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CONSTITUTIONAL REFORM REVISITED: FROM CROWDSOURCING TO STAGNATION

ABSTRACT: *The paper examines two core issues in the Icelandic constitutional revision process (2009–2024) arguing that a major reason for the Icelandic failure to finish the process is the standoffish relationship between constitutional activists and the main political parties. Activists have staged very efficient campaigns, yet, for several different reasons, leading politicians see no political gain from supporting either a return to a constitutional bill drafted by the Constitutional Council in 2011, nor from joining forces on other paths to incremental constitutional reform. The paper argues that the Icelandic parliament's failure to properly define the role of a Constitutional Council established in 2011 opened the way for increased political division instead of giving the public a greater role in the design of a new constitution. In the first part of the paper I give a brief overview and interpretation of the process. In the second and third part I discuss two important stages of the process – first the debates in the Constitutional Council on what the nature of its work and objectives should be; second the debate on natural resources and the rejection of incremental reform. The Icelandic constitutional process failed in important ways but it shows that consensus-based public engagement processes also need institutional coordination.*

KEYWORDS: Constitution; Constitutional Council; constitutional activism; constitutional revision; natural resources.

1. Introduction

As Western countries recovered in 2009 from the financial crisis which had struck the year before, governments in different countries faced a wide variety of challenges. In Iceland a "near death experience" (Heimisdóttir 2020, p. 54-55) – a financial crisis that came close to ending in national bankruptcy – created a strong demand for political renewal which – albeit for only a short period – radically changed the public mood regarding Iceland's international role and reputation. Surveys showed a majority of voters favoring EU membership, the IMF was given a key role in creating a plan for Iceland's economic reform after the financial collapse had bankrupted three of its international banks and sent its currency down the drains. Iceland recovered remarkably quickly however and was already a few years later experiencing renewed affluence and economic growth (see Ingimundarson, Urfalino & Erlingsdottir 2016). Many reforms were implemented that strengthened Iceland's economic and political system (Hjálmarsson 2021). But one central reform project failed: the revision of the Icelandic constitution, proposed in order to ensure that Iceland's political reforms made a lsting impact on the countries constitutional order. The revision project, which started in 2010 with the Parliament's decision to convene a constituent assembly remains incomplete and

continues to reappear as an irritant in Icelandic politics, a reminder that even if the country was able to resurrect itself culturally and economically, some of its political divisions remain deep and seem unreconcilable (See Árnason & Dupré 2020).

This paper discusses two major reasons for the failure of the project: (1) The Constitutional Council, which was given the role of creating a constitutional bill for the parliament to discuss, modify and vote on, lacked a coherent political strategy which I argue undermined support of the constitutional bill. (2) Instead of seeking broad consensus around a thematically radical document, the drafters of the constitutional bill focused on creating language that would not only articulate main principles but narrowly prescribe governmental action. I discuss the case of fishing licenses to illustrate this point, where the main contention has been about the precise language of an article establishing national ownership of natural resources. I conclude that the two examples I discuss show clearly how an innovative democratic project, if poorly managed, can create deadlocks rather than solutions to complex issues.

2. The Icelandic constitutional saga

The first plans for constitutional reforms were announced by a minority government which took power in February 2009 and gained a parliamentary majority in elections held in April. The Parliament in 2010 decided to establish a Constituent Assembly. A Constitutional Committee was appointed to prepare for the Assembly and a so-called national meeting was held in which almost 1000 randomly selected citizens identified key values and priorities of a new Icelandic constitution. Elections were held in November for the Constituent Assembly. 25 individuals (out of 522 candidates) were elected to serve on the assembly. In January 2011 however the Supreme Court, after having reviewed a set of complaints about how the elections had been conducted, invalidated the results due to flawed setup of booths, a design of ballots that made it possible to trace votes and other technical failures (Decision of the Supreme Court, 2011). There were no allegations of fraud.

2.1. The unsuccessful reform and amendment efforts

The Icelandic parliament decided two months after the decision of the Supreme Court to appoint the individuals who had been elected to the Assembly to form a so-called Constitutional Council. 24 of 25 accepted the appointment – the candidate who had been number 26 in the elections was given the vacant seat. The Constitutional Council came together in early April 2011 and completed its constitutional bill on 28th July. It was then submitted to parliament. In October 2012 a consultative referendum on whether voters would like to see the draft constitution of the Constitutional Council as "a basis of a new constitution"

