DRAFT

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Introduction

What is the role of mass democracy in deliberative constitution-making? This question is both normative and empirical, and my research comprises a conversation between theory and practice.

Deliberative constitutionalism studies deliberation about, and under, constitutions. Until recently, the practice of deliberative constitution-making remained ahead of the theory. Beginning with Nicaragua and Brazil in the 1980s, countries across Latin America, Africa, Europe and the Middle East have sought public participation in constitutional change and reform (Landemore 2020, 179-180). A number of these processes, including in Brazil (1988) and Ireland (2012 and 2016), have achieved high quality, consequential deliberation among citizens (Welp and Soto 2019, 33-35). Empirical evidence suggests that meaningful public participation, in particular at the drafting stage, helps to create enduring democratic rights and institutions (Eisenstadt, LeVan, and Maboudi 2015, 593-594). Today, citizens' right to participate in constitution-making is well-established as an international norm (Landemore 2020, 179).

Alongside this evolving practice, theorists have established strong normative grounds for why informal deliberation in the public sphere should be reflected in formal political decision-making, not least Habermas' discourse theory of law and democracy (1996). A commitment to place the public sphere at the centre of democratic process is also reflected in Chambers' account of deliberative constitution-making as a kind of "public conversation" (2018, 257). The theoretical

perspective of deliberative constitutionalism pulls focus away from founding moments, institutions, and documents, towards an ongoing discursive process that takes place in multiple sites across the polity.

Articulating how this normative vision can be realised in practice is an ongoing challenge. Scholars and state actors have often turned to institutional innovations, such as deliberative polling and mini-publics. Yet these small-scale mechanisms are no silver bullet, with the literature pointing to both practical and theoretical limitations. Talpin, for instance, warns that widely accepted procedural elements can be used instrumentally, as when the random selection of mini-public participants is used to exclude civil society actors (2015). Lafont's critique goes further, arguing that small-scale deliberative institutions undercut self-government (2020). Mini-publics may be representative of the public at large, but because deliberation shifts participants' preferences, their judgements rarely reflect actual public opinion. For this reason, the more we rely on mini-publics and other small-scale institutions to inform political decisions, the less the actual public is able to "identify with the policies to which they are subject and endorse them as their own" (Lafont 2020, 162). These critics show us the limitations of such institutions as conduits between the public and decision-makers. They encourage us to keep searching for constitution-making practices that tap more directly into the public sphere.

In line with these critics, this research aims to help turn deliberative constitutionalism towards mass democracy. I use the term mass democracy to refer to ways of doing democracy that are accessible to ordinary people: from casual conversations to public performance; from street art to soup kitchens; and from political organising to spontaneous protest. How does this informal deliberation in the public sphere shape constitutions? This stance already has a strong normative footing in deliberative theory, but there is work to do in articulating how it can be achieved in practice. This research will contribute to this work, observing how recent

constitution-making processes in Chile and Iceland play out in extra-institutional spaces, in order to learn more about the possibilities for mass democracy in deliberative constitution-making.

The methodology for this research combines normative theory and case study. This approach can be described as abductive—trying to make sense of things by "moving iteratively between theoretical assumptions and empirical observations"(Hendriks, Ercan, and Boswell 2020, 32). I understand this as a kind of conversation between theory and practice, allowing insights from each to illuminate the other.

Chile and Iceland have been selected as case studies because they share three key features. Firstly, constitution-making has arisen from moments of deep political crisis, defined by mass protests, with social movements becoming key drivers of constitutional change. Secondly, the constituent process has adopted participatory mechanisms to allow citizens a say in shaping the new text. And thirdly, both efforts have faltered—to date, neither Iceland nor Chile has ratified a new constitution. Together, these cases raise long-standing questions about the relationship between law-making and democracy—realistically, how can all subjects be authors of the law?

I will employ semi-structured interviews to help understand constitution-making from the perspective of citizens in both Iceland and Chile. I am seeking to interview people who have participated in constitution-making through informal means—through talk or action in extra-institutional spaces including social movements, civil society groups, artistic practice, and sui generis spaces such as cabildos (grassroots neighbourhood assemblies) in Chile, and saumaklúbbur (social sewing clubs), in Iceland.

