Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland

Silvia Suteu
University of Edinburgh School of Law, s.suteu@sms.ed.ac.uk

Follow this and additional works at: http://lawdigitalcommons.bc.edu/iclr
Part of the Comparative and Foreign Law Commons, and the Constitutional Law Commons

Recommended Citation
Silvia Suteu, Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland, 38 B.C. Int'l & Comp. L. Rev. 251 (2015), http://lawdigitalcommons.bc.edu/iclr/vol38/iss2/4

This Essay is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.
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. Other examples include the Scottish and Catalonian independence movements, as well as

© 2015, Silvia Suteu. All rights reserved.

* Silvia Suteu is a doctoral research student in law at the University of Edinburgh School of Law. E-mail: s.suteu@sms.ed.ac.uk. This Essay was prepared within the framework of “The Scottish Independence Referendum: A Democratic Audit” research project at the University of Edinburgh School of Law. It was presented at “The Future of the Small State: Threats, Opportunities, Strategies” conference at the Sutherland School of Law on September 6, 2014. Previous versions of this Essay were presented at the 19th World Congress of the International Association of Constitutional Law in Oslo, Norway, June 16–20, 2014, and before the Political Theory Research Group, University of Edinburgh, on April 9, 2014. Thanks are due to the participants at all of these conferences for their valuable comments.

the problematic adoption of a new constitution and subsequent amendments in Hungary. 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. 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.

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

---


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).


7 See Landemore, supra note 3, at 17.


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


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. The process of its creation, however, is often most central. Two common features typify 21st century legitimacy in constitution-making: popular participation and emphasis on process.

The first common feature in modern constitution-making is the notion of popular participation. 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.” 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.” Inclusive and open processes of constitutional change provide greater weight to principles of self-government and public political engagement. 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

---

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.”

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.

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. 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. 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.

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. 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. The study confirmed that “the content of constitutions

---


25 *See id.*


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).*

depends on who sits at the table to hammer out their provisions." The more inclusive the process of drafting and negotiating constitutional content, the greater the benefits for democracy and constitutional stability. 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.

3. Constitutional Longevity

There appears to be a correlation between “inclusion” during constitution-making and constitutional longevity. 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. 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. The Icelandic convention and its 2011 draft constitution were initially thought to be a prime example of this process.

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. In an age where citizens feel detached from regular politics, deliberative forms of engagement may yet resurrect their interest. 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.
34 Id.
35 Id. at 78–79.
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 REFORMING AMERICAN POLITICS 274 (2d ed., 2009)).
40 Id.
41 See id. at 99; Saunders, supra note 16, at 8.
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 Vermersch, 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-

---


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).


52 Fournier et al., supra note 3, at 10.

53 See id.

54 Id. at 13.
Constitutional Conventions & the Digital Era

trality of quasi-randomly selected citizens tasked with deciding important constitutional reforms in a deliberative setting. 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.” 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. 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. Nevertheless, the three antecedents shared a commitment to participatory and deliberative democracy aimed at “inject[ing] some popular legitimacy into policymaking.” 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. 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. 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.”

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. Calls for constitutional change had existed for some time but had never gained much traction. Indeed, “the new Icelandic republic never autonomously wrote a constitution to match the independent state.” 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). The 1944 document had initially been understood as transitory, prompting calls for setting up a constitutional convention as early as 1948. Constitutional politics dictated otherwise, however, and the constitution survived without major overhaul, with the pace of amendment only picking up in the 1970s. Iceland’s Prime Minister (as of 2009), Jóhanna Sigurdardóttir, formerly a Member of Parliament, had fought for years to institute a total constitutional review. On November 4, 2009, she tabled a bill in Parliament concerning the establishment of an advisory Constitutional Assembly. 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.
64 See Meuwese, supra note 63, at 473.
65 Bergsson & Blokker, supra note 23, at 155.
66 See Meuwese, supra note 63, at 473.
68 See Árnason, supra note 67, at 345–46.
69 Id. at 342.
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.


