

“What is a good constitution? Assessing the constitutional proposal in the Icelandic experiment”¹

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Between 2010 and 2013 Iceland engaged in an unprecedented experiment in peacetime constitutional redrafting. The process included innovative participatory methods, including a National Forum, an elected Constitutional Assembly of non-professional politicians, and the well-known use of online crowdsourcing for twelve successive drafts of the constitutional proposal (which earned the latter its international, and perhaps overhyped, reputation as the “crowdsourced constitution”). Begun in the aftermath of a cataclysmic banking and financial crisis, which was estimated to have destroyed assets equivalent at the time to seven times the country’s annual GDP, and spurred on by the new political personnel that came to power after the “Pots-and-Pans” revolution of 2008, the constitutional process ultimately led to a proposal that was approved by a two-third majority of the voters in the fall of 2012. After further amendments by legal experts, the proposal was offered to Althingi (the Icelandic Parliament) as a bill to be discussed and voted on in the spring of 2013. To many commentators’ surprise, however, the bill was shelved at the eleventh hour for reasons that seem more political than substantive (Gylfason 2013b). The crowdsourced constitutional proposal is now considered dead by its opponents and “on ice” by its advocates (Gylfason 2013 and 2014). It is unclear at this point whether it still stands a chance to be adopted as such in the near future.

The question that interests us here, however, is whether the crowdsourced proposal meant to replace the 1944 constitution was a good constitution – not merely in the sense of having been produced by the right kind of process but in a thicker, more substantive sense, which is entirely independent of the process that led to it. Previous work on the Icelandic experiment has focused on procedural aspects of the constitutional process. For example, in past work I argued that the Icelandic constitutional process

aimed to be inclusive of the full diversity of the Icelandic people's views and to the extent that it succeeded, could be expected to have produced a substantively sound constitution, that is, a constitution tracking relevant facts and values of the Icelandic people in the twenty-first century and channeling its collective wisdom (Landemore 2015). The constitutional proposal could be expected to be good, in other words, in the sense of meeting objective (though not necessarily universal) standards of quality. Such work, however, said nothing about the actual substance of the constitutional document itself, focusing instead on the properties of the procedure. What interests us here is the possibility of testing the claim that the Icelandic constitutional proposal was a good constitution, not just the result of a good procedure (since even good processes, after all, sometimes produce poor results).

A difficulty in performing this substantive assessment is that a constitutional proposal that has not become law does not lend itself to empirical validation or testing. It is thus impossible to say whether this constitutional proposal would have succeeded in its implementation and in terms of the governance outcomes it would have generated on the short, mid, and long term (although one can probably speculate about plausible outcomes). By the kind of external standard recommended by Ginsburg and Huq (Chapter 1), in which a first condition of success is existence, it is simply the case that the old 1944 constitution has proved more "successful" than the crowdsourced one, which was supposed to replace it.

My question here shall thus be a different one, and one that is to some extent orthogonal to the other contributions to this volume. It is not: Was the crowdsourced constitution successful? But: As a constitutional text, is it any good? In other words, does

the crowdsourced constitution have properties that make it deserving of being implemented – to become an actual constitution that is – including perhaps because it is likely to be successful? Another question is comparative: Is it “better” in any meaningful sense than the existing constitution? Is it better than rival constitutional drafts that were written at roughly the same time?

A reason to focus on this particular constitutional proposal in this particular country, as opposed to any other constitutional proposal in any other country, is partly access (I advantages, including crucially the fact that several quasi simultaneous, fully developed, and non-rushed draft proposals are available for comparison.²

Two of those drafts were written by experts roughly at the same time as the crowdsourced constitution and were meant to serve as the original blueprints for the latter. This convenient fact renders the assessment of the crowdsourced constitution more feasible, in that it sets a realistic benchmark of what was feasible at the time, as opposed to the too low bar of the now undeniably dated 1944 constitution and the too high bar of a “perfect” constitution with no detectable flaws whatsoever.

Was the crowdsourced constitution substantially any good? The fact that the crowdsourced proposal was approved in a 2012 referendum would seem to speak to its strengths. Conversely, the fact that the Icelandic Parliament ultimately shelved it would seem to speak to its weaknesses.³ In order to answer the question with some rigor, we

² Other examples of constitutional drafts that it would be interesting to compare in similar fashion are the Girondin proposal drawn up by the marquis de Condorcet as an alternative to the Jacobin one of 1793 and Siéyès’ proposal for 1799 that Napoléon radically altered and then adopted. Thank you to Joshua Braver for this point.