showed that more than 60% of voters supported that (Ólafsson 2024). In the spring of 2013, fearing that parliament would reject the constitutional bill, leaders of three political parties in Parliament proposed a compromise solution that postponed further discussion of the constitution but also simplified the adoption process for the next parliamentary term. The government lost its majority in the elections, and the next government was not interested in returning to the Constitutional Council's bill. A committee appointed by parties in parliament proposed three amendments to the constitution in 2016 (Prime Minister's Office, n.d.), but the amendment bill did not get majority support in Parliament. New elections were held in 2016. A short-lived government formed after the elections did not initiate any further reforms, but after fresh elections in 2017 and the formation of a broad coalition of parties from left to right on the political spectrum a new reform process was started. The constitution was to be revised in two steps over two parliamentary terms, 2018 to 2025. Various efforts were made to involve both the academic community and the public, including holding a Deliberative Poll on six of the central constitutional themes, belonging to the first half of the revision effort (see Social Science Research Instititute, 2020a; 2020b). A constitutional amendment bill was presented by the prime minister in 2021, but support was lacking, and the bill was not voted on before the term ended that same year (Parliamentary Document 787, 2021). In the fall of 2023 reports by legal specialists which addressed the question of necessary revisions in addition to the ones discussed in 2018-2021 were put on the Prime Minister's Office web site for public discussion, but the government did not initiate further constitutional bills (Expert reports, 2023). The most recent coalition government, created after fresh elections in 2024 has not made constitutional reform a priority.

2.2. The "crowdsourced" constitution

The Constitutional Council with its 25 citizen members, as requested by the Icelandic parliament, produced a constitutional bill and submitted it for further discussion and approval by parliament. The drafting process and the Council's consistent effort to involve the public in its discussions and design proposals earned considerable interest outside of Iceland were covered extensively by international media and its transparent and informal approach to public participation in the process the resulting constitutional bill draft was often referred to as "the crowdsourced constitution" in public and academic discussion. Various surveys, and especially the referendum of 2012 showed general support for the project, but the necessary political consensus was never forged. The biggest political party in Iceland fiercely opposed the constitutional renewal proposed by the Constitutional Council and other major parties remained unenthusiastic or skeptical about its draft constitution (Ólafsson, 2016).

2.3. Reasons of failure

This paper argues that overly ambitious goals of the Constitutional Council and its decision to avoid any institutional contact with the parliament during its brief and intensive work period (from the beginning of April until the end of July 2011) led to a proposal that could not get the political support necessary to survive the parliamentary process. A moral high ground taken by some of the more visible Council members also created a standoffish relationship between powerful political actors and the Constitutional Council which was both unnecessary and unhelpful in creating a path to passing a constitutional bill. The Council never reckoned with its subordinate status of proposing a draft bill to parliament which then would have the role of bringing it through the constitutionally required process for such a bill. Rather it chose to regard itself as directly representing the Icelandic nation – the only legitimate "constitution giver" as some of its members and supporters later insisted – demanding that parliament ratify the bill substantially unchanged (see Oddsdóttir 2014, 2019).

It has been argued that the revision process failed because of opposition to the constitutional draft by powerful business elites and especially from the Icelandic fishing industry whose interests continue to dominate policymaking (see Gylfason, 2013, p. 396; Bergmann, 2014 p. 181; Pálsson, 2020). However, the post Constitutional Council constitutional debates never reached the level where clear opposition to individual proposals in the constitutional draft was articulated. The bill proposed by the Constitutional Council reached the first stages of discussion in the parliament but was not voted on. Moreover, even though support of the Constitutional Council's draft constitution remains high, the "new constitution" is frequently dismissed as unimportant in electoral campaigns where other more tangible issues tend to dominate. This has remained so despite visible social media campaigns in support of the Constitutional Council's bill including a very successful collection by constitutional activists of signatures in support of a new constitution. Compromise solutions, such as the one started by Katrín Jakobsdóttir, prime minister from 2017 to 2024, who sought to launch an extensive revision of the current constitution rather than return to the bill abandoned in 2013, evoked enough opposition to be undermined, while support by political parties for returning to the Constitutional Council's draft remains low. A few weeks before parliamentary elections in 2021a survey showed less than 10% of voters ranking constitutional revision among three most important election issues (Maskína, 2021). Constitutional activism, one may conclude, is too marginal to achieve the revival of the 2011 draft, but strong enough to prevent the success of other solutions.

2.4. A fraught relationship

One of the reasons for the continued lack of success in Iceland's constitutional revision is the standoff between constitutional activist movement, using mainly the platform of the Constitutional Society on the

one hand the governing political parties on the other (Constitutional Society n.d.). The activists have shown complete loyalty to the text of the Constitutional Council's draft constitution and have engaged in confrontations about linguistic formulations of some proposed new articles in the constitution, the question who the "constitution giver is" and what that means, as well as debates about actual (or necessary) consequences of certain constitutional amendments. Some of these confrontations thus address issues quite marginal to the actual consensus debate although of theoretical interest. The activist movement moreover tends to emphasize common sense implications of the constitutional text whereas legal scholars focus on legal interpretations arguing that a full understanding of what the constitution means can only be based on judicial review (Heimisdóttir 2020, p. 63). The debate thus reflects not only disagreements about what a new or revised Icelandic constitution should contain or not contain but also deeper divisions on what a constitution is and what role it should have vis a vis ordinary legislation.

