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CONSTITUTIONAL CONVENTIONS IN THE DIGITAL ERA: LESSONS FROM ICELAND AND IRELAND

SILVIA SUTEU*

Abstract: Mechanisms of constitutional development have recently attracted significant attention, specifically, instances where popular involvement was central to the constitutional change. Examples include attempts by British Columbia, the Netherlands, and Ontario at electoral reform, in addition to the more sweeping reforms sought in Iceland and Ireland. Each of these countries' attempts exemplifies varied innovative avenues to reform involving participatory and partially citizen-led processes aimed at revitalizing politics. The little legal scholarship on these developments has provided an insufficient analytical account of such novel approaches to constitution-making. This Essay seeks to build upon the current descriptive work on constitutional conventions by focusing on the cases of Iceland and Ireland. The Essay further aims to evaluate whether the means undertaken by each country translates into novelty at a more substantive level, namely, the quality of the process and legitimacy of the end product. The Essay proposes standards of direct democratic engagements that adequately fit these new developments and further identifies lessons for participatory constitution-making processes in the digital twenty-first century.

INTRODUCTION

Mechanisms of constitutional change have gained renewed interest in recent years. The Arab Spring and its associated constitution-making processes is perhaps the most visible manifestation of this.¹ Other examples include the Scottish and Catalan independence movements, as well as

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¹ See generally *2013 Working Paper Series: Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia*, INT'L IDEA & CENTER FOR CONST. TRANSITIONS N.Y.U. L. (Zaid Al-Ali & Richard Stacey eds., 2013).

the problematic adoption of a new constitution and subsequent amendments in Hungary.² Situations wherein popular involvement was central to advancement of the process have likewise attracted significant attention; such attempts include British Columbia, the Netherlands, and Ontario's electoral reforms, in addition to the more sweeping reforms sought in Iceland and Ireland.³ All of these cases creatively experimented with whereby participatory, partially citizen-led processes intent on revitalizing politics were at the heart of the desired constitutional change.⁴

Curiosity in how new technology and social media has increasingly influenced various stages of the constitution-making process has renewed interest in such initiatives.⁵ Iceland and Ireland are often hailed as trailblazers in marrying technology and direct democracy in their respective constitutional reform processes.⁶ Iceland's constitution is widely recognized as the world's "first crowd-sourced constitution."⁷ Ireland's constitution is likewise acknowledged as a paradigm of transparency and inclusiveness.⁸ The potential reinvigoration of popular participation in political decision-making via citizen-focused constitutional conventions is another reason for optimism.⁹ Consequently, ordinary citizens have been permitted to partici-

² See, e.g., Stephen Tierney, *Legal Issues Surrounding the Referendum on Independence for Scotland*, 9 EUR. CONST. L. REV. 359, 360 (2013). See generally Miklós Bánkuti et al., *Hungary's Illiberal Turn: Disabling the Constitution*, 23 J. DEMOCRACY 138, 138 (2012).

³ See, e.g., David M. Farrell, *The Irish Constitutional Convention: A Bold Step or a Damp Squib? in 75 YEARS OF THE CONSTITUTION OF IRELAND: AN IRISH-ITALIAN DIALOGUE* 191, 195 (John O'Dowd & Giuseppe Ferrari eds., 2013); PATRICK FOURNIER ET AL., *WHEN CITIZENS DECIDE: LESSONS FROM CITIZEN ASSEMBLIES ON ELECTORAL REFORM* 28 (2011); Hélène Landemore, *Inclusive Constitution-Making: The Icelandic Experiment*, J. POL. PHIL. (Feb. 25, 2014) at 1, 9, available at <http://onlinelibrary.wiley.com/doi/10.1111/jopp.12032/epdf>, archived at <https://perma.cc/232E-DU9M>.

⁴ See Farrell, *supra* note 3, at 200 (arguing that the aim of the Irish Constitutional Convention was to re-engage with demos); FOURNIER ET AL., *supra* note 3, at 27–28 (discussing formation of citizen assemblies in Ontario, British Columbia, and the Netherlands); Farrell et al., *Deliberative Democracy in Action Irish-Style: The 2011 We the Citizens Pilot Citizens' Assembly*, 28 IRISH POL. STUD. 99, 100 (2013) (discussing the impetus for creating the Pilot Citizens Assembly as voter apathy); Landemore, *supra* note 3, at 3.

⁵ See, e.g., Landemore, *supra* note 3, at 9 (describing the use of Facebook, Twitter, and email for feedback in Iceland).

⁶ See Landemore, *supra* note 3, at 9 (discussing Iceland); Iseult Honohan, *What Can the UK Learn from the Irish Constitutional Convention?*, OPEN DEMOCRACY (Oct. 8, 2014), <https://www.opendemocracy.net/ourkingdom/iseult-honohan/what-can-uk-learn-from-irish-constitutional-convention>, archived at <https://perma.cc/8XFD-VZ5C> (discussing Ireland).

⁷ See Landemore, *supra* note 3, at 17.

⁸ See Matthew Wall, *Column: Change We Can Believe In? Ireland's Constitutional Convention Has Delivered*, JOURNAL (July 23, 2013), <http://www.thejournal.ie/readme/column-change-we-can-believe-in-ireland%E2%80%99s-constitutional-convention-has-delivered-1003278-Jul2013/>, archived at <http://perma.cc/8YDA-LT45>.

⁹ See Landemore, *supra* note 3, at 3.

pate in an arena traditionally reserved to lawyers and politicians: constitution-making.¹⁰

Legal scholarship has not yet analyzed these developments sufficiently, thereby providing an inadequate account of such novel approaches to constitution-making. Iceland's case, for example, may not be replicable due to the peculiar characteristics of that country, including its small size and homogenous population.¹¹ Ireland is likewise open to similar objections, and given the piecemeal nature of its reform process, might be criticized for a lack of ambition.¹²

There is an acute need for a comprehensive account of new forms of popular participation in constitutional conventions, not least given their renewed popular appeal. The Scottish Government, for instance, leading up to its independence referendum on September 18, 2014, indicated its expectation of calling a constitutional convention for the purpose of drafting the new country's constitutional text.¹³ The United Kingdom's (UK) Political and Constitutional Reform Parliamentary Committee published a report in March 2013 entitled "Do we need a constitutional convention for the UK?" which asked whether there was a need to employ such a convention for deciding the union's future.¹⁴ Proposals for a UK-wide constitutional convention have not abated since the Scottish referendum, rather, there have been additional calls for exploring the possibility of a crowdsourced UK constitution have manifested.¹⁵ Accordingly, constitutional conventions need to be reassessed in light of their digital era incarnation.

This Essay assesses whether the novelty in the means used in modern constitution-making translates further into novelty at a more substantive level, namely, in the quality of the constitution-making process and legitimacy of the end product. Additionally, this Essay analyzes standards of direct democratic engagements, which adequately fit these new developments, with a focus on the cases of Iceland and Ireland.

This Essay first asks why differing forms of constitution-making should be examined. Part I explains the importance of constitutional legiti-

¹⁰ See *id.* at 1–2.

¹¹ See *id.* at 3.

¹² See Farrell, *supra* note 3, at 197–98.

¹³ See SCOTTISH GOV'T, SCOTTISH INDEPENDENCE BILL: A CONSULTATION ON AN INTERIM CONSTITUTION FOR SCOTLAND 5 (June 2014), available at <http://www.scotland.gov.uk/Resource/0045/00452762.pdf>, archived at <http://perma.cc/M9WZ-7L5R>.

¹⁴ See POL. & CONST. REFORM COMMITTEE, DO WE NEED A CONSTITUTIONAL CONVENTION FOR THE UK?, 2012–13, at 5 (House of Commons London: The Stationery Office Ltd., 2013).

¹⁵ See Cormac Mac Amhlaigh, *For a Constitutional Convention for the United Kingdom*, UK CONST. L. ASS'N (Sept. 22, 2014), <http://ukconstitutionallaw.org/2014/09/22/cormac-mac-amhlaigh-for-a-constitutional-convention-for-the-united-kingdom/>, archived at <http://perma.cc/C2LB-YNH5>; Constitution UK: Introduction, LONDON SCH. ECON., <http://blogs.lse.ac.uk/constitutionuk/about/> (last visited Mar. 10, 2015), archived at <http://perma.cc/5KQB-65NW>.

macy, content, longevity, and democratic theory. Part II addresses constitutional conventions as one mechanism for facilitating constitutional change. Part III analyzes the Icelandic and Irish constitutional convention experiences and proposes a set of lessons to be drawn from them. Additionally, Part III proposes a set of principles to evaluate constitutional convention success from the standpoint of participatory and deliberative democracy. Finally, this Essay concludes with an account of the deeper significance of constitution-making processes to underlying theories of constitutional design, legitimacy, and ultimate success.

