates his opinion that deviation from the provisions of Article 81 of Act No. 24/2000 on voting booths and the requirement that the voter should be there alone was not permitted. Thus, the filling in of a ballot in public was inconsistent with the instructions in the provision, as the cardboard partitions used were not voting booths in the understanding of the law. The

executive cannot assume for itself powers to derogate from statutory law on the conduct of elections in a discretionary manner, as this would entail a risk of violation of human rights.

4. Both Thorgrímur S. Thorgrímsson and Ódinn Sigthórsson protest that voters were not permitted to fold their ballot after filling it in. They contend that this is in violation of the clear instructions in Article 85 of Act No. 24/2000, cited in the first paragraph of Article 11 of Act No. 90/2011, which state that when a voter has completed his ballot he shall fold the ballot in the same crease that it had when he received it, walk from the booth to the ballot box and place the ballot in the box in the presence of a representative of the electoral commission. They also emphasise that this provision must be construed in accordance with Article 87 of Act No. 24/2000, cited in the first paragraph of Article 11 of Act No. 90/2010, which says that if a voter allows the entry on his ballot to be seen, the ballot is invalid and cannot be placed in the ballot box. Also, it is also a criminal act under subsection (d) of Article 125 of Act No. 24/2000, contained in Chapter XXV of the Act, if a voter deliberately shows how he intends to vote or has voted. In this context it should be noted that it is specifically stated in the second paragraph of Article 15 of Act No. 90/2010 that this chapter applies to election to the Constitutional Assembly.

In a letter to the Supreme Court dated 3 January 2011, Thorgrímur S. Thorgrímsson's counsel rejects the explanations of the National Electoral Commission. He contends that the text on the ballot and the ballot itself are two different things. Admittedly, Act No. 90/2010 contains a special provision on the text on the ballot. Those provisions say nothing about the ballot itself, i.e. its size, the paper used and its crease. For this reason, the provisions of Act No. 24/2000 apply to those matters.

In the letter to the Supreme Court of 29 December 2010, Ódinn Sigthorsson protests the interpretation by the National Electoral Commission of Article 85 of Act No. 24/2000 and points out that the proper course is to look at the origin of the provision in its interpretation: Article 35 of Act No. 18/1903 states that the voter "folds the ballot once so that the printed matter faces inside." The interpretation by the National Electoral Commission of Article 85 of Act No. 24/2000 is therefore untenable.

5. Thorgrímur S. Thorgrímsson protests that the paper ballot boxes that were used instead of traditional ballot boxes did not meet the conditions of the second paragraph of Article 69 of Act No. 24/2000, cited in the first paragraph of Article 11 of Act No. 90/2010,

which states that the ballot box should be so equipped that a ballot cannot be removed from the box without opening it and it should be possible to lock it. Article 76 then states that before the voting begins the electoral commission and agents shall verify that the ballot box is empty and then lock it. The paper boxes in question did not comply with this condition.

6. Skafti Hardarson protests that candidates were not allowed and enabled to have their agents present at the polling and at the tallying of the ballots, which is required under Article 39 of Act No. 24/2000. According to the applicant this is such a serious deficiency in the conduct of the election and tallying of ballots that it warrants invalidation.

7. Ódinn Sigthorsson protests that election credentials were issued to delegates who had not received the required number of votes or a so-called “quota” to gain election. He cites subsection 2 of Article 14 of Act No. 90/2010, which provides for a quota defined by law as a proportion of valid ballots.. This quota in the election to the Constitutional Assembly was 3167 votes, according to information from the National Electoral Commission. Subsection 5 of Article 14 of the Act states that a seat shall be allocated to a candidate when the number of his votes equals or exceeds the quota. It is specifically noted that this provision also applies when the provisions of subsections 6 and 7 of Article 14 are applied. For this reason, the condition for a candidate to have been elected to the Constitutional Assembly is that he must have received a minimum of 3167 votes, which constitutes the quota. According to official information only 11 candidates achieved a quota in the election of 27 November, and thereby a valid election. The 14 subsequent candidates who were issued election credentials by the National Electoral Commission for participation in the Constitutional Assembly received a smaller number of votes than provided for in Article 14 of the Act when the provisions of subsections 6 and 7 were applied in the counting. These candidates did not, therefore, gain election to the Constitutional Assembly and therefore their election credentials should be withdrawn.

8. Skafti Hardarson also protests that the counting of the ballots was defective, as it was done using machines and there is no certainty that their counting was correct. Alternatively, he calls for a manual recount, as voters have no certainty that the machines used counted the voters’ ballots correctly.

A brief account will be given below of the facts that emerged in the submissions of the National Electoral Commission and the Ministry of Justice and Human Rights of 22 December 2010.

The submission from the National Electoral Commission of 22 December 2010 first recounts in general terms the tasks of the Commission in the election to the Constitutional Assembly. It is pointed out that Chapter II of Act No. 90/2010 applies to the election to the Constitutional Assembly. It is noted in that Chapter that the instructions in the Act on elections to the Althing No. 24/2000 apply to certain further specified matters or that they apply to certain matters "as applicable". Thus, the first paragraph of Article 10 of the Act assumes that the Ministry of Justice and Human Rights should arrange the consignments of election materials in compliance with statutory law on elections to the Althing. Also, the first paragraph of Article 11 states that precincts, polling stations and the procedure of polling "are in other respects subject to the Act on elections to the Althing, as applicable," as numerous provisions of the Act are phrased. The concluding paragraph of Article 11 furthermore states that polling documents shall be prepared in accordance with Article 95 of the Act on elections to the Althing. It is specified that the handling of ballots, their validity and the conduct of the tallying shall be subject to Act No. 24/2000, as applicable, subject to Article 14, cf. the second paragraph of Article 13 of the Act on a Constitutional Assembly. Finally, the second paragraph of Article 15 of the Act states that the provisions of Article 114 and Chapters XIX, XX, XXIV and XXV of the Act on elections to the Althing shall apply to elections under this Act "to the extent that they are applicable".

The National Electoral Commission points out that the Act on a Constitutional Assembly had been amended slightly by Act No. 120/2010, which entered into force on its publication on 23 September 2010. Among other things, this Act provided for a different form of the ballot paper, and permission was granted to the Minister of Justice and Human Rights to derogate from the provisions of the Act regarding an electronic electoral register. By an advertisement in the Legal Gazette (*Lögbirtingabladid*) on 23 September 2010, the Minister announced that an electronic electoral register would not be used in the election, as provided in Article 15 of the Act on a Constitutional Assembly and Article 5 of Act No. 120/2010. The consequence of this decision was that the boundaries of electoral districts, polling stations and precincts would remain the same as in the last election to the Althing, and the provisions of the Act which assumed the use of an electronic electoral register would

not be applied. This is further described in the notes to Article 5 of the legislative bill that became Act No. 120/2010.

In addition, the National Electoral Commission pointed out that the bill that became Act No. 90/2010 had been significantly amended in the course of readings in the Althing. Generally, the legislative history of these matters is brief. The Act governing the election of a Constitutional Assembly is a special act providing for the composition of a Constitutional Assembly to review the Constitution of the Republic of Iceland, No. 33/1944, and the provisions of the that Act therefore take precedence over general legislation on elections, principally the Act on elections to the Althing. That Act is directly grounded in the second paragraph of Article 33 of the Constitution and concerns the composition of the Althing and the exercise of legislative powers. For obvious reasons it is therefore impossible to regard as analogous in every respect an election to a Constitutional Assembly, which is conducted on the basis of Act No. 90/2010, and an election to the Althing, which is conducted on the basis of Articles 31, 33 and 34 of the Constitution and Act No. 24/2000. It must be assumed that if the Act on a Constitutional Assembly does not otherwise provide, the provisions of the Act on elections to the Althing should generally apply, as applicable. It is clear that a reference of this nature in the Act on a Constitutional Assembly, to the effect that the provisions of law on elections to the Althing should be applied as applicable, grants to the government authorities entrusted with the conduct of the election a certain degree of discretion. This is further governed by requirements such as secret ballot and open and democratic elections in other respects. To the extent that the decisions of the Constitutional Assembly and other government authorities were based on such statutory discretion it is unavoidable to take into account, among other things, that the election to the Constitutional Assembly was a direct personal election, while in elections to the Althing voters choose between political parties' candidate lists. Also, the form of the ballot paper was completely different, which has implications the actual act of voting and various related matters. No less important is the fact that the election to the Constitutional Assembly had no precedent in this country, or even elsewhere. Never have so many people, a total of 522 persons, declared their candidacy in direct personal elections All the decisions of the government bodies that were involved in the election therefore had to take account of the above facts, e.g. with regard to the form of the ballot paper, tallying methods and facilities for the tallying.