The lack of success can be seen in terms of a conflict between political leadership and civic activism. The conflict has its roots in two important actions of the Icelandic parliament: First, to appoint the Constitutional Council and give it complete freedom to decide on its approach with only very general guidelines about its role. The loose framework could neither prevent the adoption of unrealistic goals nor work against the strong conviction that the Council should present itself as directly representing the public, even though the elections had been invalidated and the Council members were formally speaking appointed by the parliament. Second, to fail to adequately prepare for the eventual reception of a constitutional bill from the Constitutional Council. The Council managed to contain differences of opinion and different political outlooks of its members and unanimously adopted a draft constitution which was then submitted to the Parliament as a constitutional bill. Given the short time the council had to revise the constitution this must be seen as a remarkable success. The parliament's majority on the other hand could not find the right path for a parliamentary process that would eventually lead to a fair assessment and vote on the bill – or on a changed version of the bill.

As the parliament considered the bill and later, when decision on it had been deferred and the constitutional process seemed permanently stalled, prominent members of the Constitutional Council and their supporters provided scathing criticisms of other constitutional revision efforts and with the slogan "we have a new constitution" systematically promoted the claim that the only legitimate path to revision was a return to parliamentary discussion of the Constitutional Council bill (one former Constitutional Council member even argued that a progress report made public in 2014 by a government appointed constitutional committee could only be seen as a part of an "attempted coup d'etat" (see Gylfason, 2014). The campaign has also led to public discussion about more fundamental issues, such as the question of whether the parliament could

claim legitimacy in making constitutional changes without substantive public involvement and debates about the meaning and purpose of key constitutional reforms such as establishing a national ownership of natural resources.

The Icelandic failure clearly indicates that serious political transformation, such as constitutional reform, since it is easily undermined, must be cooperation and consensus driven. At the very beginning of the Constitutional Council's work, its members lauded the Parliament for its non-interference in the Council's key decisions, such as the one to write a new constitution in 3-4 months rather than focus on specific reform issues (Gylfason 2020b). For some observers, non-interference however was an ominous sign of indifference showing low expectations that this work would in fact lead to constitutional reform. This suspicion may have been further strengthened when the Constitutional Council's president handed a complete constitutional draft over to the speaker of Parliament in a slightly awkward ceremony: The Parliament had no clear plans about what to do with its "new" constitution (Nordal 2020, p. 122; Ólafsson 2020, p. 130).

3. The task: the possible – the feasible; demands and achievements

The Constitutional Council held its first meetings at the beginning of April 2011. It was soon clear that the Council was not about to define its role narrowly, and after little debate, the decision was made to write a new constitution from scratch. The verbatim transcript of plenary discussion does not show much hesitation or doubt about this and although some members of the council would have been satisfied with a less ambitious goal, they did not oppose it, and no split occurred. The Council happily embarked on writing a new Icelandic constitution in the short period it had been given (Constitutional Council 2011b, p.40). Although divisive conflict was avoided it should be noted that only 15 council members voted for the proposal to start with the "table of contents" alone. 1 voted against, 5 abstained and 4 were absent. The Council had three months to finish its work. Later that was extended to four months.

The work of the Constitutional Council had been prepared for by a committee of legal scholars, officials and academics which issued a report containing an overview of Iceland's constitutional history as well as scholarly discussion of key constitutional topics and exegesis of each article of the 1944 republican constitution Constitutional Committee, 2011a; 2011b). Iceland, which until 1918 was a part of the Danish kingdom, got its first constitution from the Danish king in 1874 (A constitution on the special affairs of Iceland). In 1922, after the country had got its independence and entered a union with Denmark under a common head of state, the Danish king, a second Icelandic constitution was ratified and in 1944, when Icelanders formally abandoned the union to form their own republic, a third constitution was adopted in a national referendum.

The 1944 republican constitution however was written in the basis of the 1922 constitution of the Kingdom of Iceland and retained much of its language and style. The 1874, 1922 and 1944 constitutions all trace their roots to the Danish 1849 constitution. It was generally understood in 1944 that the constitution was provisional and would soon be revised or rewritten to reflect modern Icelandic preferences and realities (Helgadóttir & Ingólfsdóttir, 2017, p. 83).

The report of the Constitutional Committee was intended to lay a foundation for the work of the Constitutional Council and even contained examples of what a new constitution could look like in the form of two different but complete sample drafts (Constitutional Committee 2011a, p. 182-215). Salvör Nordal, who was elected chairperson of the council, later pointed out that by introducing draft constitutions, the hint was already given that the Council should write a new constitution rather than just propose revisions and amendments to current one (Nordal 2020 p. 113). The Constitutional Committee however always discussed the project in terms of a revision of the constitution rather than the creation of a new constitution.