I. BACKGROUND

A. Does Participatory Constitution-Making Matter?

There are four fundamental reasons why the processes of constitution-making should be observed in greater depth.

1. Constitutional Legitimacy

Constitutional legitimacy depends on a series of factors.¹⁶ The process of its creation, however, is often most central.¹⁷ Two common features typify 21st century legitimacy in constitution-making: popular participation and emphasis on process.¹⁸

The first common feature in modern constitution-making is the notion of popular participation.¹⁹ This concept has recently emerged due to a contemporary, near “universal acceptance that the authority for a Constitution must derive . . . from the people of the state concerned.”²⁰ Scholars have identified a broad trend “towards openness, inclusivity and the active involvement of the people of a state at all stages of the process through participation, rather than mere consultation.”²¹ Inclusive and open processes of constitutional change provide greater weight to principles of self-government and public political engagement.²² In the Icelandic context, for instance, scholars viewed the process as clearly evincing an “idea of self-governance and a perception of constitutionalism, which understands civic participation as a necessity in

¹⁶ Cheryl Saunders, *Constitution Making in the 21st Century*, 4 INT’L REV. L. 2, 3 (2012).

¹⁷ *See id.* at 3.

¹⁸ *Id.* at 2–3.

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See id.* at 9; *see also* Claude Klein & András Sajó, *Constitution-Making: Process and Substance*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 435, 436 (Michel Rosenfeld & András Sajó eds., 2012).

²² *See* Saunders, *supra* note 16, at 3 (discussing public participation creating a sense of public ownership).

order for a constitution to become a vibrant reflection of a political community's political imagery and self-understanding."²³

The second common feature is the emphasis placed on process:

Process can underpin the legitimacy of a Constitution, increase public knowledge of it, instill a sense of public ownership and create an expectation that the Constitution will be observed, in spirit as well as form. A constitution-making process may assist to set the tone for ordinary politics, including the peaceful transfer of power in accordance with constitutional rules.²⁴

In other words, there is an educational element involved in having a "good" constitution-making process because it can serve as model for subsequent political interactions.²⁵ There is also a link to public ownership and increased vigilance because an informed public will know when the constitution has been transgressed and demand accountability.²⁶ Interestingly, this was discussed in the context of the Irish constitutional reform process, which demonstrated the broader point that constitution-building should begin with the reform process itself.²⁷

2. Constitutional Content

A possible link exists between participatory constitution-making and increases in the number of mechanisms for popular involvement included in new or revised constitutions.²⁸ A study testing this notion has found that more inclusive constitutional moments lead to more democratic politics, additional constraints on government authority, and to stronger, more durable constitutions.²⁹ The study confirmed that "the content of constitutions

²³ Baldvin Thor Bergsson & Paul Blokker, *The Constitutional Experiment in Iceland*, in VERFASSUNGSGEBUNG IN KONSOLIDIRTEEN DEMOKRATIEN: NEUBEGINN ODER VERFALL EINES POLITISCHEN SYSTEMS? 154, 159–60 (Kalman Poczta ed., 2014) (article published in English).

²⁴ Saunders, *supra* note 16, at 3.

²⁵ *See id.*

²⁶ *See* Jennifer Widner, *Constitution-Writing in Post-Conflict Settings: An Overview*, 49 WM. & MARY L. REV. 1513, 1519 (2007).

²⁷ *See* STEPHEN O'HARE, IRISH COUNCIL FOR CIVIL LIBERTIES, HEAR OUR VOICES: DEVELOPING A MODEL FOR BEST PRACTICE FOR PUBLIC PARTICIPATION IN CONSTITUTIONAL REFORM, 10–11 (June 20, 2012) available at http://www.iccl.ie/attachments/download/260/ICCL_%20Best%20Practice%20for%20Constitutional%20Reform%2020%20June%202012%20FINAL.pdf, archived at <http://perma.cc/8BTv-MEGB>.

²⁸ *See generally* Zachary Elkins et al., *The Citizen as Founder: Public Participation in Constitutional Approval*, 81 TEMPLE L. REV. 361 (2008) (examining the link between public participation in constitutional promulgation and the contents of the constitutional text).

²⁹ John M. Carey, *Does It Matter How a Constitution is Created?*, in IS DEMOCRACY EXPORTABLE? 155, 175–76 (Zoltan Barany & Robert G. Moser eds., 2009).

depends on who sits at the table to hammer out their provisions.”³⁰ The more inclusive the process of drafting and negotiating constitutional content, the greater the benefits for democracy and constitutional stability.³¹ Both the Icelandic and Irish constitutional conventions included additional and expanded avenues for popular initiative and oversight as well as increased inclusiveness within their recommendations.³²

3. Constitutional Longevity

There appears to be a correlation between “inclusion” during constitution-making and constitutional longevity.³³ Empirical studies on constitutional development identify “inclusion”—the breadth of participation in both formulating and subsequently enforcing constitutional agreements—as one of the key factors ensuring constitutional survival.³⁴ The common knowledge created when the constitution is publicly formulated and debated leads to an attachment to the constitutional project, resulting in self-enforcement and longevity.³⁵ The Icelandic convention and its 2011 draft constitution were initially thought to be a prime example of this process.³⁶

4. Democratic Renewal

A final potential benefit of participatory constitutional change is its ability to combat the crisis of democracy by resorting to deliberative processes.³⁷ In an age where citizens feel detached from regular politics, deliberative forms of engagement may yet resurrect their interest.³⁸ Some scholars note that “[a]lthough electoral participation is generally declining, participation is expanding into new forms of action,” with citizens seeking a more active role, “prepared to challenge (and thereby engage with) existing

³⁰ *Id.* at 177.

³¹ *Id.*

³² See STJÓRNLAGARÁÐ [CONST. COUNCIL], A PROPOSAL FOR A NEW CONSTITUTION FOR THE REPUBLIC OF ICELAND, arts. 15, 34, 65, 66, 84 (2011) (English trans.) [hereinafter PROPOSAL FOR A NEW CONSTITUTION], available at http://www.stjornlagarad.is/other_files/stjornlagarad/Frumvarpenska.pdf, archived at <http://perma.cc/G6VJ-8FR7>; CONV. ON THE CONST., NINTH REPORT OF THE CONVENTION ON THE CONSTITUTION: CONCLUSIONS AND FINAL RECOMMENDATIONS 24–26 (Mar. 2014) (Ire.), available at <https://www.constitution.ie/AttachmentDownload.ashx?mid=55f2ba29-aab8-e311-a7ce-005056a32ee4>, archived at <https://perma.cc/2R7U-ZLW6> [hereinafter IRISH CONST. CONV. RECOMMENDATIONS].

³³ See ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 78 (2009).

³⁴ *Id.*

³⁵ *Id.* at 78–79.

³⁶ See ZACHARY ELKINS ET AL., A REVIEW OF ICELAND’S DRAFT CONSTITUTION 3 (2012), available at <http://comparativeconstitutionsproject.org/wp-content/uploads/CCP-Iceland-Report.pdf>, archived at <http://perma.cc/QA2Q-JHV9>.

³⁷ See Farrell et al., *supra* note 4, at 100.

³⁸ *Id.* at 100–01.

systems and norms.”³⁹ A “new model of democracy” is said to be evolving, one which requires more participation from its citizens.⁴⁰ The financial crisis served as the impetus for popular engagement and democratic innovation in both Iceland and Ireland because of the citizenry’s lack of confidence in more traditional paths.⁴¹ The advantages promised by deliberative democracy, such as creativity, openness and consensus-based (rather than adversarial) politics, were much more attractive when confronted with constitutional failure and stale institutions.⁴² Moreover, there is no reason to consider this a trade-off because representative institutions can coexist with such innovations and may in fact be developed and improved.⁴³

5. Cautionary Notes

The narrative centered on the benefits of increased participation in constitution-making requires at least one significant caveat: the considerations presented above may have only limited relevance in societies emerging from conflict or where there are strong possibilities that the constitution-making process would be subverted.⁴⁴ Opening up constitution-making in such post-conflict or fragile democracies might even have deleterious effects.⁴⁵ At least one study indicates that the representativeness of constitutional assemblies in post-conflict situations might not be very important.⁴⁶ Scholars have recently cautioned against idealizing constitution-making moments, noting that there is a real danger of unilateral exercises of power diverting the constitutional process in some contexts, and have argued for a preservative rather than transformative process.⁴⁷ These are valid concerns in need of further exploration. They alert us that the essentially positive, respectful and consensus-seeking nature of the Icelandic and Irish experiences may have masked crucial preconditions for their respective success.