³ Unless Gylfason (2013b and 2014) is right and the failure of the constitution is simply a coup of the politicians, which is highly plausible from his account. But I want to bracket this possibility for now.

need to determine the standards by which a constitution could be said to be “good.”

Section 1 turns to this normative task. Section 2 then introduces the various candidates for assessment in the Icelandic case. As it turns out there were there are at least five texts available – the original constitution, two proposals written by experts, the crowdsourced proposal submitted to the 2012 referendum, and a later version of the crowdsourced proposal edited by legal experts and submitted as a bill to Parliament. Section 3 takes a first stab at assessing these various texts in the absolute, in comparison with each other, and in light of two of the normative criteria delineated in Section 1 (rights-heaviness and democraticity). I conclude that the Icelandic constitutional proposal was in general a good proposal and an undeniable improvement over the 1944 constitution and the expert drafts along several important dimensions. It also had a bonus feature that marks a great constitution, namely, to be inspiring, as it has the best preamble of all the competing drafts.

1 What is a good constitution?

There are several answers one could try to give to such a daunting question, all of which refer to distinct standards of evaluation. Carey (2009) argues that three features characterize a high-quality constitutional document according happen to have sources there that I do not have in any other country) and partly the fact that the Icelandic situation offers several to the relevant academic literature: (1) “democracy”; (2) temperance; and (3) durability. Democracy refers to a property of the institutions defined by the constitutional context. Temperance refers to qualities within a constitution that

establish limits on the power of officeholders, lowers the stakes of politics, and encourages moderation and measured deliberation.⁴ Durability, finally, refers to constitutional stability and resilience over time.

In the following I propose to embrace these criteria, while refining them and adding a few. But let me first point out that I take for granted that in order to be considered a good constitution, a proposal must first minimally qualify as a constitution, even a bad one. A constitution is, arguably, a body of fundamental principles or established precedents recognized as legitimately governing, or meant to be recognized as legitimately governing, a state or other organization.⁵ This body of principles or precedents stipulates the powers and limits of the government and guarantees certain rights to the members of the organization. Two important functions of a constitution are thus to serve as a second-order procedure determining how a polity is, on the one hand, to go about its first-order decisions and, on the other, to protect certain fundamental individual rights. Notice that nothing in this definition suggests that a constitution needs to be written.

Assuming a given considered text or set of precedents qualifies as a constitution as just defined, what are now the criteria for a “good” constitution? The first criterion I propose to introduce has to do with the formal qualities of the constitution itself. Of all the criteria offered later this one is probably the least favorable to unwritten constitutions. Formal qualities include concision, clarity, and logical coherence. For a written

⁴ With these latter criteria, we are presumably entering the domain of “just” constitutions. Does a “good” constitution need also to be “just”? I assume that the answer is yes, at least partly.

⁵ Freely adapted from the online Oxford dictionary definition:
www.oxforddictionaries.com/us/definition/american_english/constitution

constitution, these qualities can be assessed in terms of how well the text is written, how clear it is in structure and organization, and whether the parts add up to a logically coherent whole.

Concision may seem like an odd and perhaps unnecessary requirement. Yet long-windedness can eventually get in the way of clarity, as it did in the case of the 300-page European Constitutional proposal that was ultimately rejected in various referendums. The US Constitution, which sets the benchmark for brevity, has been praised for this feature, which some credit as an explanation of the extraordinary longevity of the text. There is, further, some reasonable empirical evidence that long constitutions are “worse” – in terms of governance outcomes – than shorter ones (Tsebelis and Nardi 2016).

Clarity and logical coherence, on the face of it, need no justification. They seem essential in determining what others have called “interpretability” or “the ability to produce inter-subjective agreement about the meaning of a text” (Melton, Elkins, Ginsburg, and Leetaru 2013: 400). One could nonetheless argue that too much clarity and coherence are in fact liabilities in a context of deep disagreement and partisan divide. Ambiguity and lack of clarity, by contrast, may help parties achieve “incompletely theorized agreements” (Sunstein 1995) on a common, ambiguous text that lends itself to a multiplicity of interpretations. To the extent that a constitution is a social contract, however, clarity and coherence remain, as in most contracts, preferable to obscurity and contradiction. The fact that societies occasionally benefit from deferring to judges or national legislatures the task of interpreting the meaning of ambiguous and conflicting clauses should not turn strategic lack of clarity and coherence into a normative ideal,

when it simply reflects the constraints under which constitution-makers are sometimes forced to operate.