\(^{77}\) 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. 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. Despite this ruling, a parliamentary resolution was adopted in March 2011 appointing the twenty-five delegates originally elected to the Assembly. Their task was to make recommendations for constitutional change, taking the Constitutional Committee’s report as their starting point. The 700-page report was presented in April 2011, the official starting date of the Council. The Council soon agreed on their rules of procedure and divided into three working groups. 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). For this purpose, the groups set up various social media platforms. Meeting schedules and minutes were also posted online, and the Council’s website was updated with news and a weekly newsletter. Advertisements encouraging the public to get involved in the process were also published in the media. 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.

The Constitutional Council sought unanimity in adopting the bill it delivered to Parliament in July 2011. The Council focused on a few main themes, including transparency, responsibility, and the distribution of power, which were reflected in its draft. The most radical provisions were Ar-

---

**Notes:**


86. *See id.*


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

90. Valtysson, 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.*
article 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.” 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.” 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. Others regretted that such a radical process of constitution-making did not result in “a radically participatory form of democracy in constitutional terms.” 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.”

A successful referendum followed on October 20, 2012. 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?” Sixty-seven and seventy-three percent of voters answered yes to these two questions, respectively. 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. Despite welcoming the results of the (advisory) referendum, political parties were unable to fully consider the draft before the general elections in April 2013. 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.
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.).
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-
tion would be established “to consider comprehensive constitutional re-
form” on seven major issues and over the span of twelve months.\textsuperscript{116} It was
to produce a report by the end of that period, but nothing else was men-
tioned regarding its membership or procedures.\textsuperscript{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.\textsuperscript{118} The group’s
“aim was to demonstrate the virtue of deliberative approaches by holding
[its] own (pilot) citizen assembly.”\textsuperscript{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.\textsuperscript{120} The report on the initiative concluded that “de-
liberation works” and recommended that the government adopt a citizen
assembly to complement its representative institutions.\textsuperscript{121} This seemed to
contradict critics of constitutional conventions, who thought Ireland was too
different or unique for citizen assemblies to work there.\textsuperscript{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 Con-
vention, as well as in the decision over how it should be com-
prised (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.\textsuperscript{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 enti-
tled 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

\begin{footnotes}
\footnote{DEP’T OF THE TAOISEACH, PROGRAMME FOR GOVERNMENT 2011–2016, at 17 (2010), avail-
able at http://www.taoiseach.gov.ie/eng/Work_Of_The_Department/Programme_for_Government/,
archived at http://perma.cc/SDUJ-9GUN.}
\footnote{Farrell, supra note 3, at 194.}
\footnote{Farrell et al., supra note 4, at 99–100.}
\footnote{See id. at 102.}
\footnote{See id. at 103–04.}
\footnote{WE THE CITIZENS, supra note 42, at 50.}
\footnote{Farrell et al., supra note 4, at 111.}
\footnote{Farrell, supra note 3, at 194.}
\end{footnotes}
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-

---

125 See 2012 Resolution, supra note 124.
126 See id.
127 See id.
128 See ČOLIĆ, supra note 109, at 14.
130 See IRISH CONST. CONV. RECOMMENDATIONS, supra note 32, at 24.
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. The Convention invited further submissions on the listed items, including proposals from Irish citizens living abroad. It received thousands of submissions, especially on the more controversial issues such as same-sex marriage and the relationship between church and state. 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. Accordingly, two more issues were chosen: Dáil (lower house) reform and economic, social and cultural rights. The Convention also uploaded its work product onto its website and made use of social media, notably Facebook, YouTube and Twitter.

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. As one observer mentioned, “Ireland’s Constitutional Convention has delivered.” Individuals from civil society were permitted to provide input via presentations before the Convention. Regardless, some civil society organizations criticized the Convention on several grounds, lamenting the lack of avenues for their direct participation in the process. 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.). They further expressed doubt that a small