Even if the sample constitutions in the report were complete constitutional drafts, they could be exploited piecemeal in a new document. In a similar fashion, even if the currently valid republican constitution would not be the basis of a new one, in fact provided much of the substance (Ginsburg & Elkins, 2012). The council had no comprehensive explanation to give for its decision to write a new constitution and did not put itself in clear opposition to the republican constitution of 1944 or either of the two drafts. It seems to have seen its role more in modernizing and amending the constitution than in creating a constitution radically different from previous ones. So, in fact the Danish pedigree and the perceived need for a fully Icelandic constitution, in addition to the need for a complete political renewal in Iceland, seems to have inspired the Constitutional Council to agree simply on a table of contents and start from there on a new constitution, yet liberally exploiting the material it had been given and the republican constitution.

Although the Constitutional Council united in its complete constitutional renewal effort, there remained differences of opinion inside it about the nature of the task. Differences were also expressed in the formation of groups or factions with different agendas. One group for example was strongly connected to the protesters of the "pots and pans revolution" in January 2009 whereas another group pursued a more moderate right leaning liberal agenda. The former group – sometimes referred to as "the revolutionaries" – was interested in figuring out ways to design the new constitution in such a way that it would tie the hands of political leaders and officials making it more difficult for them to engage in corrupt activities. Their distrust of political power after the financial crisis was a key element in their constitutional thinking and led them to discussion about prevention mechanisms as well as general political reform. The liberal centrists

were rather concerned about the possibility that too radical proposals might, because of tensions in the Icelandic society, get majority support in the Constitutional Council.[1]

It is questionable however whether the Constitutional Council had any methodology at all. The Council was given the task to decide itself on working- and decision-making procedures, which it entrusted to a five-member committee (Constitutional Council 2011a, p. 11). This committee also proposed that the Council should use a so-called agile method for its working progress which meant that the Council's draft bill would be developed over time through the creation of successive drafts, so-called "phase document" (Icel. *áfangaskjal*) that would gradually be improved and enlarged. In its third meeting another such committee was formed to make proposals on how the Constitutional Council should approach its work and its division into working groups. The committee quickly produced the table of contents for a new constitution and also made proposals about three subcommittees and the division of labor between them. The committee's proposals were largely adopted and without further ado the Council set out to do its job.

The discussion in the council following the proposals of the first committee is surprisingly technical, when revisited, 14 years later. The Council's work is seen as consensus driven and under no authority (Constitutional Council 2011b, p.15, 22). The Council's governing board – its chairperson, her deputy as well as the appointed chairs of the three working committees – should be coordinators rather than judges; they should not be seen as having any decision-making or disciplinary power. No determination is made on either priorities or topical emphasis, but instead it is assumed that the agile procedure will suffice to ensure successful coordination leading to a complete constitutional bill. It does not look much like a format for political discussion but rather resembles collaboration techniques in software innovation. While some Council members clearly had doubts about the relevance of this working method (Constitutional Council 2011b, p. 39), others seem to have thought that the "agile method" was all that was needed to ensure the political acumen of the constitutional exploration and design ahead – an ideology by itself (Constitutional Council 2011b, p. 94; Bergmann 2014, p. 179). The point is that at each stage there exists a design which reflects the highest stage of achievement at that time, but which then benefits from new insights and suggestions and thus stands to be improved more. This technical understanding of the task has the strength of facilitating the reception of contributions (including proposals from the public). It is less obvious how it can accommodate deeper divisions in political outlook and more fundamental constitutional questions.

The discussion that follows the phase document proposal is somewhat bizarre. The committee had gone through the inevitable a discussion of whether the Council should amend the republican constitution or

[1] My account is partly based on conversations over the years with some of the former Council members, in most cases confidential.

write an entirely new one. The form of this debate however develops into a discussion about the technical layout of the "base document" (Icel. *grunnskjal*) which is then to evolve into phase documents used in the Council's work, as the committee had proposed. The question becomes whether the text of the 1944 constitution should be included in the base document or not. Two members of the committee, Eiríkur Bergmann and Pawel Bartoszek presented its solution which they referred to as a compromise solution. Although the real disagreement is about whether the Council should revise the constitution or write an altogether new one, the discussion is about whether in one column there should be the 1944 constitution and the other one empty or whether the Council should start with "an empty page". So, instead of going through a discussion of the actual question, the council discusses in detail the layout and contents of the base document – a "zero document" as one council member suggests it should be called (Constitutional Council 2011b, p. 35). Those who favor a base document containing the text of the 1944 constitution in one column with another empty column are the ones who also are inclined to see the Council's task as a revision, whereas proponents of writing a new constitution favor a document containing only the preliminary table of contents. The discussion clearly confuses some of the council members who point out that the currently valid constitution simply is there and whatever the council does will be perceived as a changing that constitution – creating also the responsibility for the council to explain such changes (Constitutional Council 2011b, p. 49).