The National Electoral Commission also points out that it is a characteristic of the Act on elections to the Althing that it generally contains somewhat detailed descriptions of matters relating to the preparation and organisation of parliamentary elections, including the actual act of voting. These provisions are intended to ensure a secret ballot. They are also intended to ensure that the elections are open and free and in this regard the rules of the elections are known beforehand by candidates and voters. In the opinion of the National Electoral Commission it must be generally assumed in this regard that comments by voters, and in particular candidates, on the conduct of the election to the Constitutional Assembly should have emerged as soon as the occasion arose. Thus, later comments which do not relate to individual events or government decisions must carry less weight. The National Electoral Commission is not aware of any objections being raised regarding the conduct of the election with respect to the matters concerned in the protests made by Mr. Hardarsson, Mr. Sigthórsson and Mr. Thorgrímsson, or of any such matters coming into question in the work of the members of electoral commissions.

In the election to the Constitutional Assembly there were principally three matters that were different from the arrangements familiar to voters in parliamentary elections: The form of the ballot paper, voting booths and ballot boxes. Even though the National Electoral Commission did not make the decisions on these matters, the Commission was consulted, especially as regards the form of the ballot papers, as its type could have great relevance for tallying by electronic means.

Concerning Point 1: With regard to the protest lodged by Thorgrímur S. Thorgrímsson, to the effect that the ballot papers were identified by a bar code on the reverse side, the National Electoral Commission points out that permission to identify ballots by means of a bar code was provided for in the second paragraph of Article 10 of Act No. 90/2010. The concluding sentence, on the identification of the ballot, is as follows: “The back of the ballot paper shall be marked with the identification code of the ballot.” The provision is unequivocal as regards the reverse of the ballot paper having an identification code. One of the principal conditions for electronic counting is that the ballot must have a special identification code or marking. This identification code is tied to the ballot itself, and cannot be traced to the voter. This is clear, among other things, from the note to the provision in the legislative bill that became Act No. 120/2010. Chance alone could determine which voter received which ballot when a voter presented himself at a polling station. The identification

code, or bar code, was not recorded at the time that the ballot was handed over. Also, the bar codes are of the nature that it is virtually impossible to read them while the ballot is being handed over, and in addition the ballot is in the end placed in a ballot box with other ballots. The bar code has the following effect:

(a) it is possible to verify that no ballots are in circulation other than the ballots printed by the Ministry of Justice for the election;

(b) at the tallying of the ballots it is possible to summon up an image of the ballot, e.g. on reconciliation, in the transfer of surplus votes and votes which have not counted in the first choice made by a voter;

(c) finally, the bar code has the purpose of making it possible to locate a ballot which may be in dispute and verify that there are no deficiencies in the electronic counting. To this end it must be possible to compare an image of the ballot, produced by scanning, with the actual ballot.

The purpose of the bar code is only in the interest of security in the conduct of the election. The contention is also rejected that Act No. 77/2000 on personal privacy and the use of personal data can apply in this case. As described above, the identification of ballot papers was based on clear legal authorisation grounded in objective viewpoints. In addition, it is not possible to see that the identification of ballots in the manner described here can be the equivalent of gathering of personal data. The National Electoral Commission is of the opinion that the preservation and disposal of election documents is subject to Article 104 of the Act on elections to the Althing.

The submission from the Ministry of Justice and Human Rights of 22 December 2010 includes the same viewpoints on these matters as revealed by the National Electoral Commission. The submission further notes that the National Electoral Commission conducted studies of the conduct of electronic tallying in England, Scotland and Ireland, which confirmed that special identification of ballot papers was a condition for electronic tallying. This identification code is tied to the ballot itself, and cannot be traced back to the voter.

The letter from the National Electoral Commission to the Supreme Court of 10 January 2011 specifies that it was considered necessary for the tallying of ballots and finalising the election results that it should be necessary to identify each and every ballot by means of a unique identifier, as this made it possible to prevent double counting and ensure that ballots used in pre-election counting trials did not appear in the actual tally. It is also revealed that the National Electoral Commission knew of no instances where information on the names of voters and identifying numbers of ballots were collected in a single record, as this would have been contrary to law. The unique identifiers were intended only to ensure security in the conduct of the election.

The letter from the Ministry of the Interior to the Supreme Court of 10 January 2011 says that the identifiers on the ballot papers were so-called bar codes, which consist of dark lines and light spaces, which refer to the sequence of numbers underneath the bars. Thus, there was no question of two types of markings on the ballots, i.e. a bar code on the one hand and a number sequence on the other hand; the marking was a single identifying symbol composed of bars and a number sequence, where the bars formed a graphic representation of the number sequence underneath the bars.

The letter from the Chairman of the National Electoral Commission to the Supreme Court of 13 January 2011 stated that in order to avoid any misunderstanding it was reiterated that the number sequence of a ballot paper also contained its serial number. It could also be assumed that the numbers of the ballots were in sequential and unbroken order. Attached to the letter of the National Electoral Commission to the Supreme Court of 17 January 2011 was an e-mail message from an employee of the contractor who assisted the National Electoral Commission in counting the ballots to the secretary of the National Electoral Commission; the e-mail message was sent on 13 January 2011. The e-mail message revealed that the ballots had all been numbered with a unique number – i.e. each number only appeared once. The numbers began at 100001 and ended at 378000.

A letter from the National Electoral Commission to the Supreme Court on 17 January 2011 reveals that it is the assessment of the National Electoral Commission that in the election that took place on 27 November 2011 it was impossible to trace how individual voters had cast their votes. In the opinion of the National Electoral Commission there is only a theoretical possibility which is subject to so many provisos that it could not be considered

probable, particularly in light of the arrangement of the voting at the polls and the security measures taken in the counting and after the counting.

In the first place it should be noted that no record was kept of the ballot papers sent to the municipalities or of their distribution to individual precincts in areas where there were precincts. In the assessment of the National Electoral Commission it is impossible to trace a ballot or ballots to back individual precincts by such means.

In the second place, the workers of the electoral commissions handed ballots to voters when they presented themselves at the polling station. Chance alone determined which ballot paper was handed to each voter. The National Electoral Commission has no knowledge of records or lists being kept in individual precincts of certain ballots being handed to certain voters. Such actions by an electoral officer would in any case constitute a criminal act under Articles 124 or 126 of Act No. 24/2000, cf. the second paragraph of Article 15 of Act No. 90/2010. In the opinion of the National Electoral Commission no proof has been supplied of the contention of Thorgrímur S. Thorgrímsson of 3 January that lists were kept of voters.

In the third place, the possibility can be imagined of persons present at the polling station being able to see the identification number of the ballot of another voter. Another possibility is that a voter could himself have recorded the serial number of the ballot that he was given. It should be underscored that in this context it makes no difference whether the identifier on a ballot was at the same time its serial number or any other identifying code or number. In the opinion of the National Electoral Commission it would not have been possible to record the identifier or serial number of a ballot in any manner other than those described here..

In order to argue that the secrecy of the voting had been breached someone must have possessed information on the identifying number of the ballot of a specific voter, he must then have had an opportunity either to penetrate the election database of the National Electoral Commission while tallying was in progress or after the tallying, or gain access to the election documents themselves. In addition, this person would have had to possess knowledge of the type of bar code, be able to connect the identifying number with a specific individual and possess a certain minimum knowledge of the structure and use of databases, including the database used in this case.

Concerning Point 2: As regards the protest by Thorgrímur S. Thorgrímsson that voters were deprived of their right to vote in a different precinct, the National Electoral Commission notes in its submission of 22 December 2010 that a relinquishment of the right to vote in a precinct where a voter is listed in the electoral register and a request to vote in another precinct within the same electoral district requires a special form to be submitted to the electoral commission where the voter wishes to cast his vote, as provided in subsection 2 of the first paragraph of Article 80 of Act No. 24/2000 and the second paragraph of Article 80 of the same Act. The National Electoral Commission did not discuss or give any instructions to the electoral commissions regarding denial of relinquishment of voters' right to vote pursuant to the cited legal provision. Furthermore, the National Electoral Commission has no knowledge that any voters were denied confirmation of relinquishment of the right to vote in their precinct and permission to vote in another precinct. The National Electoral Commission had no involvement in cases where voters requested permission to vote in a precinct other than the precinct of their registration as voters.

The submission from the Ministry of Justice and Human Rights of 22 December 2010 notes that one of the amendments made to the Act on a Constitutional Assembly by Act No. 120/2010 was that the Minister was authorised to derogate from the provisions of the Act regarding an electronic electoral register should it not prove possible to implement those provisions, cf. Article 15(a). The preparation of an electoral register for voting at polling stations would be subject to the second paragraph of Article 5 of the Act on a Constitutional Assembly and the provisions of Chapter VI of the Act on elections to the Althing, as applicable. The boundaries of electoral districts, polling stations and precincts were to be the same as in the last parliamentary election. By an advertisement posted in *Lögbirtingabladid* on 23 September 2010, the Minister announced that an electronic electoral register would not be used in the election. As a result, the country was not a single electoral district; instead, the boundaries of electoral districts, polling stations and precincts were the same as in the last election to the Althing. According to subparagraph 2 of the second paragraph of Article 80 of the Act on elections to the Althing, the relinquishment of the right to vote in a precinct where a voter was registered and a request to be permitted to vote in another precinct within the same electoral district requires a special form to be submitted to the electoral commission where the voter requests to be allowed to vote. No instructions were given by the Ministry to the effect that this right should not be available in the election to the Constitutional Assembly.