A constitutional history of Iceland

The Blue Hand

On an overcast day in October 2022, a poet and a lawyer arrive on the lawns of the Prime Ministers' Office in downtown Reykjavík. They approach a statue of King Kristian IX of Denmark, who holds a sheath of paper in his outstretched right hand — the Icelandic constitution. Working quickly, the lawyer, Ósk Elfarsdóttir, takes a paint roller on a long pole and reaches up to cover the King's hand in blue paint. Meanwhile, the poet, Hallgrímur Helgason, recites a few short lines to passersby:

Ísland þolir enga bið,	(Iceland cannot stand waiting,
eftir að bresti klíkuböndin.	after breaking the gang ties.
Þótt ríkisstjórnir hér staldri við,	Though governments were stopped,
þá stjórnar enn þá Bláa höndin	the Blue Hand still rules.)

This understated scene of civil disobedience has a lot to say about the constitutional history of Iceland. It touches on Iceland's colonial past and democratic present, on the constitutional standoff between a recalcitrant parliament and a radicalised civil society, and the tight grip of Iceland's elite on politics and public life. In this chapter, I aim to help the reader decode these layered meanings.

The Icelandic Commonwealth

Long before Iceland became a Danish colony, it was a Norse settlement on the margins of Europe. Traceable human settlement dates back to around 870 AD, when people arrived by boat from Norway and from Viking colonies in the British Isles

(Karlsson 2020, 13-22). The settlers became farmers and, with few exceptions, remained so for a millennia (Lárusson 2014, 92).

The society that grew from this remote settlement was distinct from medieval Europe in having no monarch or central authority — a stateless society (Karlsson 2020, 13). Instead, the settler-farmers established a regular assembly, the al-þing (Althing). For two weeks each summer, free men from all over the island gathered at Þingvellir, in the southwest, to share news, decide cases, and make law (Karlsson 2020, 29). In English, this period is usually called the Icelandic Commonwealth, although in Icelandic, it is known as þjóðveldi*,* literally*,* 'people power' (Hall 2020, 218).

The Icelandic Commonwealth has been mythologised by both democratic and libertarian thinkers. In the absence of a monarch, power was decentralised and somewhat fluid. Seats in the Althing were held by goðar (chieftains), who provided protection to the households within their goðorð (chieftaincy). By law, the head of each household was free to switch allegiances among goðar, leading some scholars to enthusiastically describe medieval Iceland as a democracy (Karlsson 1974). It is worth noting, however, that the majority of the population, including women, slaves, and men without property, had little agency in this system (Karlsson 2020, 34).

Another quasi-democratic feature of the Icelandic Commonwealth was the Althing, sometimes lauded as the world's oldest parliament (Hálfdanarson and Rastrick 2006, 88). It is true that the assembly has existed in some form since 930 AD. However, historian Gunnar Karlsson points out that when the al-þing first convened, the nascent settlement could hardly have been considered a nation (Karlsson 2020, 64). Moreover, a goðorð—and therefore, a seat in the Althing—was usually inherited, and could even be sold or gifted (Karlsson 2020, 33), which goes some way to explaining libertarian interest in the system.

Libertarian interest in the Icelandic Commonwealth has focussed on both commodification of power and private enforcement of the law. David Friedman first pursued these ideas, writing that medieval Icelandic institutions "might almost have been invented by a mad economist to test the lengths to which market systems could supplant government in its most fundamental functions" (1979, 400). The laws of the Althing were codified in Gràgàs (Greylag), a constitution notable for the absence of executive power. Legislative powers were vested in the Lögrétta (Law Council), with judicial powers granted to five courts (Karlsson 2020, 30-32). All crimes were tried as civil offences, and it was up to the wronged party to try to enforce any penalty. If they lacked the power to do so, they had the option of turning this right over to someone more powerful—perhaps a goði (chieftain)—and hoping for a reward (Karlsson 2020, 32). From the saga literature of this time, we can surmise that this arrangement usually favoured the more powerful party (Karlsson 2020, 32).