Independently of the formal qualities, other important standards of quality would seem to be how well a constitution is likely to do what a constitution as defined earlier is supposed to do, namely, first, serve as a second-order procedure for the resolution of first-order political disagreements and, second, protect individual rights. The first of these two criteria would presumably have to be measured in part in terms of how coherent and plausible the proposed distribution of powers, rights, and duties is and how likely it is, in light of the most up-to-date legal and social scientific knowledge on the topic, to disentangle the Gordian Knots of politics by planning for ways to channel conflicting claims into formal political institutions and procedures. A good constitution would thus ensure that all reasonably foreseeable conflicts among political actors are given clear procedural solutions, including by determining which authority has the final say on an issue and how (e.g., a Supreme Court, using simply majority rule). I propose to call this criterion “conflict resolution propensity” or, more colorfully, Gordian Knot factor. The higher the factor, the more propensity the constitution would have to diffuse conflicts.⁶

The second function – rights protection – can be crudely approximated by a third criterion, which I propose to call “rights-heaviness.” By heaviness here, I refer both to the number and quality of rights entrenched in the constitution. A minimal threshold for a good constitution would be entrenchment of basic human rights. Going up the ladder of goodness, better constitutions would thus entrench second- (socioeconomic) and third-

⁶ This Gordian Knot factor is the ex ante version of what Ginsburg and Huq (this introduction) propose to measure ex post, in an empirical fashion, namely, how good a constitution is at actually channeling political conflict once it is implemented.

generation (collective) rights. One would presumably need to weigh different types of rights and different rights within each type differently.

There are certainly practical problems with such a criterion, in that stuffing a constitution with a long list of pie-in-the-sky rights should not suffice to make it “good.” However, it seems intuitively plausible to argue that how much a constitution details and entrenches individual rights, while not a guarantee that the future regime will respect them in any way, should probably factor in our evaluation of its goodness. This criterion is also one for which economic levels of development may need to be taken into account. One cannot expect the same level of rights-heaviness in the constitution of an emerging country as in the case of a highly developed one like Iceland. Context-sensitivity should thus somehow factor in our weighing of the rights introduced in a constitution.

Returning now to the substantive standards previously laid out by the academic literature on constitution-making, I propose to rephrase the standard of “democracy” listed by Carey as a less elegant but more accurate criterion of “democraticity.” That democraticity is a desirable substantive criterion by which to assess the *ex ante* goodness of a constitution is largely taken for granted by normative theorists and empirical political scientists alike. As Carey puts it, “democracy may be the most prominent among constitutional ideals” (Carey 2009: 156). By democracy Carey himself refers both to the kind of ideal expected to be found in the text of constitutions themselves and the kind of inclusive and participatory principles that govern constitutional processes.

“Democraticity,” as I propose to use the term, is meant to capture how far along on the continuum from less to more democratic a constitution is. Contrary to Carey, I propose not to include consideration for rights, including human rights, under the

democracy criterion but file consideration for rights under a separate, previously mentioned category: rights-heaviness. It is, after all, possible for a liberal but undemocratic constitution to respect a number of rights, while violating political equality.

Turning now to the criterion of temperance, Carey describes it as consisting in “limiting the power of office-holders, lowering the stakes of politics, and encouraging moderation and measured deliberation” (Carey 2009: 157, citing Przeworski 1991; Weingast 1997; Rasch and Congleton 2006). From an institutional point of view, temperance essentially translates, into “division of power, such that no political actor can unilaterally make decisions and enforce them” (Carey 2009: 157, citing Madison 1788). Measuring temperance could be done by considering whether the proposed constitution establishes a system of checks and balances, counting how many veto points there are in the system (i.e., how many institutional actors must agree to a policy change for it to happen) or alternatively looking at what voting thresholds are in place. All these measures have been argued to, among other things, slow down the pace of changes, force those that are adopted toward the center of the policy space, and generally help prevent government abuse of individual rights (Tsebelis 1995, 1999; Tsebelis and Money 1997; Riker 1982, all cited in Carey 2009: 157–158).