Concerning Point 3: With regard to the protest by Thorgrímur S. Thorgrímsson and Ódinn Sigthórsson that the polling had not been secret because regular polling booths were not used and that instead each voter cast his vote in an open space with other voters at a table equipped with partitions, 60 cm in height, placed on three sides of the table to separate voters, the National Electoral Commission notes the following: To the extent that the National Electoral Commission is able to comment on this part of the complaint, it is the opinion of the Commission that the applicant's protest was not that voters were unable to vote in private, but that others who were present at the polling station could have seen the ballot had they "peeked" at it, and for this reason the requirement of secrecy was not fulfilled. This does not relate to a general fault in the conduct of the election, but a possibility that it might have been possible to see a voter's ballot had there been an intent to do so. In the opinion of the National Electoral Commission a protest of this kind can only be addressed if the applicant has information showing such defects in the election in a specified polling station. According to Article 68 of the Act on elections to the Althing, the municipal authorities shall decide on a polling station for each precinct. The Act on a Constitutional Assembly does not provide for any involvement by the National Electoral Commission in the arrangements of polling stations. The National Electoral Commission has therefore not taken any decision on the appearance of voting booths, nor had it made any recommendations to the local governments in this regard. Because direct personal elections to a Constitutional Assembly are by nature different from elections to the Althing, which involve lists of candidates, and because it was apparent that there was the possibility of a great number of candidates, as proved to be the case, the National Electoral Commission, in the course of preparations for the election, consulted a specialist on queuing theory at the University of Iceland in preparing plans on how the election might be organised in light of the potential number of candidates, and how long it might take to fill in a ballot paper. The conclusions of this study were submitted to the Ministry of Justice and Human Rights, which forwarded them to the municipalities. The National Electoral Commission had no further involvement in this aspect of the matter.

As regards the first sentence of the first paragraph of Article 69, it was obviously unavoidable that arrangements at polling stations should take into account the special situation that arose when it became known on last 1 November that there would be 522 candidates for seats on the Constitutional Assembly; at that time there were only 26 days until the election. In organising polling stations, the authorities faced considerable difficulty when it became apparent that the act of voting could take a significantly longer time, as

voters were permitted to list up to 25 candidates on the ballot by entering up to 100 digits in selection boxes on the ballots. Also, the voting booths had to take account of the fact that candidates [Corr.:Here the Supreme Court obviously means “voters”, not “candidates”]. were permitted to take with them a sample ballot into the voting booth and copy it to the ballot, and that the voting booths were required to contain a list of the candidates, as provided in the concluding sentence of the second paragraph of Article 9 and the second paragraph of Article 11 of the Act on a Constitutional Assembly. It was necessary to make arrangements for reasonable space to be able to fill in the ballot. It also needed to be taken into account that in light of usual participation in elections in Iceland a risk could not be taken of not increasing the number of booths significantly.

The provisions of Act No. 24/2000 include no description of the material to be used for voting booths or how voting booths should be made in other respects. It must be regarded as evident that the requirement of a “small table” was based on the appearance of a ballot in elections to the Althing. The National Electoral Commission reiterates that the Commission was not aware that any protests had emerged regarding the proposed arrangement of the voting booths, either in the course of the election or in the course of absentee voting, after the news report of the National Broadcasting Service last 4 November, which is referred to in the application. Neither does the National Electoral Commission know of any complaints that any voters were unable to fill in their ballot in privacy or that other persons at the polling stations had attempted to peek at their ballots.

The National Electoral Commission noted that permitting voters to take a sample ballot with them into the voting booths, as provided in the conclusion of the second paragraph of Article 9 of Act No. 90/2010 was an innovation, as this practice is not permitted in elections to the Althing. The provisions of the Act on elections to the Althing are tailored to viewpoints relating to ballot secrecy based, among other things, on the traditional format of ballots, where anyone seeing a ballot could easily work out how a vote had been cast. The permission granted under the Act on a Constitutional Assembly to take a sample ballot into the voting booth, on the other hand, took into account the fact that anyone getting a quick glance at the ballot of a voter who had cast a vote in the election to the Constitutional Assembly would have an extremely limited possibility of working out how the voter had cast his vote. These viewpoints must have great weight in assessing to what extent the provisions of the Act on elections to the Althing should be applied in the election to the Constitutional Assembly.

Finally, the National Electoral Commission reiterates that the staff of the electoral commissions in each location had monitored the compliance of the process of voting with applicable rules. Nothing emerged to indicate any likelihood that the election, in the present regard, were not secret.

In the submission by the Ministry of Justice and Human Rights of 22 December 2010, the Ministry notes that the final sentence of Article 4 of the Act on a Constitutional Assembly provides that the election to the Constitutional Assembly shall be conducted by secret ballot. In the conduct of the election on the part of the Ministry it had always been understood that this provision of the Act would be observed. The Ministry points out that the election to the Constitutional Assembly differed in many ways from elections to the Althing. Among other things, the decision had been made to count the ballots electronically, and instead of voters placing a mark next to the names of candidates, or the identifying letter of a list of candidates, as in the case of elections to the Althing, voters were asked to write out the four-digit identification code of the candidate of his first, second and up to 25th choice. The ballots were different from the usual ballots used in elections to the Althing, and a choice was being made between 522 candidates, and not political parties. All of this had the result that the provisions of the Act on elections to the Althing could not apply absolutely to the conduct of the election to the Constitutional Assembly; they could only be applied as applicable, as stated in the first paragraph of Article 11 of the Act on a Constitutional Assembly. By Act No. 120/2010, the Act on a Constitutional Assembly had been amended so that voters were required to cast their votes by writing the four-digit identification code of candidates on the ballot. As a result of this amendment it was clear that it could take voters a long time to fill in the ballot if they exercised their right to vote for 25 candidates. This could have resulted in long queues at the polling stations, which potentially could have kept voters away and prevented them from exercising their right to vote. On the initiative of the Ministry and the National Electoral Commission measurements were made of how many voting booths would be needed based on the number of voters in the electoral register and the length of time it was estimated that each voter would remain in the booth, as shown in the attached summary. Information on the matter was sent to all the municipalities for their guidance. It was revealed that more voting booths would be needed at the polling stations than were needed in elections to the Althing. This also had the effect that voters would need to be able to sit while they filled in their ballots and could not stand as is normally the case. In addition, the second paragraph of Article 11 of the Act on a Constitutional Assembly stipulated that voting booths

should be fitted with a list of the candidates and their identification codes. Owing to the number of candidates, who were 522 as revealed earlier, the list in question was large, or 60 x 60 cm. The Ministry undertook to investigate whether a new type of voting booth could be designed which would meet the needs posed by the election to the Constitutional Assembly. A drawing was prepared, at the request of the Ministry, of partitions with the dimensions of "52 cm x 54 cm x 60 cm" which could be fixed to a school table of 64 x 64 cm, at which a voter could sit while filling in the ballot. A drawing of such a voting booth, which could be used in the election to the Constitutional Assembly, was sent to all the municipalities, as illustrated in the attached document. It was the assessment of the Ministry that this voting booth would enable voters to cast their votes in private, without interference, and without others being able to see how they voted. It also needed to be taken into consideration that Article 69 of the Act on elections to the Althing includes no description of the features of a voting booth, except to say that it should be possible to cast a vote without others seeing how the vote was cast and that it should have a small table to serve as a writing surface. In the opinion of the Ministry the type of voting booth used in the election to the Constitutional Assembly complied with the conditions of the Act on elections to the Althing to the extent that the Article was applicable. The Ministry also points out that no complaints emerged while the election was in progress to the effect that a voter was unable to exercise his right to vote secretly.

The letter from the National Electoral Commission to the Supreme Court of 10 January 2010 notes that in the preparation and organisation of the election it was unavoidable to take measures to cope with the unexpected situation that arose when it was revealed that 522 persons had announced their candidacy and there was little time left until the election. It was assumed that participation in the election would be comparable to the usual participation in elections in Iceland. Attempts were therefore made to ensure that the voting could progress as smoothly as possible, taking into account the requirement of Article 4 of the Act on a Constitutional Assembly regarding secret ballot.