Foreign rule

The Iceland Commonwealth came to an end in the thirteenth century, when Norway exploited power struggles among the goðar and the Christian clergy to annex the island. In 1262, the Althing signed the Gamli sáttmáli (Old Treaty), designating Iceland a tributary of the Norwegian Crown (Karlsson 2020, 82-92). By 1380, Denmark had supplanted Norway as the occupying power. It would take more than 500 years for Iceland to regain full independence.

Throughout seven centuries of foreign rule, Icelanders strove to maintain self-government in two key respects. Firstly, by insisting on native officials. This began as early as 1302, when the Althing swore allegiance to the King on the condition that only Icelanders—specifically from families that had surrendered goðorð—would serve as law-men and sheriffs (Karlsson 2020, 89). This remained the policy

throughout the colonial period, with Iceland administered largely by Icelanders themselves (Karlsson 2020, 89). A degree of self-rule was also exercised through the legislative powers of the Althing, which continued to make law until the late seventeenth-century, when Denmark became an absolute monarchy.

Independence

In the nineteenth-century, Icelanders' latent nationalism crystallised into a struggle for independence. Karlsson describes this century-long campaign as "a double process of state formation and democratisation", spurred on by the resurrection of the Althing as a representative body in 1843 (2020, 238).

Electoral participation in this fledgling democracy was minimal—the franchise was heavily restricted, and among those who could vote, few actually bothered (Karlsson 2020, 238). Nonetheless, political participation was thriving in two key respects. Firstly, many Icelanders were involved in policy discussions, which were hashed out at public meetings. Participants developed a custom of drawing up a petition to the Althing, to be signed by all attendees—enfranchised or not. Eventually, this evolved into þingmálafundur (pre-parliamentary meetings), which were held in each constituency prior to each session of the Althing, giving ordinary Icelanders a degree of influence over the national agenda (Karlsson 2020, 240). Another important step in the democratisation process was the formation of free associations, which began to proliferate in the nineteenth century. Societies of all stripes became "the dominant way of addressing a problem" (Karlsson 2020, 242).

The independence struggle was fought (and won) "with legal arguments rather than arms" (Bergmann 2014, 6). One of the movement's most effective tools was the creation of a national myth, which linked the spirit of modern Iceland to the 'golden age' of the Icelandic Commonwealth (Hálfdanarson and Rastrick 2006, 88). Among

Icelanders, the idea that life had deteriorated since the early period of settlement had been prominent since at least the sixteenth-century (Karlsson 2020, 173). During the independence struggle, this theory was expanded, as nationalists reimagined the Commonwealth as a time of peace, prosperity and cultural genius, connecting its demise with the loss of national sovereignty in the thirteenth-century (Karlsson 2020, 173). For the nationalists, restoring the nation's former glory rested on reclaiming its independence (Bergmann 2014, 6).

Iceland received its first constitution in 1874—becoming, in effect, a constitutional monarchy. Home rule followed in 1904, and sovereignty in 1918. With Denmark under Nazi occupation during the Second World War, Iceland unilaterally declared full independence in 1944.

The struggle for independence did not end with the foundation of the republic. Although Iceland has grown more populous and immeasurably wealthier since the nineteenth century, it remains an micro-state on the periphery of Europe. The threat—both real and imagined—of foreign influence or incursion, has kept sovereignty at the heart of national identity and political discourse, giving rise to a "never-ending independence struggle" (Bergmann 2014, 7).

In this context, it seems surprising that Iceland's extant constitution was received as a 'gift' from the Danish Crown in 1874. Even at the time, this document was considered a necessary compromise. The Althing had hoped to ratify its own, far more radical draft, which would certainly have been rejected by Denmark. Instead, they settled on a pragmatic solution—to ask the King for a constitution as a birthday present, marking the millennial celebration of Iceland's first settlement (Karlsson 2020, 204). The constitution presented on this occasion by Christian IX established basic human rights, including religious rights, freedom of speech and association, as well as property rights (Karlsson 2020, 241). A commemorative bronze statue—the

one we are familiar with from the scene above—was completed in 1907, but its installation was delayed a full 7 years by Icelandic nationalists, who felt it sent the wrong message at a time when they continued to push for independence from Denmark.

