

Address delivered by Oddný Eir Ævarsdóttir at a press conference with Björk Guðmundsdóttir, Eva Joly, and Jón Þórisson on October 13, 2010, at Reykjavik's Nordic House.

Abstract:

The speaker asserts that the so-called “Magma affair” is a key issue in Icelandic politics, a mirror of the spirit or lack thereof in Icelandic infrastructure and law. Given grave inconsistencies in the law, our energy policy must be determined by a debate on the direction we want to take—not by legal wrangling—and at the conclusion of that policy debate, we need to rewrite our laws governing the ownership, exploitation, and conservation of natural resources. The speaker refers to the report on the Magma affair, which revealed that a systematic effort had been made to privatize the nation’s energy resources without discussion of this fundamental change or an opportunity for citizens to vote on the matter. The government’s options for ensuring that the Magma affair does not become precedent or rule are reviewed. The author also refers to research in the field of geothermal-energy indicating that the geothermal resources of Iceland’s Suðurnes region are renewable only with prudent use. Private foreign entities already own exclusive rights to the exploitation of a large geothermal area and to research in a still-larger area. Thus we face a loss of sovereignty over resources which, since independence, have belonged to the nation.

In summer 2010 the Icelandic government appointed a committee on energy and natural resources to evaluate possible responses to the so-called “Magma affair.” Much talk has ensued about the spirit versus the letter of the law, political will versus systemic obstructionism. I will briefly review several points in the committee’s report, to recap our present situation, for though the report presents its analysis in legalese, it still makes, in my opinion, a good basis for discussion: indeed it summons us to discussion. It gives an excellent legal summary and also warns that Iceland’s policy and stance on the use and protection of natural resources can never be shaped solely by the law but must equally, perhaps primarily, be based on public debate, on the national will and vision (see e.g. page 63).

We stand at a crossroads and must ask ourselves whether we wish resources that have been in the public domain since the country won independence to become a resource for stockholders.

When the report was made public on September 17 2010 on the website of the office of the Prime Minister, a party with vested interest in the affair, the director of Magma’s Iceland Team, issued press statements declaring himself pleased with the committee’s conclusions; now all doubt had been laid to rest. Yet perhaps he spoke too soon, for regardless of all statements the committee most certainly did not dismiss all doubts on the Magma affair.

On the contrary, the committee report presents the affair as a stark revelation of past and present circumstances, throwing into relief the strengths and weaknesses of our law, its intent

and its laxity. And the committee reiterates an urgent need to try this case in court and mount a thorough public debate on Icelandic energy legislation and policy.

The committee in question was appointed by the government to examine the precursors to and legality of Magma Energy's acquisition of HS Orka. Yet the committee was given no access to documentary evidence and thus could not demand vital information from the key player in this privatization, Geysir Green Energy, which had sold its share of HS Orka to Magma Energy. (Moreover, Sveinn Margeirsson, the person assigned to investigate the privatization process, was disqualified from the committee.)

As news media have reported, the committee found that Canada's Magma Energy had circumvented the law in establishing a shell corporation in Sweden to get around the Icelandic statute banning entities outside the European Economic Area (EEA) from investing in the Icelandic energy sector. The committee found that under present law the legality of this circumvention was a matter of interpretation that could only be resolved in court.

Among the measures the committee suggests to the government—should the government opt to block the sale—is revocation under the aptly-named “reality rule” (*raunveruleikareglan*) in the national interest. It would also be possible to seize company assets, invoking, among other things, the unwritten legal precept that “*in rare instances a case may develop in such a way that a decision that has been made proves so disadvantageous that revocation must be allowable even if the law does not specifically provide for it.*” The report also outlines waiver options that Iceland has yet to invoke as a member of the EEA. Elvira Méndez Pinedo, a specialist in European law, has repeatedly laid out Iceland's options for defining its position within Europe while retaining custody over its resources.