Concerning Point 4: As regards the protest made by Thorgrimur S. Thorgrímsson and Ódinn Sigthórsson that voters were not permitted to fold their ballot paper after filling it in, the National Electoral Commission notes in its submission of 22 December 2010 that the provisions of Article 10 of Act No. 90/2010 lays down specific instructions on the form and printing of ballots. Those provisions set aside the instructions in Chapter IX of the Act on

elections to the Althing, which deal with the form of ballots in general elections to the Althing. For this reason there was no crease in the ballot, nor was it folded as provided in Article 53 of the Act on elections to the Althing, since those provisions did not apply, as stated earlier. In the notes to Article 2 of the legislative bill that became Act No. 120/2010, amending the second paragraph of Article 10 of the Act on a Constitutional Assembly, it was assumed that the ballot would be an A-4 sheet. It was not provided that the ballot should be folded, as in elections to the Althing. The provisions of Article 85 of the Act on elections to the Althing assume that when a voter has finished casting his vote, he will fold the ballot "in the same crease that it had when he received it". However, the second paragraph of Article 10 of the Act on a Constitutional Assembly does not provide for handing a folded ballot to a voter. Voters were required to place the ballot in the ballot box so as to prevent others from seeing it, cf. also Article 87 of the Act on elections to the Althing.

It is clear from the above that the requirement of a folded ballot is geared to parliamentary elections, where casting a vote consists in placing an X by a selected political organisation and placing the ballot folded in a slot on top of the ballot box. In the election to the Constitutional Assembly, voters had the option of selecting candidates by writing their identification codes in up to 25 selection lines. With the decision that the ballot should not have the said crease and that it should be deposited with the reverse side up, as provided in the second paragraph of Article 10 of the Act on a Constitutional Assembly, it should have been assured that the ballot would be secret in this regard. It must also be assumed that the chute referred to earlier [Corr.: Here The Supreme Court must mean "later"] on the ballot box made it possible to place the ballot in the ballot box without risk of showing it.

The submission from the Ministry of Justice and Human Rights of 22 December 2010 notes that Article 10 of Article 90/2010 contains a description of the format of a ballot paper. Its format was therefore subject to the provisions of Act No. 90/2010, and the provisions of the Act on elections to the Althing did not apply. Article 10 of the Act does not provide for folding of the ballot, as provided in Article 53 of Act No. 24/2000. Thus, it was not provided that voters should fold the ballot as provided in Article 85 of Act No. 24/2000; instead they should place it in the ballot box in the form in which they received it, i.e. unfolded. Article 87 of the same Act provides that if a voter permits the contents of his ballot to be seen, the ballot is invalid and cannot be placed in the ballot box. The ballot boxes used in the election to the Constitutional Assembly were specially designed to accept ballots of the kind used in the

election to the Constitutional Assembly. Installing a chute on the front of the box made it possible for voters to place the ballot unfolded in the ballot box without showing it, and therefore there was no violation of Article 87 of Act No. 24/2000. Also, the Ministry is of the opinion that the method used in the election to the Constitutional Assembly of having voters write the identifying codes of candidates on the ballots rather than their names further secured the secrecy of the voting.

Concerning Point 5: As regards the protest made by Thorgrímur S. Thorgrímsson to the effect that the paper ballot boxes used in the place of traditional ballot boxes did not comply with the conditions of the second paragraph of Article 69 of Act No. 24/2000, cf. the first paragraph of Article 11 of Act No. 90/2010, the National Electoral Commission points out that the ballot boxes in question were not made of cardboard, but of a special plastic material. The boxes were specially designed to accept ballots and were used in elections in other countries, such as Scotland. The side of each ballot box had a slot, to which a chute was attached to accept the ballots. These features, together with flaps, ensured that it was impossible to remove a ballot from the ballot box without opening it. In addition, the staff of the election commissions monitored the use of the boxes. Following the polling, the chute was removed from the box and a flap used to lock the box. The flap was then sealed with a seal prepared by the Ministry of Justice and Human Rights, as provided also in the instructions of Article 95 of the Act on elections to the Althing concerning the disposal by the election commission of ballot boxes and other electoral material. The Ministry prepared special instructions to electoral commissions on the structure of ballot boxes and how they should be locked. It is the assessment of the National Electoral Commission that by these means the ballot boxes were securely closed in the understanding of the second paragraph of Article 69 of the Act on elections to the Althing.

At the close of polling, at 22:00 hours on Saturday, last 27 November, the National Electoral Commission began to take delivery of ballot boxes and electoral material and this process continued until the morning of the following day. A special register was kept of confirmations of delivery. The National Electoral Commission is not aware of any cases of seals being broken or the ballot boxes tampered with. It can only be concluded, therefore, that supervision of the conduct of the election by individual electoral commissions was in compliance with law. Furthermore, the reconciliation by the National Electoral Commission of the election, which was published on the Commission’s website, indicates that the results

of the number of ballots in the boxes balanced out almost entirely with the number of votes cast in the election, as there was a discrepancy of only sex missing votes.

The submission of the Ministry of Justice and Human Rights of 22 December 2010 states that the first paragraph of Article 11 of Act No. 90/2010 provides for the application of Act No. 24/2000 with regard to precincts, polling stations and the conduct of the election to the Constitutional Assembly, as applicable. The second paragraph of Article 69 of Act No. 24/2000 reveals that a ballot box shall be reasonably large and so equipped as to make it impossible to remove a ballot without opening it, and that it should be possible to lock the box. The ballot boxes used in the election to the Constitutional Assembly met these conditions, in the opinion of the Ministry. The boxes are made of a plastic material and specially designed to accept ballots of the kind used in the election. The boxes were assembled in a specific manner, as illustrated in the attached instructions, and they were locked using special flaps. The sides of the boxes featured a slot and a chute for the ballots. It was impossible to remove a ballot from the box through the slot or in any other manner without disassembling the box. In order to ensure the security of the boxes and their handling from the time that they left the electoral commissions of the municipalities until they reached the National Electoral Commission, the boxes were labelled, special security labels were glued over the slots after the chute had been removed, pockets were glued to the boxes containing a consignment note to be signed when the boxes were transferred for continued transport until the National Electoral Commission took delivery. The Office of the National Commissioner of Police was responsible for the transport of the boxes. The reason that a new type of ballot box was introduced was that the ballots were different from those normally used, and too large to fit through the slots of normal ballot boxes. A decision had been made on electronic counting of votes, and the National Electoral Commission had contracted with the company Skyggnir on undertaking the tallying and reconciliation of the election. A British subcontractor of Skyggnir, DRS, provided a scanner to scan the ballots, software, and to some extent staff to undertake the tallying. The company also procured the ballot boxes used in the election; they were specifically designed to accept ballots of the kind used in the election to the Constitutional Assembly, as revealed earlier.

Concerning Point 6: With regard to the complaint from Skafti Hardarson that candidates were not permitted or enabled to have an agent present at the election itself and then at the tallying of votes, the National Electoral Commission notes that the second

paragraph of Article 13 of Act No. 90/2010 provides that the counting of votes in the election to the Constitutional Assembly shall take place in the open in the facilities of the National Electoral Commission. This provision underwent changes in the course of process before the Althing from the original version of the bill, although no notes are available regarding the reasons for the changes in the provision. The provision in the second paragraph of Article 13 has a corresponding provision in the first paragraph of Article 98 of the Act on elections to the Althing, which says that the counting of votes shall take place “in the open so that voters can be present to the extent that the available space will permit.” The second paragraph of Article 98 concerns agents of candidates lists. From the changes referred to above it may be inferred that the provisions of Article 39 of the Act on elections to the Althing did not apply in this instance. Instead, the tallying was to take place in the open in the facilities of the National Electoral Commission. These arrangements applied not only to candidates and their potential agents, but also to voters. The presentation sheet of the Ministry of Justice and Human Rights, which was distributed to all households in the country on 16 November 2010, noted that the tallying of votes would take place in Laugardalshöll in Reykjavík. The National Electoral Commission published on its website, landskjor.is, and the website kosning.is, an advertisement on 21 November 2010 on the tallying of votes and taking delivery of absentee votes, cf. the first sentence of the first paragraph of Article 13 of the Act on a Constitutional Assembly. It is stated in the advertisement that the National Electoral Commission will “come together at the end of the election at 22:00 hours on next 27 November to open ballot boxes and prepare for the counting of votes cast in the election to the Constitutional Assembly, which will take place on the same day. The votes will be tallied in Laugardalshöll, Engjavegur 8, in Reykjavík, and the tallying will begin at 09:00 on Sunday, next 28 November." An advertisement of the same substance was also published in the newspapers *Morgunbladid* and *Fréttabladid* on 23 November 2010. The location of the tallying was selected so as to permit the public to observe the conduct of the tallying. Attached to the advertisement was a plan of the tallying facilities. The public could, without hindrance, ascend to a balcony overlooking the tallying hall and observed the vote counting through windows, and in addition it was possible to observe the work of the National Electoral Commission and its staff through two large glass doors. Thus, appropriate measures were taken, in compliance with the Act on a Constitutional Assembly, to enable the public to observe the conduct of the count.