Constitutional reform has been on the agenda from the beginning. In 1944, the nations' founding fathers announced that a complete revision was imminent (Bergmann 2016, 18-19). However, with the Althing unable to agree on a reform agenda, and the only change made at this time was to replace the role of the King with a popularly elected President. Four years later, Iceland's first President, Sveinn Björnsson reminded the Althing of their outstanding task, saying "… we still have a mended garment, originally made for another country, with other concerns, a hundred years ago" (Gylfason 2016, 5). Despite an appetite for reform among Icelanders at large, intense politicisation barred all but minor changes to the constitution throughout the twentieth century (Bergmann 2016, 19).

Hrun (Collapse)

The catalyst for Iceland's most recent attempt at constitutional change came with the financial crash of 2008. In October that year, the country's three largest banks collapsed, taking much of the economy with them. The ensuing crisis—which reached far beyond the financial system—has become known in Iceland as the hrun (collapse) (Hall 2020, 24).

The financial fallout from the Collapse was considerable. The Icelandic krona plummeted and inflation soared (Bergmann 2016, 15). Following the major banks, many smaller corporations also fell—by some estimates, as many as half went technically bankrupt (Ómarsdóttir and Valgarðsson 2020, 845). The impact on individual citizens was severe. On the advice of the banks, many Icelanders held

mortgages in foreign currencies. As these debts ballooned, 40% of households fell in arrears on their mortgage payments (Hall 2020, 25). Unemployment, which had been historically non-existent, rose to 9 per cent (Bergmann 2016, 15).

With hindsight, the financial collapse appears neither surprising, nor catastrophic. The banks' assets proved sufficient to repay a large part of their debts (Hall 2020, 25). Meanwhile, the weak currency helped buoy the export market, and government spending was geared to help ride out the recession, which was over by 2011 (Hall 2020, 25). Yet the Collapse was experienced by many Icelanders as an existential crisis. This was in part due to real uncertainty about the capacity of households, and the economy at large, to recover. It was also because the Collapse challenged dominant narratives around national identity (Hall 2020, 35).

Prior to 2008, Iceland's economy expanded dramatically, fuelled by a rapacious financial sector. The success of the nation's bankers and international entrepreneurs gave rise to a class of celebrity financier. For a time, these útrásarvíkingar, or 'Viking Capitalists', were celebrated as "adventurers whose gains, in the popular imagination, corresponded to the high risks they took, and who disrupted Continental hierarchies from their relatively flat peripheral societies" (Hall 2020, 221). In 2005, President Ólafur Ragnar Grímsson gave a speech in which he drew a direct line from the ninth-century Viking settlers to these latter-day financial raiders, who he claimed were endowed with the national spirit (Bergmann 2014, 11). Of course, in the aftermath of the crash, this came to seem comically arrogant, and the language quickly shifted. The financiers were now fjáraflakóngar (finance-kings), auðjöfrar (wealth-princes) and lánardrottnar (loan lords)—individuals whose quasi-feudal dominance had betrayed the prized independence of autonomous Iceland (Hall 2020, 218-221).

The dramatic rise and fall of the útrásarvíkingar perhaps obscures the real nature of elite power in Iceland. Long before the banking boom, the fishing industry helped to transform Iceland from a poor, peasant society into a wealthy capitalist state.

[Cod Wars]

By the 1980s, overfishing was causing fish stocks to decline. A solution was found in the Individual Transferable Quota system, which granted fishing rights—in perpetuity—to the owners of vessels that had recently been fishing in Icelandic waters. By design, the quota system transformed the right to harvest fish from a common good into something that could be bought, sold, and inherited like private property. Massive profits soon accrued to a small number of families, who were " were basically able to call the shots in Icelandic politics" from then on (Gylfason 2016, 6-7).

The arms of the industrial oligarchy in Iceland, colloquially known as "The Octopus", extend to other major industries, including imports, petrol, shipping and insurance. Historically, they have also had strong ties to the conservative Independence Party—the dominant force in Icelandic politics throughout the twentieth century (Belfrage, Bergmann, and Berry 2015, 13).