³⁹ See *id.* at 100 (citing RUSSELL J. DALTON, *THE GOOD CITIZEN: HOW A YOUNGER GENERATION IS RESHAPING AMERICAN POLITICS* 274 (2d ed., 2009)).

⁴⁰ *Id.*

⁴¹ See *id.* at 99; Saunders, *supra* note 16, at 8.

⁴² See, e.g., WE THE CITIZENS, *PARTICIPATORY DEMOCRACY IN ACTION—A PILOT* 10–11 (2011), available at <http://www.atlanticphilanthropies.org/sites/default/files/uploads/We-the-Citizens-2011-FINAL.pdf>, archived at <http://perma.cc/6M9G-4D99> (arguing that the 2008 financial crisis in Ireland contributed to popular frustration with and rejection of current political system).

⁴³ See *id.* at 13 (“[D]eliberative processes are not meant to replace representative or direct democracy, but to enhance and support it.”); see also Peter Vermeersch, *Innovating Democracy in Times of Crisis: Solution or Utopia?*, 4 *OPEN CITIZENSHIP* 66, 66 (2013).

⁴⁴ See David Landau, *Constitution-Making Gone Wrong*, 64 *ALA. L. REV.* 923, 934 (2013); Widner, *supra* note 26, at 1529–33.

⁴⁵ See Widner, *supra* note 26, at 1529–33.

⁴⁶ See *id.*

⁴⁷ See Landau, *supra* note 44, at 925–27.

II. DISCUSSION

A. The Constitutional Convention as a Mechanism of Constitution-Making

Comparative legal work paints a complex picture of both the formal and informal tools used by countries around the world to achieve constitutional reform.⁴⁸ This is matched by political theorists who have tried to incorporate democratic innovations such as those discussed in this Essay into models of institutional design.⁴⁹ While scholars have put forth typologies of participatory constitution-making instruments and distinguished between forms as disparate as constituent assemblies, round tables, constitutional conventions, and peace negotiations, this Essay will only analyze constitutional conventions modeled on citizen assemblies.⁵⁰ Such assemblies are by no means the sole mechanisms of participatory decision-making; rather, other devices include citizen juries, deliberative polls and participatory budgeting as well as dozens of additional participatory mechanisms.⁵¹ Among these, however, “citizen assemblies stand out as constituting the most extensive modern form of collective decision-making by common folk.”⁵² Moreover, these assemblies represent “the only method of citizen policymaking that combines all the following characteristics: a relatively large group of ordinary people, lengthy periods of learning and deliberation, and a collective decision with important political consequences for an entire political system.”⁵³ Citizen assemblies effectively amount to “a litmus test for the consequences of deliberation.”⁵⁴

Constitutional conventions of the type discussed here (termed by some scholars as “people’s conventions”) share several traits, including the cen-

⁴⁸ See, e.g., THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS (Mads Adenas ed., 2000); ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA (Xenophon Contiades ed., 2013); HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY (Dawn Oliver & Carlo Fusaro eds., 2011).

⁴⁹ See, e.g., GRAHAM SMITH, DEMOCRATIC INNOVATIONS: DESIGNING INSTITUTIONS FOR CITIZEN PARTICIPATION (2009) (reviewing different democratic innovations such as New England town meetings, citizen assemblies, direct legislation, “e-democracy,” and theorizing whether institutions can be designed to create opportunities for citizen engagement).

⁵⁰ See Andrew Arato, *Conventions, Constituent Assemblies, and Round Tables: Models, Principles and Elements of Democratic Constitution-Making*, 1 GLOBAL CONSTITUTIONALISM 173, 175–84 (2012); see also MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE AND COMMUNITY 185–209 (2010) (discussing typologies of constitution-making more broadly); Jennifer Widner, *Reform Models*, CONST. WRITING & CONFLICT RESOL. PROJECT, <http://www.princeton.edu/~pcwcr/drafting/models.html> (last visited Mar. 10, 2015), archived at <http://perma.cc/7N85-2MTU>.

⁵¹ Gene Rowe & Lynn J. Frewer, *A Typology of Public Engagement Mechanisms*, 30 SCI. TECH. & HUM. VALUES 251, 257 (2005).

⁵² FOURNIER ET AL., *supra* note 3, at 10.

⁵³ See *id.*

⁵⁴ *Id.* at 13.

trality of quasi-randomly selected citizens tasked with deciding important constitutional reforms in a deliberative setting.⁵⁵ According to one author, the common traits of such participatory constitutional conventions are that: (1) they “address big, national questions of constitutional/institutional design;” (2) they “are established by government to meet a certain objective in time-delimited fashion;” (3) they “deliberately and distinctly treated as a supplement (rather than competitor) to the existing system of representative democracy;” (4) they include ordinary citizens; (5) their “membership is based on random selection rather than election;” (6) the outcome of the deliberation is clear at the start of the process; (7) “the heart of the enterprise is deliberation.”⁵⁶ Some of these traits, however, are inherently problematic, as will be discussed below. Others have proven practically difficult to achieve, such as deliberations or the adequate selection of participants; while still others, such as the clarity of the ensuing process, are often only insufficiently fulfilled.

B. *The Constitutional Convention Enters the Digital Era*

1. Preliminaries: British Columbia, the Netherlands, and Ontario

Before delving into constitutional reform in Iceland and Ireland, one must pause to acknowledge that, for all their purported novelty, these processes were not completely original. Three antecedents are particularly relevant and should be noted: the cases of British Columbia, the Netherlands, and Ontario. British Columbia offers an especially groundbreaking experiment with citizen assemblies that provided a potential model for both the Netherlands and Ontario, and subsequently Iceland and Ireland.⁵⁷ There surely were marked differences with the Irish and Icelandic processes detailed below, however, not least of all the fact that the three earlier examples were all aimed at affecting electoral reform and not far-reaching constitutional change.⁵⁸ Nevertheless, the three antecedents shared a commitment to participatory and deliberative democracy aimed at “inject[ing] some popular legitimacy into policymaking.”⁵⁹ The three original case studies also offer important lessons in regard to citizen assemblies because each country ultimately failed to bring about their desired change: the two Canadian cas-

⁵⁵ Farrell, *supra* note 3, at 194–95.

⁵⁶ *Id.*

⁵⁷ See FOURNIER ET AL., *supra* note 3, at 28; Mark E. Warren & Hilary Pearse, *Introduction: Democratic Renewal and Deliberative Democracy*, in *DESIGNING DELIBERATIVE DEMOCRACY: THE BRITISH COLUMBIA CITIZENS’ ASSEMBLY 1*, 1 n.1 (Mark E. Warren & Hilary Pearse eds., 2008).

⁵⁸ Warren & Pearse, *supra* note 57, at 1.

⁵⁹ See FOURNIER ET AL., *supra* note 3, at 17–18 (explaining rationale for engaging citizen assemblies in British Columbia, the Netherlands, and Ontario).

es experienced unsuccessful referendums due to high thresholds, while the Dutch case saw major political changes deprive its proposed changes of support.⁶⁰ Lessons afforded by these three examples relate to the importance of momentum behind desired changes, the selection of participants, and of the process of giving effect to proposals, especially in relation to a referendum.⁶¹ A general warning informed by these three cases reminds us that “[a] citizen assembly is an expensive instrument that ought to be used sparingly, and under exceptional circumstances.”⁶²

2. The Icelandic Process

Iceland’s constitutional reformation attempt arose in the aftermath of the country’s 2008 financial crash and the resulting so-called “pots and pans” revolution.⁶³ Calls for constitutional change had existed for some time but had never gained much traction.⁶⁴ Indeed, “the new Icelandic republic never autonomously wrote a constitution to match the independent state.”⁶⁵ At the time of its adoption, the 1944 constitution focused on ending the Danish monarchy but was otherwise largely a copy of the 1874 constitution (itself a copy of the 1849 Danish constitution).⁶⁶ The 1944 document had initially been understood as transitory, prompting calls for setting up a constitutional convention as early as 1948.⁶⁷ Constitutional politics dictated otherwise, however, and the constitution survived without major overhaul, with the pace of amendment only picking up in the 1970s.⁶⁸ Iceland’s Prime Minister (as of 2009), Jóhanna Sigurdardóttir, formerly a Member of Parliament, had fought for years to institute a total constitutional review.⁶⁹ On November 4, 2009, she tabled a bill in Parliament concerning the establishment of an advisory Constitutional Assembly.⁷⁰ One should note, however, that there were still voices questioning the wisdom of engaging in

⁶⁰ *Id.* at 18.