I propose to break down this essential criterion of temperance into two: temperance *per se*, which captures the constraints on political actors as just described, and, in my view distinct, the ability to promote deliberation. The latter criterion could be phrased as “deliberative capacity,” using John Dryzek’s term to characterize “the extent to which a political system possesses structures to host deliberation that is authentic, inclusive, and consequential” (Dryzek 2009: 1382). Though the focus on inclusiveness in

Dryzek's formula suggests that deliberative capacity is connected to democraticity, the two, I believe, should be analyzed as independent characteristics. Deliberation is a value that is emphasized by deliberative democrats but needs to be separated from democraticity per se. It also needs to be distinguished from temperance because its virtues are not merely to foster consensus and moderation. Properly conducted deliberation, under the right conditions, has also the distinct property of producing epistemically superior solutions (as argued in, e.g., Landmore 2013). Containing a deliberative capacity would thus seem like an important quality for a set of institutions meant to resolve conflicting claims.

A seventh criterion worth considering is whether the document expresses values and principles that citizens can be expected to recognize as legitimate – in other words to what degree it captures the spirit of a given people. I propose to call this quality “value fitness” (or “value representativeness”). This criterion, it should immediately be said, should be subject to constraints of justice and human rights. It wouldn't seem right for a constitution to accommodate, for example, racist prejudices and thus it is perfectly reasonable to expect other criteria to trump value fitness, as was the case in the institution of the German and Japanese constitutions after World War II or in South Africa after the end of Apartheid. Nonetheless, subject to what could be defined as the satisfaction of lexically prior criteria (such as rights-heaviness), value fitness seems a *prima facie* reasonable and desirable benchmark of constitutional goodness. The new South African Constitution, though breaking radically from racial prejudices still widely shared in the population, was attuned to the specific history and, among other distinct features,

linguistic diversity of the South African people. Good constitutions, in other words, are not one-size-fits-all. Like fine jackets, they should be custom-tailored to their people.

One way to measure value fitness is to compare, prior to implementation, the proposed text with the results of a deliberative poll or equivalent (e.g., the National Forum in the case of Iceland). The more key concepts, principles, and provisions found in the constitution match those expressed by the larger population or a representative sample of it, the higher value fitness or representativeness one can consider the constitution to have. Another, more imperfect way to test whether the text properly captures the spirit of the people is the degree of actual, post-hoc legitimacy that a constitution enjoys once implemented. Post-hoc legitimacy, however, is far from a foolproof benchmark, as circumstances may dictate a rejection by the people, even as the substance of the text genuinely reflects the spirit of the people.⁷ In other words, the criterion of value fitness is distinct from sociological legitimacy, whether expected or actual. Another way to say this is that value fitness is more of a substantive, normative criterion, rather than a procedural, descriptive one. That said, value fitness is likely to increase post hoc legitimacy and thus durability. It is thus valuable instrumentally as well as in and of itself.

Because value fitness is important, another criterion needs to be introduced: adaptability, or the ability of a constitution to adapt to changing mores and social needs and understandings, that is the ability to grow and evolve, like a living organism. This quality could be measured by considering the number and scope of amendment

⁷ For example, in 1999 Venezuela and 2004 Bolivia the Congress and historical political parties were so unpopular and the demand for a constituent assembly so intense that any proposal coming from Congress would have lacked post-hoc sociological legitimacy. Alternatively a constitution may capture the spirit of the people but lack in so many other qualities that it ultimately proves unpopular and illegitimate in practice. Thank you to Joshua Braver for these examples and helping me clarify this point.

procedures included in the proposed constitution and whether they apply to what is sometimes seen as the untouchable core of a constitution or its more superficial layers.

Finally, because in particular the latter adaptability criterion may introduce the danger of great instability (the possibility of constitutional replacement in the guise of amendment), all of what comes before would have to be compatible with a ninth criterion of expected minimal durability. This criterion has more to do with the “likelihood” of success of a constitution than its a priori goodness per se, but without it a constitution could troublingly be said to be “good” even as it has absolutely no chance of lasting long enough to make any difference in the world. This criterion is equivalent to Carey’s “durability” – which I propose to rephrase as “expected durability,” to emphasize that it is the ex ante value that matters, and which I would additionally make a threshold criterion. In other words, the criterion of durability matters only up to a point.