[Neoliberalism]

Búsáhaldabyltingin (Pots and Pans Revolution)

Parallel to the financial crash, a political crisis was unfolding. As it became clear that a combination of nepotism and incompetence—both in government and the banking sector—had led to the Collapse, trust in public institutions plummeted (Ómarsdóttir and Valgarðsson 2020, 845). Ólafsson describes a "double reversal of

trust," as citizens turned away from institutions, and towards each other (2019, 119). The result was "a collapse—at least temporarily— of the political order"(Ólafsson 2019, 119).

The most obvious expression of public fury were frequent protests on Austurvöllur Square, in front of the Althing (Gylfason 2016, 2-3). Between October 2008 and January 2009, some 33,200 to 43,800 people gathered there, banging on pots and pans to demand "the resignation of the government, the directors of the Central Bank, and the Financial Supervisory Authority" (Ómarsdóttir and Valgarðsson 2020, 845) (Heffernan 2020, 243). Other demands soon began to formulate, including "for a stronger democracy, political accountability, transparency in government, social rights, collective ownership of natural resources and a new constitution that would enshrine these demands" (Ómarsdóttir and Valgarðsson 2020, 845).The so-called búsáhaldabyltingin (Pots and Pans Revolution) reached a crescendo in January 2009, when the protests intensified into daily demonstrations with thousands of participants. As the National Choir sang patriotic songs on the front steps of parliament, the Vice-Chief of police, "in full gear, a good singer," joined in (Gylfason 2016, 2-3). In February, the government at last stepped down (Bergmann 2016, 16).

General elections were held in April 2009. During the campaign, every major party, except the incumbent Independence Party, pledged to deliver constitutional change (Ómarsdóttir and Valgarðsson 2020, 846). Public anger at the incumbents swept a left-wing coalition to power. The new government inevitably faced a profoundly difficult set of challenges in responding to citizens' demands for reform, while bailing out the economy. An IMF rescue package was negotiated, forcing austerity measures. "On top of all of this, Iceland entered one of the fiercest and most dramatic international conflicts in its history in the form of the Icesave dispute with the UK and Netherlands, while the government also attempted to overturn the fishing quota system, launched a controversial application for membership of the

European Union, and initiated a process for revising or rewriting the country's constitution" (Ómarsdóttir and Valgarðsson 2020, 842).

The action was no less intense in the public sphere, where civil society began to articulate demands for democratic reform. As had happened during the Independence struggle, new associations proliferated, exploring various paths out of the crisis (Bergmann 2016, 16). Vigorous public debate also played out on blogs, social media and in ostensibly apolitical spaces such as sewing clubs (Bergmann 2016, 16) (Jerrett 2015). The tenor of the discourse was systemic reform: the establishment of Iceland's Second Republic, a 'New Iceland' or even 'Iceland 2.0' (Bergmann 2016, 16). More participatory governance was seen by many to be a necessary step in rebuilding public trust in institutions, and protecting those institutions from the power of vested interests (Ólafsson 2019, 123).

Curious echoes from the post-independence era emerged. Among them the renewed popularity of the lopapeysa, a kind of hand-knitted jumper made from home-spun wool. Although this quasi-traditional item was popular in the new republic, for decades it had been a souvenir commodity sold to tourists. Following the Collapse, a wave of nostalgia returned lopapeysur as a symbol of the authentic Icelandic people—connected to and united by their self-sufficient farming roots (Donlan 2016, 16-17). Homegrown and traditional foods underwent a similar revival (Gianotti and Mathiesen 2014, 85). It is interesting to note how these resurgent practices may connect to a paradigm shift in national identity, in which "nature is replacing culture as the predominant symbol of the Icelandic" (Hálfdanarson and Rastrick 2006, 97).