Two council members express the fundamental concerns though neither of these concerns is explicitly discussed in the Council. Pawel Bartoszek, a right leaning council member is the only one to point out that the Constitutional Council should think about an approach to a constitutional bill that would be likely to succeed in Parliament. A constitutional bill which would propose changes to the 1944 constitution, he thought, would have more chances all things considered than a new constitution (Constitutional Council 2011b, p. 34). Illugi Jökulsson whose alliances lay more with those groups who saw themselves as radical reformers on the other hand described it as a betrayal if the Council did not recognize that the 1944 constitution was greatly flawed and should not in any way influence the work of the council. It will send "a totally wrong message to society if it seems that we are going to repair this old and useless document" (Constitutional Council 2011b, p. 35) he declared.

Although the conflict makes its appearance in declarations like this, the council never approaches it directly and no discussion ensues on the relative merits of revision versus renewal. The compromise solution eventually adopted for the base document accepts the presence of the 1944 constitution as a constant "alternative" but does not require that council members, in their respective working committees, see their work as a revision of or amendment to that text (Constitutional Council 2011b, p. 37).

The lack of direct discussion of fundamental differences is on the one hand a prudential decision. It would have been a wrong move to stage a confrontation of two opposed views early in the constitutional revision

process and risk a permanent split in the council. Constitutional Council members are well aware that their only chance to accomplish something is to work with differences and seek common solutions. But the tendency to move to a technical discussion to avoid substantive disagreement or conflict is a key weakness in the Council's work, allowing its members to have different views and even to some extent different conceptions of the Council's task and reachable goals.

Arguably the freedom the Council was given in determining its task also precludes its success. The discussion about revision versus renewal is too dangerous for it to embark on which means that it should not have been put in the position where it became a necessary discussion. Parliament would have been much more helpful had it given clear instructions about parts to revise and new items to be discussed. As this discussion shows, the council heads off in the wrong direction, right at the start.

The eventual outcome is, as is well known, a constitutional bill with an entirely new constitution. Although this was not well recognized at the time, this bill probably never had any chance of getting a parliamentary approval. Already in late 2011, the majority of the leftist government was becoming increasingly shaky, and its lack of popularity was palpable. Its eventual electoral loss was on the horizon, so the main parties of the opposition had no inclination to support the bill and parliamentary rules gave them many ways to delay and undermine it without a parliamentary majority.

If we now take a look at the very end the Council's work, we can see how the final unanimous approval of the document suggests a similar tendency as in the early stages, i.e. to sidestep differences rather than bring them out in the open. An example of that is the question about the nature of the Council's bill. The first half of the Council's final discussion of its bill took place at its 17th meeting, convened on 20 July 2011. The chairperson of the Council, Salvör Nordal, took the floor at the beginning of this meeting and summarized the Council's work in brief remarks, praising the cooperative spirit and unity that had emerged in its work. It is noteworthy that Salvör never refers to the bill as proposing a "new constitution" but rather describes the council's effort as a revision process, carefully listing the different parts of the bill in terms of changes they entail to the 1944 constitution (Constitutional Council 2011c, p. 539-540).

This important omission (the preamble states that the Constitutional Council's draft constitution is a "new constitution") suggests a fundamental difference between the members identifying with more radical positions and the ones who seek to remain loyal to a narrower interpretation of the Council's role in addressing a number of issues which the 1944 constitution is either silent about or which need to be changed. The Council's final discussion of the last changes to be considered to proposed articles of the new constitution is conducted in a respectful, almost solemn atmosphere, judging from the verbatim report, where certain differences emerge but are quickly solved or sidestepped.

One discussion about a relatively insignificant issue reveals the continuing division between different

groups of Council members. One group favors an approach where it is seen as a major objective in the design of the constitution to clearly and unambiguously direct government action. Another group is more inclined to see the constitution as setting the stage for further legislation expressing the spirit of the public will, giving the legislature better space to determine how to regulate the decisions of the government. The discussion concerns article 32 about cultural heritage which states that "Valuable national possessions pertaining to the Icelandic cultural heritage" can never be destroyed, given away, sold or pledged. As one Council member suggests a certain simplification of this formulation changing "may neither be destroyed nor surrendered for permanent possession or use, sold or pledged" into "may neither be destroyed nor surrendered for permanent possession, sold or pledged" (dropping permanent use), another one warns that this change might open the way for a government to allow someone to permanently keep such cultural assets without becoming their formal owner (Constitutional Council 2011c, p. 559, 561). Therefore, the slightly redundant formulation is kept, even if it seems plain that it would not preclude such arrangement simply under some other pretext. A tempting interpretation of the situation is to see this not as an agreement that the chosen formulation is better, but rather as an accommodation of a request in order to allow a harmless formulation to be retained in the text in order to keep the peace. A similar discussion emerges around natural resources, which I discuss below.