138 See Čolić, supra note 109, at 20.
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 intimi-
dated by their politician colleagues, could “meaningfully be said to repre-
sent the population.”145 The latter point, on the impact of politician in-
volvelement, is seen as a positive by other commentators, who argue that the
modus operandi of the Convention ensured equal opportunity among mem-
bers.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 candi-
dates, 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 recommenda-
tions.151 Some have claimed this was at least mitigated by the latter’s com-
mitment to responding to Convention recommendations in a timely man-
ner.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 inher-
ent differences between a process aimed at drafting an entirely new consti-
tution and one that considers reforms piecemeal, also played a differentiat-
ing role.154 Indeed, some have praised precisely this aspect of the Irish pro-
cess as having ensured its relative success: submitting constitutional chan-
ges 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 Constitu-
tional 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.”\(^\text{161}\) 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.\(^\text{162}\) 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.\(^\text{163}\) 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.”\(^\text{164}\) The drafting process was not itself an instance of crowdsourcing—or the “commons-based peer production” used in writing Wikipedia articles, for instance.\(^\text{165}\) The “crowd” did not write the constitution, although it had ways of influencing the process.\(^\text{166}\)

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.\(^\text{167}\) 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.\(^\text{168}\) This latter point exposes a potential weakness of the statistical notion of representativeness typically used when selecting participants for citizen assemblies.\(^\text{169}\) This form of representativeness aims to mirror society as closely as possible, especially with respect to gender, age and geographical representation.\(^\text{170}\) 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.

\(^{164}\) Valtisson, 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.

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.\footnote{See \textcite{O'HARE109}, note 11.}

Finally, such concerns echo criticisms of other forms of direct democracy, particularly referendums.\footnote{Stephen Tierney, \textit{Constitutional Referendums: The Theory and Practice of Republican Deliberation} 39 (2012).} 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.”\footnote{See \textcite{O'HARE109}, note 11.} 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.\footnote{See \textcite{O'HARE109}, note 11.}

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.\footnote{See \textcite{Landemore3}, note 16–17.} 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.\footnote{See \textcite{Landemore3}, note 22.} Their work in some instances exceeded mere rewording, but rather amounted to an alteration of substance and the meaning of certain provisions.\footnote{See \textcite{Landemore3}, note 23.} 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.”\footnote{See \textcite{Landemore3}, note 23.}

In Ireland, experts were also involved in the Constitutional Convention, though less directly.\footnote{See \textcite{COLIC109}, note 16–18, 27.} They gave presentations on the issues under consideration by the Convention.\footnote{See \textcite{LANDEMORE3}, note 3, at 14.} The expert’s contributions were then made public in the Convention’s reports.\footnote{See \textcite{COLIC109}, note 16–18, 27.} Moreover, the “We the Citi-
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{185} There was uncertainty as to whether the draft could be amended.\textsuperscript{186} Moreover, the very wording of the first referendum question created confusion regarding the status of the draft.\textsuperscript{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.\textsuperscript{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.\textsuperscript{189} The Irish government alone would decide on the appropriate manner to respond to the Constitutional Convention’s recommendations.\textsuperscript{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

---
\textsuperscript{182} See Jon Elster, \textit{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).
\textsuperscript{183} See Blokker & Bergsson, \textit{supra} note 23, at 171.
\textsuperscript{184} See ČOLIĆ, \textit{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).
\textsuperscript{185} Bergsson & Blokker, \textit{supra} note 23, at 171.
\textsuperscript{186} \textit{Id.} at 167.
\textsuperscript{187} \textit{Id.}
\textsuperscript{188} See TIERNEY, \textit{supra} note 172, at 260–84.
\textsuperscript{189} See ČOLIĆ, \textit{supra} note 109, at 19.
\textsuperscript{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. 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. 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. In Iceland, much of the participation from the public came in the form of statements rather than deliberation. 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. 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.

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. 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.” Such views serve to counterbalance the more optimistic praise for popular involvement and the embrace of social media, particularly in Iceland. These views also resonate with wider concerns of direct democracy, such as the “deliberative deficit” objection to referendums. 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,
citizens.” 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.\textsuperscript{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”\textsuperscript{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 unanimity\textsuperscript{215} 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.\textsuperscript{216}

\textsuperscript{213}Tierney, supra note 172, at 49; Arato, supra note 50, at 225–26.
\textsuperscript{214}Vermeersch, supra note 43, at 67.
\textsuperscript{215}Árnason, supra note 67, at 347.
\textsuperscript{216}See Fournier et al., supra note 3, at 157.