Another key shift following the Collapse was the discourse on gender. In opposition to the hyper-masculine culture of the útrásarvíkingar, symbols of the feminine proliferated, from the lopapeysur to the eponymous kitchenware of the

Pots and Pans Revolution. Another such symbol is the Fjallkonan (Lady of the Mountain), and image which first materialised in the eighteenth century, representing 'Iceland as mother', in opposition of course, to the Danish King (Donlan 2016, 42-43). The essentialism of this discourse notwithstanding, it has been accompanied by real gains in gender equity. In 2009, Jóhanna Sigurðardóttir became Iceland's first female prime minister – and the first openly gay world leader. Since then, successive governments from across the political spectrum, have passed laws to mandate equal-pay certification and a gender quota for company boards, to extend parental leave, to expand access to abortion, and to protect transgender rights (Erlingsdóttir 2021, 91).

The renewal of the political and public spheres was not comprehensive. Even as a 'new critical order' emerged, key figures from the old order maintained their influence (Bergmann 2016, 17). Among them was David Oddsson, former Prime Minister (1991-2004) turned governor of the Central Bank. Having stepped down from the Central Bank, Oddsson was soon appointed editor by the owners of Iceland's daily broadsheet, Morgunblaðið (Gylfason 2016, 4). Oddsson is a divisive figure in Iceland—a charismatic, conservative leader, who presided over much of the deregulation that preceded the Collapse. He also appears to have inspired the slang term, Bláa höndin (the Blue Hand). Blue being the colour of the Independence Party, and hand being a reference to both the party's neoliberal fervour (i.e. Smith's invisible hand) and Oddsson's capacity to take revenge on those who crossed him.

Among the post-Collapse civil society initiatives was Mauraþúfan (the Anthill). In 2009, this grassroots group organised the National Forum, a one-day event that brought together 300 representatives from civil society and 1200 citizens randomly selected from the National Population Register (Bergmann 2021, 1-2). Participants discussed the values and priorities that should guide the reform of government and

the public service. The event received national press coverage, and an enthusiastic response in the public sphere (Landemore 2015, 169).

Constituent process

In June the following year, the Althing formally initiated a constituent process. A seven-member Constitutional Committee was appointed, which then recruited the Anthill to organise a second National Forum. This institutional iteration of the event brought together 950 citizens, selected through stratified random sampling (Landemore 2015, 178). Their task was to establish "the principal viewpoints and points of emphasis of the public concerning the organization of the country's government and its constitution" (Landemore 2015, 169). Ólafsson is critical of this remit, which he argues was "based on the belief that Icelandic society, since it is small and relatively homogeneous, could express values that were not only common but also comprehensive" (2016, 263). The findings of the National Forum 2010 stressed the protection of human rights; safeguarding of Iceland's sovereignty and language; preferential voting; and the public ownership of national resources (Bergmann 2016, 20-21).

The next phase in the constituent process was a national election for a 25-member Constitutional Assembly. Incredibly, 522 candidates stood for election, with each collecting signatures from at least 30 supporters. This means that close to 5 per cent of the population signed on to support one of the candidates (Bergmann 2016, 21). Nevertheless, an extraordinary election with an unprecedented number of candidates proved too much for the national press, which provided just a quarter of the normal coverage for a periodically fixed election—coverage of the individual candidates and their platforms was often non-existent (Bergmann 2016, 21-22). Come election day, only 37 per cent of voters participated. Bergmann posits that the

low turn-out damaged the legitimacy of the Constitutional Assembly (Bergmann 2016, 22).

A more serious blow to the legitimacy of the process occurred when opponents of the process, linked to the Independence Party, launched a legal challenge which claimed electoral irregularities. In a controversial ruling, the Supreme Court upheld the challenge and invalidated the election on technical grounds. Instead of calling another election, the Althing chose to simply appoint the successful candidates to a Constitutional Council, which would perform essentially the same task as the Assembly (Bergmann 2016, 23). Only one of the successful candidates refused; a substitute was appointed in her place and the process continued (Bergmann 2016, 23).

The Constitutional Council responded to this highly politicised atmosphere by distancing itself from institutional politics, including the Althing and political parties. Further, the members of the Council prioritised consensus, hoping that internal solidarity could fend off outside opposition (Bergmann 2016, 25). Although these strategies were somewhat successful in reassuring the public, they had the unintended consequence of alienating the political elite from the process (Bergmann 2016, 27).