The friendly and cooperative spirit within the Council makes it possible for Council members to pursue different agendas and see the result of their work in different ways, allowing for multiple interpretations of the ensuing constitutional bill. Once the draft has been submitted and enters public discourse as a new and complete constitutional proposal it becomes clear that not only will there be different views about the merits and shortcomings of the constitutional bill, but also different understandings about what the bill really presents.

An interesting example of such a difference is a debate following remarks made by the president of Iceland in a speech held in parliament, opening a new legislative session shortly after the Constitutional Council submitted its bill. The president remains critical of the new constitution, but also provides his own reading which somewhat upset – or surprised – Council members who reacted in different ways to his remarks. The president claimed that the bill proposed greatly increased power of the presidency, thereby departing in an important way from the spirit of the 1944 constitution. One Council member immediately reacted to that in a radio interview arguing that the president was not reading the text correctly. Another Council member however contradicted his colleague, insisting that the president's remarks made perfect sense, endorsing his reading of the text. A third Council member used the opportunity to point out that controversies of this kind only illustrated the necessity of a public discussion about the proposal in which Council members would have a chance to publicly explain their work and their thinking. He did not see the obvious, namely, that if council members understood their work differently and would then pursue their

differences in public debates, that might somewhat undermine their joint work (see Ólafsson 2016, p. 256, 268).

As things developed however, only few Council members entered the public discussion about the bill, and the ones who did avoided contradicting each other about the meaning of the different parts of their constitutional bill. Among those Council members and their supporters who continued to criticize Parliament for its failure to formally complete its work on the constitutional bill a consensus emerged according to which the "New constitution" contained satisfactory solutions to many pressing issues, such as second and third generation rights, including rights of nature as well as the human right to clean and non-toxic environment, demands for an new democratic framework giving more space to citizen engagement and direct participation in policy- and decision-making. Last but not least, these constitutional activists believe that the Constitutional Council has so far produced the only acceptable version of a constitutional article on natural resources giving them the status of national property. I will next turn to the discussion of that issue (see Constitutional Society n.d., e.g. short videos on the "new constitution").

4. "We have a new constitution" – Why not incremental reform?

Natural resources have been in the center of the constitutional debate from the first attempts to initiate a reform process. Already in 2009, when a minority government proposed a constitutional bill to establish a Constituent Assembly, it included in that bill a substantive amendment on natural resources, according to which natural resources were to be considered "national property" (Icel. *þjóðareign*)– under governmental jurisdiction, not transferable to private ownership and subject only to temporary rental agreements. Such amendments had been proposed before. The earliest proposals aiming to secure sovereign or national ownership of natural resources were discussed in the Icelandic parliament already in 1963 (Þorsteinsdóttir 2020, p. 191-194).

In 2009 the concept of national property had become the preferred characterization, and the debated question was whether and how the Icelandic authorities should be restricted in licensing the use of natural resources. Even though the proposed amendment always refers to natural resources generally (characterizing the scope in different ways) the key issue in the constitutional debate in 2009 and later is fishing quotas. Since the early eighties Iceland has had a system of regulating the fishing industry using quotas to limit how much could be caught. The quotas can be bought and sold and are treated as private property. This had led to the rise of a few very wealthy quota owners with all but complete power over the industry (See Elster 2016, p. 191). It meant for example that many villages around the country no longer had access to their

traditional fishing grounds and could neither keep their own fishing boats nor run production units ashore if the catch could more profitably be brought elsewhere by fishing companies owning the quota. Supporters of this system argue that it works well to both maximize profits and prevent overfishing, critics point out the inequality the system has created, and how these profits mainly work to serve a few extremely powerful quota owners instead of benefiting Icelandic society in a more equitable way (Stefán Ólafsson 2016, p.62-63; Thorhallsson 2020, p. 178; Gylfason 2020a, p. 234).

Although a provision making natural resources – the fish – national property has overwhelming support among voters (the national referendum of 2012 and various surveys before and after the referendum show 80-90% support) it has not been possible to pass this constitutional amendment. In addition to the 2009 proposal, the Constitutional Council's draft and separate constitutional bills in 2016 and 2021 this proposal has not even come close to being voted on in the Parliament. That raises the crucial question: If a proposed constitutional amendment enjoys overwhelming support among voters, and should in principle be endorsed by a majority of MP's, most of whom also think that it is important, why is the corresponding constitutional amendment so difficult to accomplish?