⁶¹ *See id.* at 17–18.

⁶² *Id.* at 155.

⁶³ *See* Anne Meuwese, *Popular Constitution-Making: The Case of Iceland*, in *SOCIAL & POLITICAL FOUNDATIONS OF CONSTITUTIONS* 469, 472 (Denis J. Galligan & Mila Versteeg eds., 2013); Landemore, *supra* note 3, at 7.

⁶⁴ *See* Meuwese, *supra* note 63, at 473.

⁶⁵ Bergsson & Blokker, *supra* note 23, at 155.

⁶⁶ *See* Meuwese, *supra* note 63, at 473.

⁶⁷ *See id.*; Ágúst Þór Árnason, *A Review of the Icelandic Constitution—Popular Sovereignty or Political Confusion*, 2011 *TJDSCHRIFT VOOR CONSTITUTIONEEL RECHT* [J. CONST. LAW] 342, 346 (2011).

⁶⁸ *See* Árnason, *supra* note 67, at 345–46.

⁶⁹ *Id.* at 342.

⁷⁰ *See The Constitutional Council Hands Over the Bill for a New Constitution*, STJÓRNLAGARÁÐ [CONST. COUNCIL] (July 29, 2011), <http://www.stjornlagarad.is/>, archived at <https://perma.cc/4H3S-3HZB?type=source> [hereinafter *Council Hands Over the Bill*].

constitutional overhaul during a time of crisis and by means outside the traditional legislative route.⁷¹

The Icelandic constitution's narrative as the world's first "crowdsourced constitution" typically begins with the first National Forum, which was organized by the grassroots organization, "the Anthill," in November 2009.⁷² Under the slogan "National Assembly: A Date with the Future," this was "a one-day exercise that consisted of articulating the values and priorities that should guide the renewal of government and public administration."⁷³ The forum was made up of 1,200 randomly selected citizens and 300 representatives of interest groups and institutions, which were divided into 162 tables.⁷⁴ They were instructed to discuss and agree on Icelandic societal values, which would ultimately be made public.⁷⁵ In June 2010, Iceland passed the Act on a Constitutional Assembly No. 90/2010.⁷⁶ It provided for the creation of a twenty-five to thirty-one member advisory Constitutional Assembly (later Council) whose task was to produce a bill for submission to Parliament, indicating changes to the constitution within a three to four month period.⁷⁷ The act also provided for the establishment of a Constitutional Committee, which would prepare a second National Forum, a report based on the latter's results, and a collection of materials relevant to the future Constitutional Assembly.⁷⁸ The second National Forum was held in November 2010.⁷⁹ Approximately 950 quasi-randomly selected citizens participated.⁸⁰ The report constituted the starting point for the deliberation of the Constitutional Convention.⁸¹ Despite attempts to the contrary, the Forum was only partially representative (mostly due to age and geographic representation, though not gender) and there was a strong element of self-selection in its composition.⁸²

⁷¹ Bergsson & Blokker, *supra* note 23, at 158 n.3.

⁷² See Landemore, *supra* note 3, at 4.

⁷³ See *id.*

⁷⁴ *Can We Learn from Iceland?*, PEOPLE'S NEWS, (Jan. 9, 2010), at 1–2, available at <http://www.people.ie/news/09jan10.pdf>, archived at <http://perma.cc/ZQ27-EHNU>.

⁷⁵ See *Themes*, ÞJÓÐFUNDAR [NAT'L CONF.], <http://www.thjodfundur2009.is/english/> (last visited Mar. 10, 2015), archived at <http://perma.cc/GLY2-7V8B>.

⁷⁶ *Act on a Constitutional Assembly, Committees and Personnel*, STJÓRNLAGARÁÐ [CONST. COUNCIL], <http://stjornlagarad.is/english/> (last visited Mar. 30, 2015), archived at <http://perma.cc/XT7D-LUZX>.

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See Landemore, *supra* note 3, at 4.

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² See *id.* at 12–13.

Elections to the Constitutional Assembly were held in October 2010, with 522 candidates standing for election.⁸³ A hurdle relating to the election's legitimacy soon followed, when a successful request for invalidation of the elections was brought before Iceland's Supreme Court.⁸⁴ Despite this ruling, a parliamentary resolution was adopted in March 2011 appointing the twenty-five delegates originally elected to the Assembly.⁸⁵ Their task was to make recommendations for constitutional change, taking the Constitutional Committee's report as their starting point.⁸⁶ The 700-page report was presented in April 2011, the official starting date of the Council.⁸⁷ The Council soon agreed on their rules of procedure and divided into three working groups.⁸⁸ The groups sought to both inform the public of its progress, as well as to have the public participate and make suggestions as discussions progressed (including on platforms such as, Facebook, Twitter, Flickr, and YouTube).⁸⁹ For this purpose, the groups set up various social media platforms.⁹⁰ Meeting schedules and minutes were also posted online, and the Council's website was updated with news and a weekly newsletter.⁹¹ Advertisements encouraging the public to get involved in the process were also published in the media.⁹² By the end of the Council's work, the public had made some 360 proposals and more than 3,600 comments on the available platforms.⁹³

The Constitutional Council sought unanimity in adopting the bill it delivered to Parliament in July 2011.⁹⁴ The Council focused on a few main themes, including transparency, responsibility, and the distribution of power, which were reflected in its draft.⁹⁵ The most radical provisions were Ar-

⁸³ *Elections for the Constitutional Assembly*, STJÓRNLAGARÁÐ [CONST. COUNCIL], <http://stjornlagarad.is/english/> (last visited Mar. 30, 2015), archived at <http://perma.cc/XT7D-LUZX>.

⁸⁴ *See Invalidation of the elections for the Constitutional Assembly*, STJÓRNLAGARÁÐ [CONST. COUNCIL], <http://stjornlagarad.is/english/> (last visited Mar. 30, 2015), archived at <http://perma.cc/XT7D-LUZX>.

⁸⁵ *See Agreement on a Parliamentary Resolution*, STJÓRNLAGARÁÐ [CONST. COUNCIL], <http://stjornlagarad.is/english/> (last visited Mar. 30, 2015), archived at <http://perma.cc/XT7D-LUZX>.

⁸⁶ *See id.*

⁸⁷ *See The Constitutional Council Formed on 6 April*, STJÓRNLAGARÁÐ [CONST. COUNCIL], <http://stjornlagarad.is/english/> (last visited Mar. 30, 2015), archived at <http://perma.cc/XT7D-LUZX>.

⁸⁸ *Working Procedures of the Constitutional Council*, STJÓRNLAGARÁÐ [CONST. COUNCIL], <http://stjornlagarad.is/english/> (last visited Mar. 30, 2015), archived at <http://perma.cc/XT7D-LUZX>.

⁸⁹ *See Meuwese, supra* note 63, at 470; Bjarki Valtýsson, *Democracy in Disguise: The Use of Social Media in Reviewing the Icelandic Constitution*, 36 MEDIA, CULTURE & SOC'Y 52, 53 (2014).

⁹⁰ Valtýsson, *supra* note 89, at 53.

⁹¹ *See id.* at 56.

⁹² *See id.*

⁹³ Landemore, *supra* note 3, at 17.

⁹⁴ *See Council Hands Over the Bill, supra* note 70 (stating that the vote was unanimous).

⁹⁵ *See PROPOSAL FOR A NEW CONSTITUTION, supra* note 32, at 5, 8–9, 18–19.

ticle 65, which stipulated that “[t]en percent of voters may demand a national referendum on laws passed by Althingi,” and Article 66, which stated that “[t]wo percent of voters may present an issue to Althingi.”⁹⁶ Commentaries on the draft constitution have noted that “[o]ne of the most salient features of the Icelandic Constitutional Bill is its open approach to the direct participation of citizens, through referendums, in government business and legislation.”⁹⁷ The Venice Commission was more ambivalent in its appraisal of the draft, noting the lack of clarity and of necessary technical detail in direct democracy provisions.⁹⁸ Others regretted that such a radical process of constitution-making did not result in “a radically participatory form of democracy in constitutional terms.”⁹⁹ Nonetheless, the draft was also met with enthusiasm by many who believed “that Iceland’s [draft] constitution [came] in as one of the most inclusive in history and well-above the mean of contemporary constitutions.”¹⁰⁰

A successful referendum followed on October 20, 2012.¹⁰¹ Six questions were posed, including: “[d]o you wish the Constitution Council’s proposals to form the basis of a new draft Constitution?” and, “[w]ould you like to see a provision in the new Constitution stating that a certain proportion of the electorate is able to demand that issues be put to a referendum?”¹⁰² Sixty-seven and seventy-three percent of voters answered yes to these two questions, respectively.¹⁰³ The wording of the first question, in particular, posed problems in determining the precise status of the draft constitution and the extent to which Parliament could modify it.¹⁰⁴ Despite welcoming the results of the (advisory) referendum, political parties were unable to fully consider the draft before the general elections in April 2013.¹⁰⁵ The bill had been discussed twice in Parliament before another bill was passed in March 2013, which effectively postponed the third and final

⁹⁶ See *id.* at 15.