The Constitutional Council went to great lengths to involve the public in the drafting. According to Eiríkur Bergman, a Professor of Politics at Bifrost University of Iceland, and former member of the Council, the members believed that inviting the public to participate might help the Council regain public trust amid the intense politicisation of the process (2016, 24). To this end, interactive website was launched, allowing Icelanders to follow the progress of Council meetings, read working documents and submit feedback—either via the website, social media, or traditional post (Gylfason 2016, 9).

The iterative process by which the Council developed their draft has garnered a lot of attention, at least among the pundits and scholars who followed the process. From the beginning, the Council work in an 'agile' fashion, with three committees working separately on different parts of the document and presenting their draft proposals at a weekly plenary session. After taking comments from the Council and written input from the public, the committees worked to revise their proposals. All up, the Council produced 12 separate drafts, and received several thousand comments. The subsequent document has even been called a "crowdsourced" constitution (Landemore 2015, 175). Bergmann, however, warns that this was "never a realistic description of the drafting process" (Bergmann 2021, 3). The Council were, in effect, making it up as they went along, and neither the time, nor resources needed to work through public input systematically were available. Furthermore, there was no obligation on members to take public input into account, and some Council members did not actually read any of it (Bergmann 2021, 3).

After just four months, the Council members unanimously approved their completed draft constitution (Gylfason 2016, 9). The coalition government spent the next year shepherding it through parliamentary procedures before an advisory referendum was finally announced, for 20 October 2012 (Bergmann 2016, 27). The ballot asked voters whether the Constitutional Council draft should be the basis of a new constitution for Iceland. A further five questions addressed some of the most controversial articles, including: public ownership of natural resources; increased use of referendums; increased personal voting; equal weighting of votes; and disestablishing the state church. Around half of the electorate participated in the referendum, with 66.3% approving the draft as the basis of a new constitution (Bergmann 2016, 27).

Despite this emphatic referendum result, the constituent process has not progressed. Running out of time ahead of general elections in April 2013, the government delegated the decision on a bill for a new constitution to the next Parliament (Bergmann 2016, 27). The April elections saw the return of the Independence Party to a coalition government, which shelved the Constitutional Council's draft and appointed its own highly partisan constitutional committee (Bergmann 2016, 28).

Hvar er nýja stjórnarskráin (Where is the new constitution?)

In a formal sense, the attempt at constitutional change initiated by the Althing in 2010 was dead in the water by 2013, when the newly elected parliament chose to ignore the referendum result. Since then, various institutional attempts to review, revise or otherwise revive the process have led nowhere. Yet it is impossible to say that the constituent process has closed. There is still strong public support for a new constitution, and there is an ongoing grassroots campaign to ratify the Constitutional Council's draft text.

The story of how this draft text began its second life in the public sphere begins in 2016. When the Panama Papers were dropped, it came to light that that a number of Icelandic politicians—including the Prime Minister—held significant, undeclared offshore assets (Heffernan 2020, 237). As they had in 2008, protesters flooded Austurvöllur Square, calling on the government to step down, and for the new constitution to be ratified (Heffernan 2020, 237). While they were successful only on the former demand, the episode served as a reminder that the constitution was unfinished business, rekindling public interest.

With time, the campaign for constitutional change has become more organised. Activists have organised "open discussions, publications, street art projects, digital

activism, civil disobedience, rallies and protests, as well as online campaigns" (O'Farrell and Oddsdóttir 2023, 3). Much of the organising is connected to newly established civil society groups, such as the Icelandic Constitutional Society and the Association of Women for the New Constitution (AWNC).

One of the movement's most significant efforts came in 2020, when the AWNC launched an online petition calling for the new constitution to be ratified. The slogan for their campaign was 'Hvar er nýja stjórnarskráin' (Where is the new constitution?), a question that activists spray painted all over downtown Reykjavík (O'Farrell and Oddsdóttir 2023, 8). When the municipal council began to clean these messages away, the activists posted templates for the stencil online, leading to the message being found in towns across Iceland. (O'Farrell and Oddsdóttir 2023, 9). Further scandals involving the fishing industry helped the petition gain traction. By the time it closed in October 2020, more than 43,000 citizens had signed, representing 17 percent of all voters. The largest group of signatories were those born after 1987—in other words, young Icelanders, many of whom were too young to vote in 2012 (O'Farrell and Oddsdóttir 2023, 10-11).