Powerful interest groups in Iceland would not like to see a constitutional amendment that could weaken their position, seriously diminish their revenue or undermine their claim to quotas. It is not unlikely that such interest groups would campaign fiercely against plans to pass a constitutional amendment that would have such consequences. It has however never come to that. Instead, the political opposition to passing the amendment has been focused on a rather complex argument about its formulation, where it is seen as watered down and useless, if it fails to make the quota system unviable, even going into the semantic details about how a proposed article could ensure not only that the fish in the sea is characterized as national property but that the quota system also would become unconstitutional (see Árnason et al. 2021, p. 10; Héðinsson 2020, p. 16). At the same time an activist led opposition to incremental change, and a continued demand for a return to the Constitutional Council bill has undermined political consensus on a formulation even though the principle is widely supported.

The discussion centers around the question about how the principle that individuals or private legal entities cannot gain ownership or enjoy the benefits of indirect ownership over natural resources can be enforced. This would be the case for example if temporary exploitation rights would include the possibility of being able, through a pledge, to get loans or credits in return for a stake in expected benefits resulting from one's use of those rights (see Pálsson 2020, p. 17). The first proposed amendment in 2009 simply said that natural resources should be used in a way that most benefited the Icelandic people and could neither be sold or permanently given away. The Constitutional Council in 2011 in article 34 of its bill emphasized sustainable development and made clear that no rights of ownership or irrevocable control can be thereby

established, it also demands that "full payment" must be made for any temporary use of natural resources (Constitutional Council 2011, p. 14. See also p. 82-87).

The issue of the "full payment" continues to haunt later discussion of the amendment, together with the question of how the article could preclude permanent using rights and/or any pledging on behalf of a private entity to receive credits or benefits for the intended profits coming from the use of a rented natural resource. Thus, two later attempts to propose this amendment fail. The first one in 2016 was widely condemned by the constitutional activists as "a watered down" version of their proposal since it fails to instate the principle of full payment, but instead simply requires that permits be based on legislation ensuring transparency and equity, and "appropriate" payments (Icel. *eðlileg*) (Parliamentary document 1577, 2016). Earlier, when the parliament was still considering the Constitutional Council bill, other options were also discussed such as "fair" (Icel. *sanngjarn*). The activists also argued that the formulation did not preclude pledging or mortgaging of permits, which for them should be done explicitly in the constitutional text rather than ensured by law. The last attempt, a part of a bill proposed by the prime minister in 2021, simply said that fees and other conditions of use should be determined by legislation, which was of course received with even more distaste by activists (Parliamentary Document 787, 2021). In short, the dispute is about what the constitution should determine and what should be done via ordinary legislation (Árnason, et al. 2010).

The lengthy and pedantic discussion of what formulation of this proposed amendment truly reflected the interests of the Icelandic people is symptomatic of the spiraling dead end development of the constitutional revision process. Already in the Constitutional Council we can clearly see the insistence by some Council members that a formulation must be sought that either makes it required for the Parliament to legislate in particular ways or simply contains clear proscriptions which, in the understanding of these Council members, would be sufficient to make abuses impossible.

This prevailing distrust of government in the Constitutional Council is never discussed as such – at least the recorded evidence of the plenary meetings does not reveal any such fundamental discussion – and the Council members who harbor it do not meet much resistance when they caution other members about what they perceive as lapses in the text. This is another example of the lack of the discussion of fundamentals in the Constitutional Council's work. But the belief that a constitution must be equipped to deal with a corrupt government and therefore institute prohibitions and prescriptions that would make certain corrupt acts impossible is not only based on constitutional fundamentalism but also on a narrow interpretation of natural language meaning which ignores the possible pretexts that could be used to subvert this original intention, or interpretations that might have adverse consequences. It is for example possible that the full payment demand, meaning that the government would be constitutionally required always to accept only proposals

or tenders of those paying the highest price can under certain circumstances be counterproductive, for example if there is consensus that certain social or cultural reasons might exist for doing something different. The constitutional text is usually seen as more permanent and fundamental than ordinary legislation. It is therefore prudent to use legislation rather than constitutional text to deal with issues that may be subject to changes reflecting social and political developments in the society (Þorsteinsdóttir 2020, p. 203). But the activists see their new constitution as aiming higher, permanently outlawing what they see as abuses.

The fate of the amendment on natural resources is instructive for the whole constitutional revision process. Since constitutional change is consensus dependent, polarization does not have to increase much before the spoiler effect can be felt, even when alternative visions are far from gaining the necessary political support. Social media also makes it possible to enhance marginal views to seem mainstream, through low stakes mobilization that is as true politically as it is commercially (Is Digital Activism Effective? 2022; Cinelli et al., 2021). The constitutional activist movement had for example later great success in building up a Facebook group with thousands of women ostensibly endorsing a demand that the parliament return to the "new" constitution, followed by a petition to the same effect signed by more than 43 thousand individuals (O'Farrell & Oddsdóttir 2023, p. 1335). The leaders of that effort consistently presented their group as demanding a return to the Constitutional Council draft – the "new" constitution. It is unlikely that a maximalist demand was what everyone shared, but the leading activists controlled the message in a way that made efforts by the government or other political agents in Iceland to seek compromise solutions look suspicious and corrupt.