The submission of the Ministry of Justice and Human Rights of 22 December 2010 notes that the election to the Constitutional Assembly was in many ways different from elections to the Althing. This was not an election where voters chose between lists of candidates, as provided in Article 39 of the Act on elections to the Althing; instead the poll involved direct personal election, where voters could choose from 522 individuals who had announced their candidacy. The Ministry is therefore of the opinion that the provisions of Article 39 of the Act on elections to the Althing clearly did not apply to the election to the Constitutional Assembly. Act No. 90/2010 does not provide for the nomination by candidates of their respective agent or agents for the election. Clearly such a system would have been difficult to implement owing to the number of candidates. If each of them had appointed two agents, there would have been 1044 agents. The Ministry also points out that votes were tallied in a single location, and in accordance with the second paragraph of Article 13 of the Act on a Constitutional Assembly the tallying took place in public in the facilities of the National Electoral Commission. In accordance with the provisions of the Act, the National Electoral Commission advertised last 18 November where and when the Commission would assemble to open ballot boxes and begin the counting of votes. The candidates therefore had an opportunity to be present personally at the tallying of the votes.

The letter from the National Electoral Commission to the Supreme Court notes that an occasion never arose for the National Electoral Commission to make a formal decision regarding requests by candidates to be present at the count itself. If any such requests had been received, it is clear that acceding to them would have posed significant difficulties owing to the limited space, delicate equipment and number of candidates. This would have been impossible without discrimination among the 522 candidates.

In the course of oral proceedings, the chairman of the National Electoral Commission was asked whether the Commission had considered other possible avenues, e.g. inviting candidates to agree on a certain number of agents, or selecting by drawing lots the number of agents that it would be feasible to have present at the counting of votes. It was revealed that no special consideration had been given to these options.

Concerning Point 7: As regards the complaint of Ódinn Sigthorsson to the effect that electoral credentials had been issued to delegates who had not received the stipulated number of votes, the so-called quota, to achieve election, the National Electoral Commission noted in its submission of 22 December 2010 that the method used in the election was the method

known in English as the Single Transferable Vote system (STV). After amendments made to the Act in September 2010, the method was substantially identical to the version of the STV system known in English as the *Weighted Inclusive Gregory Method (WIGM)* which is the most common version and was, for instance, used in the local government elections in Scotland in 2007 (*The Scottish Local Government Elections Order 2007 No. 42, http://www.legislation.gov.uk/ssi/2007/42/contents/made*). The Icelandic name "preferential ordering method" (*forgangsröðunaradferð*") is rather too wide in scope and can apply to other types of methods. We will therefore use the term *STV-method*. Counting of votes and allocation of seats are subject to the first paragraph of Article 14 of Act No. 90/2010. This was further described as quoted here:

1. "First a quota is determined, which is the number of votes that a candidate needs initially in order to be allocated a seat. In the election to the Constitutional Assembly the quota was calculated as 3,167 votes.
2. Next, the votes are sorted by the names of candidates specified as the first choice. If a candidate achieves the quota immediately at the outset, that candidate is allocated a seat, as stated in subsection 5.
3. Subsection 6 describes the transfer of the surplus votes of those who are elected pursuant to subsection 5. Votes are transferred in accordance with the next available choice of each of their voters. A proportion of each vote is transferred so that the total of the remaining fractions of votes correspond precisely to the quota. Votes (or fractions of votes) which cannot be transferred owing to the absence of a name on the ballot in question are set aside as untransferable.
   When there is no longer any candidate with votes equalling or exceeding the quota, the candidate then with the lowest number of votes is excluded. His votes are transferred in their entirety based on the next valid choice on each of the ballots. A valid choice refers to a candidate who has been selected and has not been excluded or attained the quota.
5. If a candidate achieves a quota following a transfer of vote, that candidate shall automatically be allocated a seat and his surplus votes transferred as described above.
6. Subsection 8 concerns the end of allocation. The text is as follows: 'The provisions of subsections 6 and 7 shall be applied, with the provisions of subsection 6 always taking precedence. When the number of candidates still in contention for a seat is equal to the number of the 25 seats that remain to be allocated, the seats shall be allocated to those candidates without further calculation.'"

Subsection 8 is therefore unequivocal. It addresses the situation where the number of candidates who are still in contention is equal to the number of seats remaining to be allocated. In that situation there is no further calculation and the seats are allocated to the remaining candidates.

As regards the theoretical background of the allocation rules, the National Electoral Commission noted the following in its submission:

The quota (Icel. *saetishlutur*) is a fundamental concept in the STV method. It is usually found by dividing the number of valid votes by a figure which corresponds to the number of candidates to be selected, plus 1, with the result rounded off to the nearest whole number above. This is the definition of the quota in the Icelandic Act. The divisor in the election to the Constitutional Assembly was 25+1, i.e. 26, and based on the results of the election the quota was calculated as 3,167 votes. It is a fundamental feature of the quota that it is the smallest whole number where no more than the number of candidates to be elected, in this case 25, can receive votes which equal or exceed the quota. It is important to bear this in mind. As recounted earlier, the STV method assumes that votes, or fractions of votes, will, for as long as possible, be transferred from candidates receiving votes in excess of the quota or from candidates who are excluded, in accordance with the next available choice of the voter in question. The expectation is that the conclusion will be that only those will be elected who have achieved a quota. This can be illustrated by a simple example:

Example 1: Two delegates are to be elected, there are three candidates and only five voters. The quota is calculated by dividing 5 by three (2+1) and round off to the nearest whole number above, which is 2. The quota is therefore 2. Let us call the candidates A, B and C, and say that A received 3 votes as first choice and B and C each received one vote. A has then exceeded the quota and is elected immediately, but leaves a surplus of 3-2=1 vote. It then depends on the third [Corr.: Should be "second"]. choice of the other three voters where the vote is transferred. Let us say in this simple example that all 3 voters of A had B as their second choice. The surplus vote is then transferred to B, who is then elected, having received 2 votes. Following the transfer, A and B have then both achieved the quota of 2 votes, but the fifth vote remains with C. The result is therefore ideal, as both of the elected candidates have been allocated a seat with a full quota.

Unfortunately, this is rarely the result in reality. The reason is simply that it is rare for voters to select a sufficient number of candidates in any election.

Example 2: Let us alter Example 1 slightly. Let us say that one of the voters of A did not enter any other names in his ballot. This means that a whole vote will no longer be transferred from A to B, but only 2/3 of a vote. This is not sufficient for B to be elected at this point, as he now only has 1 2/3 votes. Then candidate C is excluded and his vote transferred to the candidate of the next choice. Let us say that the second choice on this ballot is A, who has already been elected. Then the third choice of this single voter of C comes into question, which should ordinarily be B, but let us assume that this is left blank by the voter. Then this vote is eliminated. The counting is nevertheless concluded, since B alone remains and he receives the seat even though he is missing a third of a vote to achieve a full quota. The reason is it was not possible to transfer 1 1/3 vote to a candidate who is still in contention.

Voters in the election to the Constitutional Assembly were unusually diligent in selecting candidates, as on average there were 14.8 candidates proposed on each ballot. In the election just short of 17% of the votes, or more accurately vote values, were not transferable. This is a low proportion considering the large number of candidates, 522. But the consequence was nevertheless that the last 14 candidates who were elected had not received a transfer of sufficient votes to achieve a full quota even though – as stipulated by law – all transferable votes had been transferred to the top 25 candidates. *No votes remained in the end with the 497 candidates who were not elected.*

The last seat. The candidate who was elected last, Dögg Hardardóttir, in the end had received a total of 1995.77187 vote values. Íris Lind Saemundsdóttir, who came closest to being elected, had 1929.59223 vote values when she was excluded. Her votes were then transferred to the other 14 who remained in contention. Of these vote values, Ms. Hardardóttir received 29.72332 from those who had voted for Ms. Saemundsdóttir. Following

subtraction of these vote values, Ms. Hardardóttir's position was 1995.77187 - 29.72332 = 1966.04855 vote values, when Ms Hardardóttir and Ms. Saemundsdóttir were compared to determine which of them would be allocated the 25th seat. Ms. Hardardóttir then came out ahead with 36.45632 vote values in excess of Ms. Saemundsdóttir."

As regards the allocation rule of Article 14 of Act No. 90/2010 the following emerged in the submission from the National Electoral Commission.

"It should be noted that the first paragraph of Article 14 assumes that candidates can be allocated seats in two ways: in accordance with subsection 5 or in accordance with subsection 8 of the Article. In his complaint the applicant first cites subsection 2 of the first paragraph of Article 14, which is as follows:

> "2. *Quota:* A quota is determined by first dividing the total number of valid votes by 26. The result shall be rounded down to the nearest whole number; i.e. any remainder shall be deleted. After this, the number one shall be added and the result is the quota."