⁹⁷ European Commission for Democracy Through Law (Venice Commission), *Opinion on the Draft New Constitution of Iceland*, Opinion No. 702 ¶ 116 (2013), available at <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282013%29010-e>.

⁹⁸ *Id.* ¶¶ 121–122.

⁹⁹ Bergsson & Blokker, *supra* note 23, at 162.

¹⁰⁰ ELKINS ET. AL., *supra* note 36, at 3.

¹⁰¹ Landemore, *supra* note 3, at 4.

¹⁰² See *Questions on the Ballot—Discussion and Clarification*, THJODARATKVAEDI [REFERENDUM], http://www.thjodaratkvaedi.is/2012/en/question_on_the_ballot.html, archived at <http://perma.cc/R3PD-YHAM> (providing that other questions on the ballot asked about national ownership over natural resources, the establishment of a national church, the election of individuals to Parliament, and the weight of votes cast in different parts of the country) (Ice.).

¹⁰³ *Advertisement of the Results of the Referendum on 20 October 2012*, MINISTRY OF THE INTERIOR (Oct. 31, 2012), <http://eng.innanrikisraduneyti.is/news/nr/28296>, archived at <http://perma.cc/4AA7-2LAS>.

¹⁰⁴ Bergsson & Blokker, *supra* note 23, at 165.

¹⁰⁵ *Id.* at 166–67.

discussion for after the elections.¹⁰⁶ This latter bill proposed a new procedure to amend the constitution by 2017, combining legislative initiatives and a threshold referendum.¹⁰⁷ During the general elections, the constitution was not a high priority for voters and, although all parties agreed that constitutional change was necessary, support for a completely new constitution had waned.¹⁰⁸

3. The Irish Process

The Irish constitution, the first adopted by popular vote, has been amended several times since its implementation in 1937.¹⁰⁹ Such amendments have been effectuated through its formal amendment procedure via a referendum of all qualified voters.¹¹⁰ Recent calls for constitutional change stemmed from demands for “more efficient control and accountability of public bodies, and the slimming down of the public sector and its emoluments” in the aftermath of the country’s economic downturn and from the desire to have a text that better reflects present day understandings of good government.¹¹¹ Such context set forth plans for a constitutional convention to take place during 2016, the centenary of the Easter Rising against British Rule.¹¹²

Ireland’s current reform process began in late 2009 and early 2010, when the Parliament Joint Committee on the Constitution debated the need for electoral reform.¹¹³ The Committee report, issued in July 2010, proposed the establishment of a citizen assembly to consider this question.¹¹⁴ Major political parties in Ireland shared this concern for constitutional change, including the Fine Gael and the Labour Party, the two parties that would form the governing coalition following the 2011 elections.¹¹⁵ The 2011–2016 Programme for Government indicated a Constitutional Conven-

¹⁰⁶ *Id.* at 168.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 169–71.

¹⁰⁹ JASMINA ČOLIĆ, CONSTITUTIONAL REFORM IN IRELAND: LEGAL MEMORANDUM, PUBLIC INTERNATIONAL LAW AND POLICY GROUP 4 (2014), available at <http://www.mreza-mira.net/wp-content/uploads/Constitutional-Reform-in-Ireland-Feb-2014.pdf>, archived at <http://perma.cc/GXJ6-MEBV>.

¹¹⁰ *See id.* at 6.

¹¹¹ *See* Fiona de Londras & David Gwynn Morgan, *Constitutional Amendment in Ireland*, in *ENGINEERING CONSTITUTIONAL CHANGE*, *supra* note 48, at 178, 179–80 (Xenophon Contiades ed., 2013); *see also* Clodagh Harris et al., *Rule By the People? Alternative Perspectives on Citizen Participation in Democratic Policymaking*, 60 ADMIN. 201, 207 (2013).

¹¹² Londras & Morgan, *supra* note 111, at 179.

¹¹³ *See* ČOLIĆ, *supra* note 109, at 10.

¹¹⁴ JOINT COMMITTEE ON THE CONST., ARTICLE 16 OF THE CONSTITUTION: REVIEW OF THE ELECTORAL SYSTEM FOR THE ELECTION OF MEMBERS TO DÁIL ÉIREANN [HOUSE OF DEPUTIES] 3 (2010), available at http://www.oireachtas.ie/documents/committees30thdail/j-constitution/report_2008/20100722.pdf, archived at <http://perma.cc/83TZ-FR2C>.

¹¹⁵ Farrell, *supra* note 3, at 192–93.

tion would be established “to consider comprehensive constitutional reform” on seven major issues and over the span of twelve months.¹¹⁶ It was to produce a report by the end of that period, but nothing else was mentioned regarding its membership or procedures.¹¹⁷

A notable development occurred in the midst of this legislative action, whereby a group of academics, inspired by other recent experiments with citizen assemblies, set up the “We the Citizens” initiative.¹¹⁸ The group’s “aim was to demonstrate the virtue of deliberative approaches by holding [its] own (pilot) citizen assembly.”¹¹⁹ The experiment took place in June 2011, when one hundred randomly selected citizens from all sectors of Irish society were given expert information and the opportunity to deliberate on particular policy issues.¹²⁰ The report on the initiative concluded that “deliberation works” and recommended that the government adopt a citizen assembly to complement its representative institutions.¹²¹ This seemed to contradict critics of constitutional conventions, who thought Ireland was too different or unique for citizen assemblies to work there.¹²² The architects of “We the Citizens” have also speculated that the project

was influential in the move by the government to finally—albeit 18 months later than envisaged—launch the Constitutional Convention, as well as in the decision over how it should be comprised (notably the decision to increase the citizen membership to two-thirds of the total and to dispense with expert members) and how it should operate, namely along deliberative lines.¹²³

The Parliament passed a resolution in July 2012 establishing the terms for the convention. It was to consist of one hundred members, including:

a Chairperson to be appointed by the Government, 66 citizens entitled to vote at a referendum, randomly selected so as to be broadly representative of Irish society, a member of the Northern Ireland Assembly from each of the political parties in the Assembly which accepts an invitation from the Government; and members of the

¹¹⁶ DEP’T OF THE TAOISEACH, PROGRAMME FOR GOVERNMENT 2011–2016, at 17 (2010), *available at* http://www.taoiseach.gov.ie/eng/Work_Of_The_Department/Programme_for_Government/, *archived at* <http://perma.cc/5DUJ-9GUN>.

¹¹⁷ Farrell, *supra* note 3, at 194.

¹¹⁸ Farrell et al., *supra* note 4, at 99–100.

¹¹⁹ *See id.* at 102.

¹²⁰ *See id.* at 103–04.

¹²¹ WE THE CITIZENS, *supra* note 42, at 50.

¹²² Farrell et al., *supra* note 4, at 111.

¹²³ Farrell, *supra* note 3, at 194.

Houses of the Oireachtas, so as to be impartially representative of the Houses.¹²⁴

The Convention sought to produce reports on each of the issues listed in its terms of reference, but was not limited thereto and could also propose, after the completion of the former reports, “such other relevant constitutional amendments” as it deemed fit.¹²⁵ Additionally, the Convention was to set its own rules of procedure and install a majority voting system, where the chairperson would cast a vote in case of deadlock.¹²⁶ Importantly, the government committed to respond to the Convention’s reports within four months and to further indicate a time frame for submitting accepted recommendations for a referendum.¹²⁷ Initial controversy surrounding the anonymity of its citizen-members was swiftly resolved when the representatives agreed to renounce it at the first meeting of the Convention.¹²⁸

The Constitutional Convention held its first meeting on December 1, 2012 and was to run no later than March 31, 2014, after extending its mandate from the original twelve months.¹²⁹ The Convention considered and made recommendations on all seven listed items.¹³⁰ Of these, the government responded to four as of the time of writing of this Essay (September 2014) including: changes to the President’s term of office, reducing the voting age, changes to the clause on women in the home, and the legalization of same-sex marriage.¹³¹ In three of these (reducing the voting age; reducing the age of candidacy for Presidential elections; and same sex marriage), the response indicated that referendums on these issues would be held in 2015.¹³² By July 2014, however, there were delays in the government’s response to the Convention’s subsequent reports.¹³³ A further motion for abol-

¹²⁴ *Resolution of the Houses of the Oireachtas of July 2012*, available at https://www.constitution.ie/Documents/Terms_of_Reference.pdf, archived at <https://perma.cc/9PQY-B56D?type=pdf> (Ir.) [hereinafter *2012 Resolution*]; see *Constitutional Convention: Motion*, HOUSE OF THE OIREACTHAS (July 10, 2012), available at <http://debates.oireachtas.ie/dail/2012/07/10/00026.asp>, archived at <https://perma.cc/3639-3LAU?type=image> (Ir.).