Consistent opposition from constitutional activists to other kinds of constitutional renewal than going back to the failed Constitutional Council draft, has therefore arguably been a major reason for the failure not only to pass a constitutional bill entirely replacing the current constitution but the failure to pass reforms that a big majority of voters recognizes as timely and important, such as the amendment on natural resources. Low stakes mobilization i.e. mobilization through minimal effort or commitment, such as liking or following a social media group or signing an online petition, can be an extremely powerful tool in a successful campaign even when the campaign is organized and led by a small and politically not very influential group of people. Liking however is not the same as acting or voting (Wurst, Pohl & Haßler 2023).

Political parties like to cherry pick issues and rarely engage with topics which may land them in an untenable position (Setälä 2021). Over a period of two parliamentary terms, constitutional activists enjoyed the support of the Icelandic Pirate Party, which gave their demands a face in the parliament by proposing repeatedly that the Constitutional Council draft would be reintroduced as a constitutional bill in the Parliament. The remnants of the Social democratic party Samfylkingin, which had been in decline after 2013 also pledged support for the new constitution. But such proposals were merely symbolic. Once Samfylkingin was rebuilt by a new

leadership it was declared that constitutional reform would not be a priority. The constitution should be revised incrementally but during the parliamentary term 2024–2028 only a new amendment on natural resources would be proposed (Platform 2024). The Pirates lost all their seats in 2024.

5. Conclusion

I have discussed two important aspects in the internationally well-known constitutional process in Iceland which started in 2010 but has not yet, at least not officially, been given up. These two aspects, how, on the one hand, the Constitutional Council chose to overcome differences and frame its constitutional revision, and, on the other, how the public discussion, on the other national ownership and licensing of natural resources became overly focused on semantic differences, demonstrate the pitfalls that can practically destroy a well meant and in many ways innovative approach to democratic participation process (Hudson 2021; Valtysson 2014). This may occur when processes are designed in such a way that instead of facilitating reachable reform and forging a political consensus, they enable movements with narrower agendas to dominate the political process.

My conclusion does not mean that activist movements should be blamed for their ability to wage successful campaigns. The failure in Iceland is a result of a decision by the parliament to give free reign to the Constitutional Council, thereby setting in motion a process through which a document was created that has been presented as the real – the "new" constitution of the republic – and which could be bolstered in social media campaigns. It would also be misleading to reject flatly claims made by the most visible constitutional activists, some of whom have also attempted to give their position a more analytic form in scholarly papers, who argue that constitutional failure is mainly the result of political corruption (Gylfason 2020a, 2020b). Nor do I not want to criticize or lament colorful symbolic campaigns such as converting the text of "the new constitution" into libretto for operetta style pieces or painting a slogan such as "Where is the new constitution" on walls and pavements all over Reykjavík. But politically speaking the result has been the stagnation of constitutional discourse and debate (O'Farrell & Oddsdóttir 2023; Nordic Culture Point 2021).

The wrong-headed start of the Constitutional Council is primarily a result of flawed planning on behalf of the Icelandic parliament which left the Council, and indeed the Icelandic population, under the impression that its constitutional bill would be processed in a serious manner taking into account both public support of the bill and public views about its content. The Icelandic parliament's majority failed in explaining the demise of the bill, which was never voted on, but put on hold shortly before parliamentary elections in 2013. Although opposition parties have symbolically revived the bill, its reintroduction has never been realistic.

How constitutional activism arose as a hesitant and embattled parliamentary majority in 2012 and 2013 grew less and less secure about the constitutional revision project is both understandable and instructive. Even though the Constitutional Council and its work did not arouse as much interest in Iceland as was the case abroad, the Icelandic public has remained largely supportive of the Council and its bill (Ólafsson 2020, p. 131). The opportunity to participate in debates, get in touch with council members directly and contribute ideas and proposals was also used by individuals and civil societies, and was perhaps the most successful and interesting part of the council's work.

In this paper I have addressed troublesome aspects of the Icelandic constitutional revision project which have not been discussed in a systematic way in previous scholarly discussion of the project, which has largely been positive, highlighting its innovative aspects. The examples I have discussed give an insight into how the political process may be negatively affected if organized public engagement is launched without clear instructions and a clear vision of what it should accomplish. Such failures serve to articulate the difference between unorganized public engagement in the political discussion and debate at each time – which should be free of interference – and organized policy-making processes where public engagement is invited for clearly defined tasks. When organized processes fail or are left unfinished they may become a larger problem themselves, than the problems they were created to solve.

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