As recounted earlier, the quota proved to be correctly determined at 3,167 votes. The applicant then cites subsection 5, which reads as follows:

> "5. *Allocation of seats:* Each time it is revealed that the vote count of a candidate equals or exceeds the quota, that candidate shall be allocated a seat. This applies both at the start and subsequently when the provisions of subsections 6 and 7 are applied.

The complaint says, to quote it directly, "that a seat shall be allocated to a candidate when the candidate's vote count equals or exceeds the quota. It is specifically noted that this provision also applies when the provisions of subsections 6 and 7 are applied." The applicant furthermore contends that: "For this reason, it is a condition for a candidate to have been elected to the Constitutional Assembly that he has received a minimum of 3,167 votes, which constitutes the quota." This is correct, *but only with regard to allocation pursuant to subsection 5. The complaint ignores the fact that seats are also allocated pursuant to subsection 8.*

Subsection 8 lays down the following instructions (our underlining):

> „8. *End of allocation:* The provisions of subsections 6 and 7 shall be applied, as long as they are applicable, with the provisions of subsection 6 always taking precedence. When the number of candidates still in contention for a seat is equal to the 25 seats that remain to be allocated, the seats shall be allocated to those candidates without further calculation."

According to the above it is unequivocal that seats *shall* be allocated in the end, but only when allocation is no longer possible pursuant to he earlier provisions, as indicated by the underlined phrase "as long as they are applicable".

The applicant correctly notes that 11 candidates were elected pursuant to subsection 5, and also that the other 14 "were issued election credentials." Also he can be said to be correct when he says that these 14 received "fewer votes than required under Article 14 of the Act after the application of the provisions of subsections 6 and 7," if by this he means that they

received fewer votes than the quota after the exhaustive application of subsections 6 and 7. However, the applicant draws the false conclusion that the 14 candidates in question were not elected to the Constitutional Assembly. On the contrary, they were properly elected pursuant to the clear provisions of subsection 8.

The attached report of the National Electoral Commission is accompanied, for further information, by a discussion of some foreign models. The attachment with the report was also accompanied by "Briefing Note on the Election of Candidates With and Without Quota of Votes" by dr. James Gilmour.

According to the above, it is the position of the National Electoral Commission that the allocation of seats to delegates for the Constitutional Assembly was in every respect in compliance with the instructions in the first paragraph of Article of the Act on a Constitutional Assembly, cf. in particular subsections 5 and 8 of that Article.

Concerning Point 8: With respect to the complaint of Skafti Hardarson that the counting of votes was defective as it was done by machines and that there is no certainty that their counting was correct, the National Electoral Commission notes in its submission of 22 December 2010 its opinion that the second paragraph of Article 14 [Corr.: Should be article 13] of the Act on a Constitutional Assembly can only be understood as a clear authorisation to use "electronic means … in counting ballots and calculating which candidates have been elected." More precisely this includes, on the one hand, the means of gathering information from a ballot and, on the other hand, the method of calculating the outcome. In this regard there are two routes available: either to key the identifying codes manually into a database, with approved software then used to calculate the results, or, on the other hand, as was done in the election to the Constitutional Assembly, to capture an image of each ballot using special imaging equipment and then to use approved software to recognise the identifying code, with the assistance of the human eye when the recognition is in doubt, and, finally to calculate the results. The applicant is of the opinion that entering manually using the human eye must be more secure than the use of the machinery in question. The contentions of the applicant are not supported by any evidence or reasoning. The fact is that according to information obtained by the National Electoral Commission, the reverse is true owing to the risk of typographical errors. In addition, the viewpoints of the applicant are contrary to the clear provisions of law, as recounted earlier.

The National Electoral Commission points out that scanning using machinery of the kind in question here has been known for a long time and has been used before in scanning ballot papers, e.g. in elections in Scotland. Also, scanning digits or codes for the same purpose is also a known technique in other contexts. Most people are familiar, e.g., with scanning lottery tickets and tax returns. In order to ensure the reliability of the scanning a collection was made of writing samples in Iceland of the numerals 0-9. Hand-written numerals were collected from 90 individuals aged 18-84 with a relatively equal division between genders and the proportion of right-handed and left-handed participants corresponded the proportion known for Iceland. The purpose of collecting handwriting samples from Icelanders was to enable adaptation of the hardware and software to conditions in Iceland. Also, the identification codes of candidates, which were four digits, were chosen specifically with a view to reducing the risk of confusion and facilitating their reading. The method of counting was that ballot papers were removed from the ballot boxes and placed in parcels in specially designed trays. An image was captured of each ballot in each parcel, so that it could be located again for further inspection. Confirmation that the machine had read the identifying codes properly was obtained in two ways. First by means of a primary sorting, where the staff of the contractor, under the supervision of a representative of the National Electoral Commission, read individual digits from a monitor and confirmed the digit or suggested another. Then each ballot was assessed by projecting it onto a screen where an employee of the contractor and a representative of the National Electoral Commission confirmed the identifying code or, as applicable, marked the ballot for further inspection. This inspection was conducted using a special screen where the representative of the National Electoral Commission supervised the final confirmation. In cases of doubt, the ballot was placed in a parcel and evaluated separately by the National Electoral Commission. The work described began on the morning of Sunday 28 November and was completed on the eve of the 30th of the same month. The most time-consuming part of the work was the final confirmation. At 7 a.m. on 30 November the identification codes of the candidates were read electronically from the database into another software programme which calculated the results of the election.

The consultant appointed by the National Electoral Commission also monitored the scanning and its accuracy separately and made independent observations. Also, the representative of the Ministry of Justice and Human Rights, Dr. James Gilmour, monitored the tally separately. The tallying described above took place in the open in the facilities of the

National Electoral Commission and anyone who took an interest was able to observe the process, as recounted earlier. Using the method described here, confirmation of the scanned ballot papers was always by the human eye, so to speak. First in the primary viewing of individual figures, then in the inspection of identifying codes and last in the final assessment.

In the opinion of the National Electoral Commission nothing emerged to indicate that any mistakes or inaccuracies occurred in the entry of the data from the ballot papers into the database. It cannot be seen from the complaint that there are any indications or information in the complaint to justify a call for a recount.

Finally, the submission from the Ministry of Justice and Human Rights of 22 December 2010 notes that the Ministry had in its submission provided information on the conduct of the election with regard to the protests made and also on how decisions were made and on what viewpoints the decisions had been based. The involvement of the Ministry was based on the provisions of Act No. 90/2010 and Act No. 24/2000 to the extent that the latter Act was applicable, in the view of the Ministry. The Ministry is of the opinion that the observation of the Act was consistent with the rules available and that the principles of election by secret ballot were observed. The Ministry emphasises that the election to the Constitutional Assembly differed in many ways from elections to the Althing. Article 15 of the Act on a Constitutional Assembly states that certain provisions of the Act on elections to the Althing should be applied to the extent that they are applicable. To the extent that the Ministry made decisions on the conduct of the elections, the Ministry endeavoured to employ objective standards in making discretionary decisions, as recounted in this submission. The Ministry notes that it is not aware of any protests having been made on or before the election day regarding any matters relating to the conduct of the election to the Constitutional Assembly which the applicant’s complaints concern, neither by voters nor by candidates. Furthermore, the Ministry is of the opinion that it must be taken into account that in the complaints the protests of the conduct were submitted after the election had ended and that no specific incidents have been cited which could have resulted in a candidate's election to the Constitutional Assembly being for some reason unlawful.

V

In a letter from Gísli Tryggvason, one of the delegates elected to the Constitutional Assembly, dated 31 December 2010 and received by the Supreme Court on 4 January 2011,

Mr. Tryggvason expresses his belief that any potential defects in the conduct of the election verifiably did not affect its outcome.

With regard to the secrecy of the election, Mr. Tryggvason notes that no instructions are provided on how ballot secrecy should be ensured, and therefore the applicant carries the burden of proof that this was generally not the case. The allegation that voters were unable to cast their votes without interference was neither supported by evidence nor shown to be likely. He also believes that the voting system used did not make it easier for a voter to reveal his or her vote, since this would require the voter concerned to show a collaborator up to 25 four-digit numbers, as opposed to the standard practice in party-list elections of only marking a single letter with an X. Thus, the voting system used in the Constitutional Assembly elections while considered unpractical by many, is better suited to ensure ballot secrecy than the one generally employed in elections in Iceland. The fact that ballots could not be folded for technical reasons made no difference, Mr. Tryggvason argues, since voters deposited their ballots directly into a closed chute facing down, as everyone who participated in the elections to the Assembly knows.