Where to place the threshold is a thorny issue, but one could argue that two generations would seem like a minimum duration for constitutional stability. Thomas Jefferson suggested that constitutions should be written for the living and should be revisited every generation or so. But that does not mean that the expected longevity of a constitution should only be one generation. Ideally each generation would be free to revisit their constitution, but if they decided not to do so they should have the luxury of not having to change it for some time. Given that the current length of a generation is generally to be twenty- five years (whereas the actual average life-expectancy of constitutions around the world is only around nineteen years (Elkins, Ginsburg, and Melton 2009)), two generations would take us close to an expected longevity of fifty years.

All these nine criteria together – formal qualities, Gordian Knot factor, rights-heaviness, democraticity, temperance, deliberative capacity, value fitness, adaptability, and minimal expected durability – should be combined in some context-sensitive fashion, which would need to be specified further, adding for example lexical priority considerations or a different weighing of the various criteria, in order to assess the ex ante quality of a constitution, that is its quality as assessed prior to its implementation. In other words, a good constitution would score minimally high on all (or at least most) of these criteria, which together would form the highest possible bar. A good constitution would thus (1) be a clear, concise, logically coherent document; (2) offer reasonable procedural solutions to foreseeable political conflicts; (3) protect and entrench rights of various kinds, first and foremost human rights, as well as (4) entrench democratic principles – centrally political equality and majority rule. It would further delineate (5) a temperate political system, characterized by (6) deliberative capacity. It would contain (7) values and principles that are representative of citizens’ preferences while allowing for (8) the possibility of change over time and yet retaining (9) a decent (sufficient) life expectancy.

For additional points – for a “great” as opposed to just “good” constitution – I propose finally to add a tenth requirement of (10) “inspiration.” A great constitution would thus be one that is beautifully written and likely to generate emotions such as love and admiration among its own people and beyond, among current and future generations. Such a text would be conducive, in the best case scenario, to the “constitutional patriotism” theorized by Habermas and observed in the case of some historic constitutions – the American one to begin with.

The following goes some way toward assessing the goodness of the Icelandic constitutional proposal in light of two of these criteria: rights-heaviness and democraticity. My main question is: Was the proposed constitution a good constitution by at least those two standards? How did it compare in those respects with the existing constitution? How did it compare with the two expert-written drafts that were written and circulated at the same time as examples of what a new constitution might look like?

2. Assessing the crowdsourced constitution

In order to assess the value of the crowdsourced constitutional proposal – hereafter constitutional proposal C, which is both for “crowdsourced” (though the term is slightly exaggerated) and for Constitutional Council – I utilize the original constitution from 1944 (hereafter O) and two other draft proposals written by experts in the Constitutional Committee as preparatory material and templates for the Constitutional Council – entitled in the Icelandic “Example A” and “Example B” (hereafter A and B) – for comparison. In my view this comparative element is essential to measure the intrinsic “goodness” of a constitution if one is not to judge the proposal by the too low standard set by the previous constitution (which was written in a different time under different circumstances for a different people) and the unrealistically high standards of ideal theory only (the perfectly “just” constitution, if there is such a thing). In other words, my aim here is to assess whether the Icelandic constitutional proposal was a good constitution, not a perfect constitution. In Amartya Sen’s terms, I am seeking to identify a high local optimum, as opposed to the global one (Sen 2009). Let me now introduce each constitutional text in turn.

The 1944 constitution (O)

The original constitution that forms the first point of comparison dates from June 17, 1944. This constitution is a slightly altered version of the one granted by Danish rulers in 1874, the so-called constitution on the Special Affairs of Iceland, itself inspired by the Danish Constitution of 1849 and the Belgian Constitution of 1831 (Torfason 2009, cited in Bergsson and Blokker Forthcoming: 154). In 1944, when Iceland unilaterally declared her independence from then Nazi-occupied Denmark, the Althing agreed on a new document, while also proclaiming a referendum on the old and new constitution. In May 1944 an election was organized. Almost 98% of the population turned out and among them 97% of the voters voted to break off the current relationship law with Denmark and 95% approved a constitutional republic.