All these measures hinge on many complex factors, but the basic logic for pursuing such measures is straightforward. Making bold to interpret legal complexity: **Potential damage suits and legislative adjustments will cost the nation little compared to the enormous loss it faces should this transaction proceed. Profits in foreign investment and local employment from the sale are likely to be small compared to the vital public interests at stake.**

This brings us to the importance of a comprehensive assessment of the sale's impact on Iceland's labour market, economy, culture, and environment. The committee considers it imperative that the interests at stake be assessed and weighed but notes that it was not appointed to conduct such an assessment. The report does however raise potential negative consequences to Iceland and its people if transactions in the spirit of the Magma acquisition, especially involving this circumvention of law, were to become the rule rather than the exception. For example, the report notes that historically “*when control over natural resources is shifted abroad, substantial economic and consequently political control shifts out with it. As a result the society becomes less able to curb unequal distributions of domestic wealth.*” (p. 60).

The report reviews Icelandic legislative precedent in energy affairs and demonstrates that societal well-being and national independence have always been closely tied to the country's control over its energy resources. For half a century the law was continually improved, as legislators refined definitions of who had the right to use and benefit from Icelandic resources.

Then, the report suggests, in the last decade of the last century, haphazard changes were made to the law upon Iceland's entry into the EEA, though these changes could not properly be construed as requirements of European cooperation. Subsequently, from 2003 to 2007, a systematic effort seems to have been made to alter the law in favour of the privatization of Iceland's energy resources, without any justification for the legal shift being submitted to public consideration. Moreover the law was altered so that the right of private entities to exploit natural resources was no longer granted by the Althing but solely by individual acting ministers.

This legislative shift seems to me to have reached its apex in the facilitation of Geysir Green Energy's 2007 purchase of the public share in Hitaveita Suðurnesja Ltd. Here, by all appearances, the law was custom-tailored for an individual company. And since that company has been tied to corruption right and left, one cannot help but ask what has become of the law's intent and the public interest. If the law can be used to justify circumvention of the public interest, does it not need revival?

The report details several attempts since the economic collapse to reform the law, adding clauses to guard the public interest and protect the resources themselves. Nonetheless it seems to me that we have yet to reckon with the great policy shift of the first decade of this century, to expose the covert yet public energy policy that no one ever voted on, that was never debated judiciously, taking all viewpoints into account. The body of the law has not been reformed. Its disunity and inconsistency are such that it may evidently be used to justify the sale of HS Orka to private entities and with equal ease or difficulty be used to block the sale. The law alone is powerless to justify current policy on natural resources.

An open forum on the report was recently held at the University of Iceland. Benedikt Erlingsson led off the discussion by elucidating the law and then asking committee members whether it didn't resemble going to a swimming pool and finding a locker-room door marked, "Women only," with a note beneath that saying, "Also men," and then learning that actually the room was open to anyone wearing special shoes, Swedish sandals perhaps....One committee woman attending the discussion, lawyer Aagot Óskarsdóttir, speculated on why Iceland had not made use of the waivers available to small nations under the rules of European cooperation, and asked whether a constitutional amendment might be needed on the use and protection of natural resources. As Bjarni from Vogli had said a century ago, the nation's independence was at stake.

In the course of the discussion geologist Stefán Arnórsson remarked that he found it extremely odd that Iceland seemed bent on becoming a colony again. As he recalled, historically and worldwide, colonialism had been all about resources and not much for ethical standards—typically deciding to maximize energy use in the short term to benefit special interests rather than take a moral stance on behalf of the land and people.

Arnórsson reminded the audience that many years of geological research, his own and others', had shown that the energy now being bought and sold is unfortunately not as renewable as people imagine and could easily be depleted within fifty years if current usage plans are not revised. This kind of energy resource renews over millennia.

The report states, *“The scale of the energy sector in Iceland is such that it could easily develop to the point of overwhelming Icelandic commerce and government in much the same way as the Icelandic banking system outgrew Icelandic society”* (p. 61).

It is truly bracing and encouraging that such a friend to democracy as Eva Joly should endorse the petition of Björk and twenty thousand other Icelanders for a national referendum on the privatization of energy resources and the purchase agreement between Magma Energy and HS Orka (see www.orkuadlindir.is). By Icelandic governmental tradition, a sitting government cannot ignore a petition signed by fifteen percent of the nation. When may we expect a thorough review of Iceland’s energy policy, conducted publically, with all the documents on the table? When 35,000 signatures are on that petition?

Translation: Sarah Brownsberger.