In an e-mail sent to the Supreme Court on 17 January 2011, Mr. Tryggvason argues that in view of statutes and other sources of law, the complaints and responses thereto, as well as the information gathered during the on-site visit, it must be concluded that it would have required a conspiracy between electoral commission members and those involved in centralised tallying for there to be any chance of ballot secrecy being compromised or votes being traced to individual voters. The applicants are not alleging that any “misconduct” occurred. Therefore, with reference to the precedent laid down by the Supreme Court on 9 February 1982 (H 1980:192) in case No. 96/1980 (item II, point 1), Mr. Tryggvason submits that the request for invalidation of the elections should be rejected on the same grounds.

VI

The Althing passed Act No. 90/2010 on elections to a Constitutional Assembly, which was amended by Act No. 120/2010. The Act includes provisions designed to ensure general, free, secret and direct elections on a non-discriminatory basis. The holding of elections in accordance with these main principles is the foundation as well as a prerequisite for a democratic system of government. The first paragraph of Article 11 of Act No. 90/2010 provides that, other than set forth in the Act, precincts, polling stations and the procedure of

the polling shall be subject to the Act on elections to the Althing. Subject to this condition, the provisions of Chapters III, XIII and XIV of Act No. 24/2000 therefore apply in respect of these details. With regard to absentee voting, the second paragraph of Article 12 of Act No. 90/2010 provides that the entry in the Absentee Voters' Register shall replace the consignment note, certification and register provided for in Articles 63 and 66 of the Act on elections to the Althing and that in all other respects, the procedure for voting shall be subject to the said Act, except as otherwise provided in Act No. 90/2010. The provisions of Chapter XII of Act No. 24/2000 therefore applied to the absentee voting to the extent that Act No. 90/2010 did not provide otherwise. In addition, the second paragraph of Article 13 of Act No. 90/2010 states that the handling of ballots, their validity and the conduct of the counting shall be subject to the Act on elections to the Althing, as applicable, subject to Article 14. The provisions of Chapter XV of Act No. 24/2000 therefore apply in this respect. Finally, the second paragraph of Article 15 of Act No. 90/2010 states that the provisions of Article 114 and Chapters XIX, XX, XXIV and XXV of the Act on elections to the Althing shall apply to the election to the Constitutional Assembly to the extent that they are applicable.

VI.1.

The protest lodged by Thorgrímur S. Thorgrímsson complains that ballots had been identified by a bar code and a number on the reverse side. According to a letter sent from an employee of a contractor of the National Electoral Commission to the secretary of the Commission on 13 January 2011, all the ballots were labelled with a unique number, ranging from 100001 to 378000. Mr. Thorgrímsson claims that the ballots were distributed to precincts by numerical order and therefore it was possible to trace the ballots back to their precincts after the voting had ended. The ballots were also handed to voters in numerical order. Mr. Thorgrímsson also claimed to know that in some precincts electoral commissions recorded the names of the voters in a list as they cast their votes. With this list in hand, and the numerical sequence, it would be possible, to trace ballots back to individual voters. It is also maintained that the permission granted under the second paragraph of Article 10 of Act No. 90/2010 extends only to the bar coding of ballots, not their numbering.

The final sentence of the second paragraph of Article 10 of Act No. 90/2010, as amended by Article 2 of Act No. 120/2010, provides that the back of the ballot paper shall be marked with the identification code of the ballot. According to the notes to Article 2 of the bill that became Act No. 120/2010, an examination by the National Electoral Commission of

the procedures used in electronic tallying of votes, particularly in England, Scotland and Ireland, revealed that the ballots must be given a unique code for such tallying to be possible, as also explained in the notes to Article 4 of the bill. Such identification codes are linked only to the ballots themselves and cannot be traced back to voters. The provision removes any doubt regarding the permission to identify ballots specifically for the electronic tallying of votes.

In determining how ballots should be identified on the basis of the second paragraph of Article 10 of Act No. 90/2010, cf. Article 2 of Act No. 120/2010, the Ministry of Justice and Human Rights, now the Ministry of the Interior, was under obligation to take into consideration the provision of Article 4 of the Act that the elections should be conducted by secret ballot. As clearly stated in the notes to the bill, it should not be possible to trace ballots back to individual voters. It is common knowledge that voters' names are often written down in the order in which they arrive to cast their votes in order to keep track of how many voters have entered the precinct. In view of the information that the ballots were not only identified by a bar code but also numbered in a continuous and consecutive sequence, it must be concluded that it was in fact a very easy matter to write down details next to voters' names that would allow one to trace them back to the numbers of the ballots provided. It must be concluded that the decision to number the ballots in the manner described above was in violation of the final provision of Article 4 of Act No. 90/2010 regarding ballot secrecy, which provision is consistent with the fundamental provisions of the Constitution concerning public elections, cf. Article 5 and 26, the first paragraph of Article 31 and the second paragraph of Article 79 of the Constitution. This must be seen as a significant defect in the conduct of the elections, particularly in view of the fact, to be further addressed below, that votes must be tallied in the open and in the presence of agents according to the second paragraph of Article 94 of Act No. 24/2000.

VI.2.

Both Thorgrímur S. Thorgrímsson and Ódinn Sigthórsson protest that traditional voting booths were not used in the elections; instead each voter sat at a table in an open space and voted together with other voters; the tables were fitted with cardboard partitions, 60 cm in height, which were placed on three sides of the table to separate voters. These partitions were then arranged side by side. It is impossible that voters could not have glanced at the ballots of the next voter, e.g. when standing up from the table after filling out their own ballots or when

walking past another voter and looking over his shoulder. They contend that this arrangement is a clear violation of the first paragraph of Article 69 of Act No. 24/2000, cited in the first paragraph of Article 11 of Act No. 90/2010, which provides that a voting booth should be equipped so that a vote can be cast without others being able to see how the voter is casting his vote. The applicants contend that for this reason the election was not by secret ballot.

Article 69 of Act No. 24/2000 deals with the specifications of ballot boxes. It states that each polling station shall be furnished with a sufficient number of voting booths. The voting booth shall be so furnished that it is possible for voters to cast their votes there without others being able to see for whom they are voting. Each polling booth shall have a small table which can be used as a writing surface. When a voter has received the ballot paper the voter shall take the ballot into the voting booth, where he alone is permitted to be present, and to a table located in the booth, according to the first paragraph of Article 81 of the same Act. Article 86 of the same Act provides that if a voter needs assistance in casting a vote because of loss of eyesight or because the voter is not able to use his or her hand, an election official of the voter's choice shall provide assistance in doing so in the polling booth. Finally, Article 85 provides that after completing the ballot, the voter shall leave the polling booth and approach the ballot box and place the ballot paper into the box in the presence of election officials.

It was revealed in the course of oral proceedings on behalf of the National Electoral Commission that traditional polling booths had been used in some precincts. In other precincts, cardboard partitions, designed according to the Ministry's instructions, were used. At the request of the Ministry a drawing was made of partitions that were "52 cm x 54 cm and 60 cm in height", which could be placed on a school table, 64 cm x 64 cm, at which a voter could sit and fill out the ballot paper.

In the opinion of the Supreme Court, these cardboard partitions do not meet the necessary criteria to be considered a polling booth within the meaning of Act No. 24/2000, since they do not demarcate a space in which a voter would be able to cast his or her vote in private. This arrangement also does not meet the condition of allowing voters to cast their votes without others being able to see how they voted, since the markings on the ballot paper could be seen if one were to stand behind a behind a voter sitting at a cardboard partition to fill out his or her ballot. On the other hand, the Court agrees with the National Electoral Commission and the Ministry of the Interior that the method employed in the election of assigning a four-digit identification code to each voter, which was written on the ballot paper,

went some way toward maintaining ballot secrecy even if the ballot papers could be seen, considering that were 522 candidates and voters could select 25. However, it cannot be stated with certainty that this arrangement was sufficient to maintain secrecy in all cases where ballot papers could be seen as a result of the aforementioned deficiencies. It must also be borne in mind that rules on the specifications of polling booths are intended to ensure free and secret elections by preventing others from directly or indirectly observing and thereby influencing how a voter casts his or her vote. The fact that voters' ballot papers, which must have taken considerable time to fill in for anyone who selected the maximum number of candidates, could be seen served to restrict a voter's ability to exercise his or her right to vote, in the event that the voter was observed by a person on which he or she was dependent, or if the voter had reason to believe that this was the case. This is considered a defect in the conduct of the elections.

VI.3.

Both Thorgrímur S. Thorgrímsson and Ódinn Sigthórsson protest that voters were not permitted to fold their ballot after filling it in. They contend that this is in violation of the clear instructions in Article 85 of Act No. 24/2000, cited in the first paragraph of Article 11 of Act No. 90/2011, which are to the effect that when a voter has completed his ballot he shall fold the ballot in the same crease that it had when he received it, walk out of the booth to the ballot box and place the ballot in the box in the presence of a representative of the electoral commission.