¹²⁵ See *2012 Resolution*, *supra* note 124.

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ See ČOLIĆ, *supra* note 109, at 14.

¹²⁹ See *Convention on the Constitution: Motion*, HOUSE OF THE OIREACTHAS (Jan. 29, 2014), available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2014012900022?opendocument#U02700>, archived at <https://perma.cc/9B9R-CLKL?type=image>; ČOLIĆ, *supra* note 109, at 13.

¹³⁰ See IRISH CONST. CONV. RECOMMENDATIONS, *supra* note 32, at 24.

¹³¹ See *Written Answers No. 123: Constitutional Convention Recommendations (30774/14)*, HOUSE OF THE OIREACTHAS (July 15, 2014), available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2014071500055#WRD03600>, archived at <http://perma.cc/L6D5-JZ9G> (Ir.).

¹³² See *id.*

¹³³ See *id.*

ishing the Seanad (the Irish Senate) was referred to the Convention in June 2012, but the Convention voted to not consider the matter.¹³⁴ The Convention invited further submissions on the listed items, including proposals from Irish citizens living abroad.¹³⁵ It received thousands of submissions, especially on the more controversial issues such as same-sex marriage and the relationship between church and state.¹³⁶ The Convention also requested public input on items to add to its agenda, and held specific regional meetings from October to November 2013 for this purpose.¹³⁷ Accordingly, two more issues were chosen: Dáil (lower house) reform and economic, social and cultural rights.¹³⁸ The Convention also uploaded its work product onto its website and made use of social media, notably Facebook, YouTube and Twitter.¹³⁹

Given the timely completion of its task, as well as its transparent working method, the Irish Constitutional Convention has received generally favorable reviews to date.¹⁴⁰ As one observer mentioned, “Ireland’s Constitutional Convention has delivered.”¹⁴¹ Individuals from civil society were permitted to provide input via presentations before the Convention.¹⁴² Regardless, some civil society organizations criticized the Convention on several grounds, lamenting the lack of avenues for their direct participation in the process.¹⁴³ Such organizations also feared the random selection mechanism would end up excluding marginalized groups, which was particularly disconcerting given their centrality to some of the issues up for consideration by the Convention (same-sex marriage, reducing the voting age, the status of women et cetera.).¹⁴⁴ They further expressed doubt that a small

¹³⁴ See Fiach Kelly, *Convention Rejects Call for Seanad Debate*, INDEP. (May 20, 2013), <http://www.independent.ie/irish-news/convention-rejects-call-for-seanad-debate-29279438.html>, archived at <http://perma.cc/NP3S-ZTQ9>.

¹³⁵ See Press Release, Convention on the Constitution, Convention Calls on the Diaspora, available at <http://eirecham.com/OldSite/?p=678> (last visited Mar. 30, 2015), archived at <http://perma.cc/4SGZ-ZKHT>.

¹³⁶ See *Submissions*, CONVENTION ON THE CONST., <https://www.constitution.ie/Submissions.aspx> (last visited Mar. 30, 2015), archived at <https://perma.cc/3A75-PX8Y>.

¹³⁷ *Constitutional Convention Announces Public Meetings Nationwide*, IRISH EXAMINER, (Oct. 14, 2013), <http://www.irishtimes.com/breakingnews/ireland/constitutional-convention-announces-public-meetings-nationwide-610056.html>, archived at <http://perma.cc/K2DJ-TQZG>.

¹³⁸ See ČOLIĆ, *supra* note 109, at 20.

¹³⁹ See *Convention Documents*, CONVENTION ON THE CONSTITUTION, <https://www.constitution.ie/Convention.aspx> (last visited Mar. 30, 2015), archived at <https://perma.cc/3A75-PX8Y> (including links to convention’s Facebook, Twitter, and YouTube channel).

¹⁴⁰ See, e.g., Wall, *supra* note 8.

¹⁴¹ *Id.*

¹⁴² ČOLIĆ, *supra* note 109, at 16 (reporting that convention members received expert presentations).

¹⁴³ See *id.* at 24.

¹⁴⁴ O’HARE, *supra* note 27, at 7.

group of inexperienced and non-representative participants, likely intimidated by their politician colleagues, could “meaningfully be said to represent the population.”¹⁴⁵ The latter point, on the impact of politician involvement, is seen as a positive by other commentators, who argue that the *modus operandi* of the Convention ensured equal opportunity among members.¹⁴⁶ It could also “prove useful in helping to minimize the risks of a ‘disconnect’ between the Convention and the political class” as in Canada, the Netherlands, and now Iceland.¹⁴⁷

The Convention’s agenda has also been criticized for being too limited, with the list of issues too restrictive and not fundamental enough.¹⁴⁸ Others have claimed, however, that the non-exhaustive nature of the issue list and its freedom to interpret its brief liberally mitigated such concerns.¹⁴⁹ Indeed, it appears the Convention has provided such a liberal construction on at least two occasions: in recommending the voting age of sixteen instead of seventeen, as it had initially been asked to consider, and in recommending to give citizens a direct role in the process of nominating presidential candidates, issues arguably entirely beyond its mandate.¹⁵⁰

Another criticism, and one which echoes the Icelandic experience, was that the government maintained the final word on any reform recommendations.¹⁵¹ Some have claimed this was at least mitigated by the latter’s commitment to responding to Convention recommendations in a timely manner.¹⁵² Nevertheless, it is clear that the Constitutional Convention’s work was far more constrained in scope, at least from the point of view of issues considered, than that of the Constitutional Council in Iceland.¹⁵³ The inherent differences between a process aimed at drafting an entirely new constitution and one that considers reforms piecemeal, also played a differentiating role.¹⁵⁴ Indeed, some have praised precisely this aspect of the Irish process as having ensured its relative success: submitting constitutional changes to government review and possibly popular referendum one at a time helped avoid blockage of the process.¹⁵⁵

¹⁴⁵ See *id.* at 8.

¹⁴⁶ Farrell, *supra* note 3, at 197–98.

¹⁴⁷ *Id.* at 198.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 199.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See *id.* at 199–200

¹⁵³ See *id.* at 198, 200; Landemore, *supra* note 3, at 4.

¹⁵⁴ Compare 2012 Resolution, *supra* note 124 (Irish parliament set seven specific questions regarding potential constitutional amendments for review by convention), with Act on a Constitutional Assembly, Committees and Personnel, *supra* note 76 (Icelandic parliament asked council to address the foundations of the Icelandic constitution and its fundamental concepts).

¹⁵⁵ See ČOLIĆ, *supra* note 109, at 27.

III. ANALYSIS

A. Lessons from the Iceland and Ireland Processes

The two innovative processes presently discussed offer several lessons for participatory constitution-making in the digital age:

1. Inclusiveness Will Always Be Imperfect

One lesson has to do with the inclusiveness of the endeavor. In Iceland this was

aimed at, and partially achieved, through three different and complementary methods: (i) direct popular participation at various stages of the process, (ii) elements of descriptive representativeness where direct participation wasn't possible, and (iii) transparency. All three aspects arguably combined to ensure not just procedural legitimacy, but also some degree of epistemic reliability.¹⁵⁶

The three elements combined—participation, representativeness and transparency—form a complex notion of inclusiveness, reaching beyond the mere sum of its parts.¹⁵⁷ Iceland and Ireland achieved each element to varying degrees.

Iceland's progression from a large National Forum purposefully designed with increased representativeness to a Constitutional Council seeking to widely publicize its work and accommodate all public interventions to a referendum on the draft constitution was indeed an impressive undertaking.¹⁵⁸ The process contained design flaws, however, including issues regarding its implementation at various phases, which should encourage caution for any future initiatives.¹⁵⁹ Such missteps included: the structure and procedures of the National Forum not being participatory; the lack of consultation on how to proceed following the Supreme Court's invalidation of elections to the Constitutional Assembly; the role played by the Constitutional Committee in preparing the report on the results of the second National Forum; the lack of discussion (outside Parliament) of the selection process for the Constitutional Assembly; and the allotted time for the Constitutional Council to finish its work (three months with one month extension) as arbitrary and insufficient.¹⁶⁰

¹⁵⁶ Landemore, *supra* note 3, at 3.