[In Search of Magic — A Proposal for a New Constitution for the Republic of Iceland]

Here, we can return to the scene of The Blue Hand, which succinctly captures where things stand today. King Cristian IX's constitution remains in place. Against the popular will, political elites continue to evade constitutional change, and vested interests maintain a hold over the political, economic and public spheres. Within civil society, the Constitutional Council's draft has retained, even gained legitimacy over the years. A small number of groups continue to keep the issue alive in the public imagination, and on the political agenda. Most Icelanders support constitutional change, but they are, for the most part, getting on with their lives.

The shadow constitution

Today, more than fifteen years have passed since the Collapse, and more than a decade since the constitutional referendum. The new constitution is politically dead, but it is thriving in the public sphere. How does deliberative constitutional theory help make sense of this?

In classical liberal constitutional theory, there is a tension between the will of the people on the one hand, and individual's pre-existing rights and freedoms on the other. Deliberative constitutionalism collapses this dichotomy. Habermas' discourse ethics deny the primacy of human rights—the only legitimate norms are those arrived at through egalitarian discourse (1996). For Habermas, human rights and popular sovereignty are *co-original*, because certain rights are necessary to realise egalitarian discourse in the first place (1994, 2).

Taking Habermas' co-originality thesis as a starting point, Chambers puts forward a conception of deliberative constitution-making as an iterative process rather than a bounded project. It is less concerned with founding moments and documents than with a kind of public conversation that is "both about constitutional principles and is governed by those principles" (2018, 257).

> *…the only plausible justification of the rights and freedoms enshrined in a constitution is that they are the outcome of a popular discursive process; popular discursive processes only have the power to justify constitutions if they are undertaken under conditions that respect the rights and freedoms of participants, that is, under constitutions. (Chambers 2018, 258)*

In Chambers' terms, this circularity calls for a kind of 'bootstrapping', where constitutional norms are crafted according to prevailing conditions. Ideally, each constitutional reform would help to create more egalitarian discursive conditions that in turn create new opportunities for constitution-making. We can see that deliberative constitutionalism shifts focus away from the empowered spaces of the courts, the executive, and the legislature, and towards the public sphere, where the public conversation plays out.

Another implication of this theory is that it introduces a second, shadow constitution, comprised of social, rather than legal norms. This is because constitution-making happens first and foremost in the demos, where the kinds of rights and freedoms realised among citizens can differ from those enshrined in the law and upheld by institutions. If this is the case, we should expect to find constitutional norms taking root in the public sphere, from the bottom up.

The idea that constitutions can be influenced by informal power is also found in Reva Siegel's work on "constitutional culture" (Siegel 2006). Siegel argues that our "conventional explanations depict constitutional change as resulting either from lawmaking that amends the Constitution's text or from judicial interpretation of the existing text", but she points out that the interactions of citizens and officials, also play an important role in determining the meaning of the constitution, and therefore how it is enacted (Siegel 2006, 1340). Siegel cites the feminist movement's efforts in the United States to secure an Equal Rights Amendment (ERA). The reform failed because of counter mobilisation, and yet the campaign was successful in changing the constitutional culture such that the Supreme Court began to interpret the Fourteenth Amendment in ways that helped achieve the movements' goals, leading to a 'defacto ERA'. "Justice Ruth Bader Ginsburg observed: 'There is no practical difference between what has evolved and the ERA.'" (Siegel 2006, 1334).

Where Siegel is focused on constitutional interpretation within empowered spaces— or how the actual text of the constitution is enacted by the courts — we are concerned with constitution-making in the public sphere. The shadow constitution argues that new constitutional norms can take hold informally and can shape politics in ways that we expect of a written constitution.

[Constitutional conventions, shadow policy and discursive institutionalism]

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