Article 10 of Act No. 90/2010 includes provisions on the preparation and printing of ballots in connection with the elections to the Constitutional Assembly. The second paragraph thereof includes provisions on the content of ballot papers. The Court is of the opinion that these provisions set out how matters should be handled which are specific to this election, and thus different from the provisions of Article 52 of Act No. 24/2000 on the content of ballot papers in connection with elections to the Althing. As previously mentioned, the final sentence of Article 4 of Act No. 90/2010 provides that elections to the Constitutional Assembly should be conducted by secret ballot. The instructions set out in Article 85 of Act No. 24/2000 to the effect that voters should fold their ballots before depositing them in the ballot box are intended to ensure voters' rights to cast their votes in secret. No provisions were included in Article 10 of Act No. 90/2010 expressly deviating from these instructions, even though it would have been easy to do so had this been the intent at the time of the

passing the Act. For these reasons, and in view of the provision of the first paragraph of Article 11 of the same Act to the effect that the procedure of the polling should be subject to the Act on elections to the Althing, it must be concluded that Article 85 of that Act applied to the election to the Constitutional Assembly, in which case Article 53, for its part, must also be deemed applicable due to the reference made in Article 85 to the substance of that Article. The instructions set out in these statutory provisions were not observed in the election, which must be regarded as a defect in its execution.

Gardar Gíslason and Vidar Már Matthíasson hold a different view regarding this point. They point to the fact that Article 11 of Act No. 90/2010 provides that precincts, polling stations and the procedure of the polling are "in other respects subject to the Act on elections to the Althing, as applicable." This entails that the provisions of Act No. 24/2000 can only apply to the matters under consideration if Act No. 90/2010 does not provide otherwise. Article 10 of the latter Act contains provisions on the preparation and printing of ballots, with the second paragraph thereof setting out in detail how they should be made. As stated above, this means that the provisions of Act No. 24/2000 on precincts and polling stations, including voting booths, applied to the election to the Constitutional Assembly. However, the provisions of Chapter XIV of Act No. 24/2000, dealing with voting at the voting station, apply to the election to the Constitutional Assembly only to a certain degree. For instance, various provisions in the Chapter cannot, by their nature, apply to the ballot papers, since they relate to party-list elections. This includes provisions such as the second paragraph of Article 81, Article 82 and Article 83. As noted above, the second paragraph of Article 10 of Act No. 90/2010 includes specific provisions on ballot papers. It makes no mention of a crease in the ballot paper, which voters should use. Article 85 of Act No. 24/2000 provides that after casting a vote, a voter should fold the ballot paper "in the way that it was folded when it was handed to him or her." This rule is directly related to Article 53 of the Act, which provides that ballot papers should be printed so that they are folded with the blank side facing outwards. The first paragraph of Article 10 of Act No. 90/2010 contains specific provisions on the printing of ballot papers; it does not state that ballot papers should have a crease. Thus, the fact that no provision was made for ballot papers to be folded before they were deposited in a ballot box cannot be considered a violation of statutory provisions on the conduct of elections to the Constitutional Assembly.

Thorgrímur S. Thorgrímsson protests that the “paper ballot boxes” that were used instead of traditional ballot boxes did not meet the conditions of the second paragraph of Article 69 of Act No. 24/2000, cited in the first paragraph of Article 11 of Act No. 90/2010, which states that the ballot box should be so equipped that a ballot cannot be removed from the box without opening it and it should be possible to lock it Article 76 then reveals that before the voting begins, the electoral commission and agents shall verify that the ballot box is empty and then lock it. The “paper boxes” in question did not comply with this condition.

The National Electoral Commission points that the ballot boxes concerned were not made out of paper but out of a special plastic material. The boxes were specifically designed so that they could accept ballot papers and they have been used in elections elsewhere, including in Scotland.

The ballot boxes used in the elections to the Constitutional Assembly did not meet the conditions of the second paragraph of Article 69 of Act No. 24/2000 to the effect that it should be possible to lock them. In addition, the design of the ballot boxes was such that they could be taken apart with little effort in order to gain access to the ballot papers. Thus, the design of the ballot boxes served to compromise the security and secrecy of the elections. This is therefore considered a defect in its execution.

VI.5.

Skafti Hardarson protests that candidates were not permitted and enabled to have their agents present at the elections themselves and at the counting of the ballots, which is required under Article 39 of Act No. 24/2000. In addition, tallying was not conducted in the open.

According to the second paragraph of Article 13 of Act No. 90/2010, counting of votes shall take place in the open at the facilities of the National Electoral Commission. It was revealed during oral proceedings that the National Electoral Commission had decided before the elections that no one would be allowed to enter the counting hall other than those who had a role to play in the tallying conducted by the National Electoral Commission. However, anyone interested could have gone up to the balcony overlooking the counting hall and observed the counting through windows, and in addition it was possible to observe the work of the National Electoral Commission and its staff through two large glass doors.

The provision of the first paragraph of Article 13 of Act No. 90/2010, stipulating that the counting of votes should be conducted in the open at the facilities of the National Electoral Commission, must be construed in accordance with the first paragraph of Article 98 of Act No. 24/2000, which provides that the counting of votes should take place in the open so that voters have an opportunity to attend as long as space will permit. Thus, the National Electoral Commission should have allowed access to the facility where the tallying was conducted, establishing rules ensuring that order and security would be maintained and that access would only be granted as long as space permitted. The fact that tallying did not take place in the open must be considered a defect in the conduct of tallying in the elections to the Constitutional Assembly.

As stated at the beginning of this Chapter, it cannot be seen that the provisions of Chapter IX of Act No. 24/2000 regarding agents applied in the election to the Constitutional Assembly. As a result, candidates in the elections were not entitled to have two agents present when the National Electoral Commission handed down rulings in accordance with Article 40 of Act No. 24/2000. On the other hand, Article 13 of Act No. 90/2010 provided that the handling of ballots, their validity and the conduct of the counting should be subject to the Act on elections to the Althing, as applicable, subject to Article 14 of the Act. Thus, the conduct of counting was subject, *inter alia*, to the provision of the second paragraph of Article 98 of Act No. 24/2000, which states: “If the agents of one of the lists are not attending the counting session, the senior electoral commission or the regional electoral commission shall summon a group of honourable persons from the same political organisation, if possible, in order to attend to the interests of the list.” On the basis of this provision, the National Electoral Commission was required, *mutatis mutandis*, to summon honourable persons to attend to the interests of the candidates during the counting votes, if this was possible in light of electronic tallying and other factors. Act No. 24/2000 is based on the fundamental principle that votes should be tallied in a transparent manner. In this regard it should be noted that it is not sufficient that votes have been tallied accurately if people do not trust that the tallying was conducted in the correct manner. According to information from the National Electoral Commission, uncertainties in the electronic reading of ballot papers, requiring a special decisions to be made as to how numbers written down by a voter should be interpreted, occurred in 13 to 15% of all ballots. For this reason the need for the presence of agents to protect candidates' rights during the tallying was especially urgent. Accordingly, it must be considered a significant defect in the conduct of the tallying of votes in the election

to the Constitutional Assembly that the National Electoral Commission failed to appoint agents to attend the tallying on behalf of candidates, as required by the second paragraph of Article 98 of Act No. 24/2000. The significance of this defect is compounded by the fact, as noted above, that the tallying of votes was also not conducted in the open, as required by law. The fact that the tallying was observed by a representative of the Ministry of the Interior, Dr. James Gilmour, does not alter this conclusion.

VI.6.

The election to the Constitutional Assembly pursuant to Act No. 90/2010 differed from other public elections held in Iceland in several respects, including the fact that delegates were elected by direct personal election, there were 522 candidates, with only 30 to 50 sponsors being required, votes were cast by writing down the identification codes of candidates, voters were allowed to select 25 candidates, votes could be tallied electronically and the tallying took place at a single location by the National Electoral Commission. It is the responsibility of the legislature to lay down clear and detailed rules on the conduct of public elections, taking into account the circumstances resulting from their unique nature. However, the public authorities were not entitled to deviate from clear statutory instructions on the conduct of the election in light of the large number of candidates or new procedures deemed suitable because of the introduction of electronic tallying.

In Icelandic case law, elections have been invalidated where their execution is in violation of law or compromises ballot secrecy. As an example, an election held in the municipality of Helgafellssveit on a merger of municipalities was invalidated on the grounds that the design of the ballot paper was such that it was possible to see the markings through the paper even after it had been folded (judgment of the Supreme Court of 8 December 1994 in case No. 425/1994, published on p. 2640 in the Court's Collected Judgments for that year).

The above defects in the conduct of the election held on 27 November 2010 to the Constitutional Assembly must be considered collectively, and it is the conclusion of the Supreme Court that because of these defects, there is no alternative but to invalidate the election.

Conclusion:

The election to the Constitutional Assembly held on 27 November 2010 is invalid.