¹⁵⁷ *See id.*

¹⁵⁸ *See id.* at 3–5.

¹⁵⁹ *See id.* at 16–23.

¹⁶⁰ *See id.*

Even where the process was distinctly inclusive, shortcomings remained. For example, the Constitutional Council provided transcripts of only its open meetings which due to weeks' delays were "too late for an immediate feedback loop to take place between the Council and the crowd members willing to read the transcripts."¹⁶¹ Furthermore, the Council provided "irregular, informal, and limited" feedback to the suggestions received from the public, possibly due to the lack of resources and institutionalization of feedback-giving.¹⁶² The extent of citizen involvement also seems problematic, as evidenced by insufficient involvement and the small number of comments proffered by the older and less technologically-savvy citizenry.¹⁶³ It is worth noting that the extent to which this truly was an instance of "crowdsourcing" a constitution is also questionable. The Constitutional Council clarified its role, stating at one point during the process that, "the phase we are now in should be called an exercise in open democracy and transparency rather than crowdsourcing."¹⁶⁴ The drafting process was not itself an instance of crowdsourcing—or the "commons-based peer production" used in writing Wikipedia articles, for instance.¹⁶⁵ The "crowd" did not write the constitution, although it had ways of influencing the process.¹⁶⁶

Similar shortcomings also existed in the Irish context. As already noted, civil society organizations voiced strong objections to not being directly included in the Constitutional Convention.¹⁶⁷ They feared the representativeness of the process would be lacking, given that marginalized groups were not explicitly included, even though pertinent issues concerned them directly.¹⁶⁸ This latter point exposes a potential weakness of the statistical notion of representativeness typically used when selecting participants for citizen assemblies.¹⁶⁹ This form of representativeness aims to mirror society as closely as possible, especially with respect to gender, age and geographical representation.¹⁷⁰ The fundamental character of the issues involved in constitutional reform processes and their often divisive nature, however, may require an alternative idea of representativeness—for example, one

¹⁶¹ See *id.* at 17.

¹⁶² *Id.*

¹⁶³ See *id.* at 17–18.

¹⁶⁴ Valtysson, *supra* note 89, at 63.

¹⁶⁵ Landemore, *supra* note 3, at 10.

¹⁶⁶ See *id.*

¹⁶⁷ See O'HARE, *supra* note 27, at 7–9.

¹⁶⁸ See *id.* at 7–8.

¹⁶⁹ See *id.*

¹⁷⁰ See CONVENTION ON THE CONSTITUTION, FOURTH REPORT OF THE CONVENTION ON THE CONSTITUTION: DÁIL ELECTORAL SYSTEM 3 (2013), available at <https://www.constitution.ie/AttachmentDownload.ashx?mid=fd70670-030f-e311-a203-005056a32ee4>, archived at <https://perma.cc/DK8W-CLTL>.

based on providing a voice to all those whose interests are affected. This is especially relevant for marginalized groups relating to sexual orientation or other minorities, whose rights have increasingly come under constitutional scrutiny in recent years in countries such as Ireland.¹⁷¹

Finally, such concerns echo criticisms of other forms of direct democracy, particularly referendums.¹⁷² The “majoritarian danger” objection to referendums is based on the fear that “they represent a model of majoritarian decision-making that imperils the interests of dissenting individuals and minorities.”¹⁷³ With referendums, the main source of this danger is the mode of decision-making itself; however, the potential for outcomes that are not representative of all societal views is relevant to constitutional conventions as well.¹⁷⁴

2. Expert Involvement Should Be Handled with Care

A related lesson deals with the role experts are to play in the process. As previously noted, Iceland’s Constitutional Committee, a body of appointed experts, had a significant impact on the drafting process. They summarized and added to the results of the second National Forum, as well as advising the Constitutional Council.¹⁷⁵ Moreover, lawyers were included to help reword passages in the constitutional draft with a view to ensure consistency and compatibility with Iceland’s international treaties.¹⁷⁶ Their work in some instances exceeded mere rewording, but rather amounted to an alteration of substance and the meaning of certain provisions.¹⁷⁷ Despite disagreement from some members of the Constitutional Council over the role of these lawyers, “they ultimately did not (or could not) question their changes, and a public justification for these changes was never issued.”¹⁷⁸

In Ireland, experts were also involved in the Constitutional Convention, though less directly.¹⁷⁹ They gave presentations on the issues under consideration by the Convention.¹⁸⁰ The expert’s contributions were then made public in the Convention’s reports.¹⁸¹ Moreover, the “We the Citi-

¹⁷¹ See O’HARE, *supra* note 27, at 9; ČOLIĆ, *supra* note 109, at 11.

¹⁷² STEPHEN TIERNEY, CONSTITUTIONAL REFERENDUMS: THE THEORY AND PRACTICE OF REPUBLICAN DELIBERATION 39 (2012).

¹⁷³ See *id.*

¹⁷⁴ See O’HARE, *supra* note 27, at 7; TIERNEY, *supra* note 172, at 39; Landemore, *supra* note 3, at 14.

¹⁷⁵ See Landemore, *supra* note 3, at 16–17.

¹⁷⁶ See *id.* at 22.

¹⁷⁷ See *id.*

¹⁷⁸ See *id.* at 23.

¹⁷⁹ See ČOLIĆ, *supra* note 109, at 16–18, 27.

¹⁸⁰ See *id.*

¹⁸¹ See, e.g., CONVENTION ON THE CONSTITUTION, *supra* note 170, at 13–57.

zens” initiative, which was entirely academic-led, may have influenced the type of constitutional convention created in Ireland. Ireland’s Constitutional Convention may have been purposefully designed so as to keep the experts’ role in check, a recommendation long made by theorists of deliberative democracy and constitution-making.¹⁸²

3. The Outcome of the Process Should Be Clear from the Outset

The Icelandic and Irish constitution-making processes provide a further lesson on the importance of process design and clarity of outcome. Despite its common perception as a significant victory for direct democracy, the Icelandic draft bill and successful referendum were followed by a near standstill in what appears to be a failure to effect constitutional renewal.¹⁸³ Part of the criticism levied at the process has pointed to the advisory nature of the referendum, which may have resulted in bias that pervaded the Constitutional Council’s work.¹⁸⁴ More significant, this Essay argues, is the criticism that it was unclear what would happen to the draft post-referendum: “while the October 2012 referendum has shown sizable civic support, [it] at the same time left important questions open.”¹⁸⁵ There was uncertainty as to whether the draft could be amended.¹⁸⁶ Moreover, the very wording of the first referendum question created confusion regarding the status of the draft.¹⁸⁷ The choice of mechanism for implementing recommendations is an important one and referendums carry their own set of challenges when used in constitution-making.¹⁸⁸

The Irish process was comparatively clearer because all parties knew from the outset that the government would have the final word on authorizing constitutional reform.¹⁸⁹ The Irish government alone would decide on the appropriate manner to respond to the Constitutional Convention’s recommendations.¹⁹⁰ Such government discretion aligns with scholarly observations that political elites will adopt mechanisms such as citizen assemblies on serious matters, but will “make sure that change does not come too

¹⁸² See Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L. J. 364, 395 (suggesting that keeping experts’ role to a minimum creates more stable solutions).

¹⁸³ See Blokker & Bergsson, *supra* note 23, at 171.

¹⁸⁴ See ČOLIĆ, *supra* note 109, at 16 (proposing that because they knew Parliament would have the final word, drafters may have been influenced by what they perceived would be acceptable to that body).

¹⁸⁵ Bergsson & Blokker, *supra* note 23, at 171.

¹⁸⁶ *Id.* at 167.

¹⁸⁷ *Id.*

¹⁸⁸ See TIERNEY, *supra* note 172, at 260–84.

¹⁸⁹ See ČOLIĆ, *supra* note 109, at 19.

¹⁹⁰ See *id.*

easily, and that they can, if necessary, block an unpalatable reform.”¹⁹¹ There is a link here with the “elite-control syndrome” associated with referendums, which is further discussed below.

4. Political Actors Should Not Be Alienated

The case studies also demonstrate the importance of not alienating the political actors who have a role in deciding the fate of the process.¹⁹² This point is made in light of the apparent failure of Iceland’s process after popular involvement ended and the new draft constitution reached the Icelandic Parliament.¹⁹³ Scholars note that “[a] strong emphasis on civic-driven constitutional politics appears to have ‘alienated’ parliament as well as part of the academic community from the process.”¹⁹⁴ Perhaps it was such considerations that led Ireland to also include politicians in its experiment with popular participation in constitution-making.¹⁹⁵ That said, a balance between not alienating elites and having them overtake the entire process might be difficult to strike.¹⁹⁶ In the case of referendums, concerns of the latter type have been referred to as “elite-control syndrome,” which encapsulates the fear “that elites can dominate the process of referendums in such a way as to procure a particular result.”¹⁹⁷ The charge is not that elites are involved in the process of referendum decision-making at all, “but rather that these elites are able to exploit their role for narrow political advantage.”¹⁹⁸ In the Irish case, for example, there was reticence from the outset regarding the government’s control of the outcome, including whether to submit the Convention’s recommendations to referendums.¹⁹⁹ Likewise, in Iceland, it was legislative elites who ultimately decided to renounce constitutional overhaul, despite the complex process previously set in motion to draft a new constitution.²⁰⁰

5. The Deliberative Promise Should Not Be Overstated

A final lesson from the two cases deals with their deliberative promise. The Icelandic process’s inclusive nature has already been called into ques-

¹⁹¹ FOURNIER ET AL., *supra* note 3, at 147–48.

¹⁹² Bergsson & Blokker, *supra* note 23, at 171.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *See id.*; Farrell et al., *supra* note 4, at 99–100.

¹⁹⁶ *See* ČOLIĆ, *supra* note 109, at 15.

¹⁹⁷ *See* TIERNEY, *supra* note 172, at 23.

¹⁹⁸ *See id.* at 24.

¹⁹⁹ O’HARE, *supra* note 27, at 10.

²⁰⁰ Bergsson & Blokker, *supra* note 23, at 171.

tion, with Ireland facing similar misgivings as well.²⁰¹ Despite experimenting with large forums aimed at inclusiveness, the innovative use of social media, and attempts to increase citizen participation in the drafting process, the deliberative credentials of the two processes are problematic.²⁰² A full evaluation of deliberative practices in these two cases reaches beyond the scope of this Essay. Briefly, however, there is one strand of criticism focused on the procedures of the constitutional conventions themselves.²⁰³ In Iceland, much of the participation from the public came in the form of statements rather than deliberation.²⁰⁴ In Ireland, too, despite a citizen's ability to make submissions to the Convention on what issues to consider, it remained unclear to what extent public input made a difference.²⁰⁵ The Convention's procedural rules also indicated that decisions would be by a majority, with the appointed chairperson maintaining the last vote in case of a tie—a departure from the consensus-seeking procedures of the Icelandic Constitutional Council.²⁰⁶

Most importantly, in both cases, the final word was not vested in the citizenry or even the constitutional convention, but rather with the political elites.²⁰⁷ This has led critics to question the meaningfulness of such processes and to ultimately conclude that “the communicative efforts of the general public remain in the form of weak publics belonging to the cultural public spheres since decision-making still takes place in the ‘upper’ structures of political public spheres.”²⁰⁸ Such views serve to counterbalance the more optimistic praise for popular involvement and the embrace of social media, particularly in Iceland.²⁰⁹ These views also resonate with wider concerns of direct democracy, such as the “deliberative deficit” objection to referendums.²¹⁰ The objection is that “referendums by their nature facilitate or indeed encourage the mere aggregation of individual wills and in doing so fail to foster either the acquisition of information by or the active deliberation of,

²⁰¹ See ČOLIĆ, *supra* note 109, at 14–16; O'HARE, *supra* note 27, at 7; Landemore, *supra* note 3, at 17–23.

²⁰² See ČOLIĆ, *supra* note 109, at 14–16; O'HARE, *supra* note 27, at 7; Landemore, *supra* note 3, at 17–23.

²⁰³ See, e.g., O'HARE, *supra* note 27, at 9; Valtysson, *supra* note 89, at 60.

²⁰⁴ Valtysson, *supra* note 89, at 57–58, 60 (explaining that access and interaction are not the same as participation).

²⁰⁵ See IRISH CONST. CONV. RECOMMENDATIONS, *supra* note 32, at 4 (explaining that the Convention received 2,500 public submissions).

²⁰⁶ Compare 2012 Resolution, *supra* note 124 (votes require majority), with *Council Hands Over the Bill*, *supra* note 70 (stating that the vote was unanimous).

²⁰⁷ See ČOLIĆ, *supra* note 109, at 19; Bergsson & Blokker, *supra* note 23, at 171.

²⁰⁸ Valtysson, *supra* note 89, at 52.

²⁰⁹ Meuwese, *supra* note 63, at 493–94; Valtysson, *supra* note 89, at 52.

²¹⁰ TIERNEY, *supra* note 172, at 27–39.

citizens.”²¹¹ Similar considerations of decision-making, which should go beyond mere aggregation, are relevant to the inner workings of constitutional conventions. Interestingly, to the extent that consensus was sought, notably in Iceland’s Constitutional Council, it was done for strategic reasons, such as to maximize the likelihood of later legislative support, and was not institutionalized in the procedural rules of the body.

*B. Principles of Participatory Constitution-Making Good Practice:
A Preliminary Sketch*

The aforementioned lessons, based on shortcomings identified in the two cases, form the basis for a set of principles to guide constitution-making by way of participatory constitutional conventions.

1. Inclusiveness

Inclusiveness should be aimed at (1) achieving representativeness; (2) maintaining responsiveness at all stages; and (3) ensuring oversight. It can be achieved by (1) quasi-random selection of participants; (2) participation in important stages of decision-making, and (3) transparency.

2. Clarity of Process

Clarity should be aimed at expectation adjustment and strategic positioning. Strategic positioning refers to participants having an opportunity to adopt strategies aimed at the final success of the constitution-making endeavor. An example would be managing resource allocation so as to cover not just constitutional conventions, but also subsequent referendums or political elections on which the implementation of the convention’s recommendations would ultimately depend. Clarity can be achieved by advance notice of the steps and fate of the outcome.

3. Involvement of All Relevant Actors

Involvement of all relevant actors is aimed at avoiding alienation and ensuring public ownership. It can be achieved by involving both political elites and interested parties.

4. Equality as Parity of Esteem

Equality as parity of esteem can be achieved by responsible and transparent decision-making procedures and is important for the aim of facilitating true deliberation.²¹²

²¹¹ *Id.* at. 28–29.

²¹² *Id.* at 52–54; *see also* Arato, *supra* note 50, at 198 (discussing “equal participation” as a principle of constitution-making).

5. Consensus-Based Decision-Making

Consensus-based decision-making is necessary to avoid mere aggregation of preferences and to facilitate true deliberation.²¹³ It can be achieved by creating consensus-seeking decision-making procedures at the outset of the process.

The five principles mix procedural and substantive considerations and are aimed at achieving a truly participatory, and as much as possible, deliberative process of constitution-making. The underlying premises are that real participation must reach beyond mere inclusion at various stages of the constitution-making process, that the process's outcome is significant, and that decision-making procedures employed throughout matter.

CONCLUSION

The appeal of participatory constitutional conventions and citizen assemblies is unlikely to fade soon. It is tied to a sustained dissatisfaction with traditional avenues of constitution-making and might be part of a larger movement towards informal or at least not yet formalized methods of constitutional change. While one might not speak of a “unified movement”²¹⁴ of citizen-centered approaches just yet, there is a clear demonstration effect between the cases where they have emerged. Moreover, there are calls for exploring the potential of participatory constitutional conventions in countries undergoing important constitutional changes, such as the United Kingdom.

Nevertheless, caution is needed before venturing down this route. Post-conflict and fragile democracies might not offer the requisite fertile ground for such mechanisms. Furthermore, by focusing on the few case studies available, there is a danger of ignoring context-specific aspects that likely had significant bearing on the success of participatory processes there. The relevance of Ireland's pattern of public consultation on important matters and Iceland's general rule that constitutional change be based on consensus or unanimity²¹⁵ cannot be assessed without additional cases. Their small population size, societal homogeneity, high availability of technology, and recent experiences with acute economic crises also impacted the success of their experiments with constitutional conventions. Thus, if “the setting in which assemblies exist may undo all the good they are able to achieve,” future architects of participatory constitutional conventions would do well to keep their compatibility with a country's constitutional culture in mind.²¹⁶

²¹³ TIERNEY, *supra* note 172, at 49; Arato, *supra* note 50, at 225–26.

²¹⁴ Vermeersch, *supra* note 43, at 67.

²¹⁵ Arnason, *supra* note 67, at 347.

²¹⁶ See FOURNIER ET AL., *supra* note 3, at 157.