The 1944 constitution, however, which was hastily put together by replacing “King” with “Elected President” in the original document and making minimal changes to the latter, was not all that “new” and was in fact always intended as a temporary document (A’rnason 2011: 345; Jo’hannesson 2011: 63–68, cited in Bergsson and Blokker Forthcoming). As a result, it has been described as a “mended garment” (cited in Gylfason 2014: 2) with the flavor of an “imposed constitution” (Levinson 2005, cited in Bergsson and Blokker Forthcoming). Politicians promised to revisit it at some later point to give Iceland a true custom-tailored document but they came and went over the years without ever delivering on this promise (Gylfason 2014). One of the reasons for this failure to update or change the document is the relative rigidity of the text (the amendment procedure is complex and demanding). Since 1944, the Icelandic

Constitution has nonetheless been amended seven times so far, mostly due to changes in Icelandic constituencies and the conditions of voting eligibility.

Additionally, in 1991 the organization of the Icelandic Parliament changed so that it now worked in one house rather than two as before. Extensive modifications were also made in 1995 when the human rights sections of the constitution were reviewed.

The expert drafts (A and B)

These expert drafts were part of a two-volume report that was formally submitted by the Constitutional Committee to the Constitutional Council at its first meeting on April 6, 2011. They were meant to serve as templates for what a new constitution might look like. I refer to each of them as Example A and B (their actual titles in the report).

The Constitutional Committee was a seven-member committee appointed by parliament and “consisting mainly of academic experts from a range of fields (law, literature, natural science, and social science)” (Gylfason 2014: 7). Its job had been to organize a National Forum upstream of the constitutional process; prepare a nationwide election of twenty-five representatives to a Constitutional Assembly tasked with writing a new constitution; and also prepare the ground for the Constitutional Assembly by offering an analysis of the 1944 constitution and gathering information on foreign constitutions and other relevant material. Specifically, the Committee’s mandate included “suggestions to the Constitutional Council (CC) regarding potential changes to the existing constitution.”

Although the Constitutional Committee offered the expert drafts in good spirit and, according to one of its members “constantly kept in mind that we were NOT the

body elected to revise the constitution, but rather a committee entrusted to provide relevant information and facilitate the work of the Constitutional Council,” one of the seven members of the Constitutional Committee signed the report with the reservation that he believed that the committee was exceeding its mandate by proposing these texts to the constitutional assembly (Gylfason personal communication, March 2015, emphasis in the original). The intention was that the twenty-five members of the Constitutional Council would use these examples as templates for what a new constitution might look like. The proposals were meant to be complete in the sense of covering all relevant aspects of a constitution. In theory, each proposal was self-sustaining.

Sources differ in the account of how the expert drafts were written. Insiders say that the Committee worked as a group on both proposals and wrote them in parallel, one chapter at a time. “Many paragraphs were left unchanged [from the original constitution] but [the committee] took care to maintain inner consistency in each draft” (Pétursdóttir personal communication, April 2015). They also justify the offer of two proposals as a deliberate way to avoid “‘dictating’ any changes to the Constitutional Council” and to provide them with more than one option so as to “open [the options] for discussion without promoting one particular solution” (Pétursdóttir personal communication, April 2015).

Outsiders offer a slightly different story, arguing that the two drafts resulted from serious disagreements between two particularly vocal members of the constitutional committee, who decided to write two different versions reflecting their disagreement (Gylfason personal communication, March 2015). Others claim that Example A was written by a single person (Björg Thorarensen) during a previous period (2005–2007) of

discussion about the revision of the existing constitution (Olafsson personal communication, March 2015).⁸

C: The crowdsourced constitution

The crowdsourced constitutional proposal, finally, was written by the twenty- five Constitutional Council members. They wrote it over a four-month-period (from April 6 to July 6, 2011). Over that period they crowdsourced twelve successive drafts online (by posting them on their own special page and on Facebook among other places). The crowdsourced constitution integrated the Icelandic values identified by a National Forum, which had taken place in the summer 2010. The details of the remarkable process that led to this output have been extensively covered elsewhere (e.g., Gylfason 2014; Landemore 2015) and so I leave the account out of this chapter. The proposal is well known because it was translated in English early on and made widely available on the Internet.

The crowdsourced constitution exists in at least two versions: the proposal that was submitted for referendum and the version amended by legal experts just after the referendum and submitted as a bill to parliament. The latter one, which I will call the “professional” version of the crowdsourced constitution (P), is a supposedly improved version of the proposal after it was given to the Parliamentary Committee for careful

⁸ It is perhaps worth mentioning that yet another expert draft was circulated after the crowdsourced bill stalled in Parliament. It was written by two members of the Constitutional Committee, who became vocally opposed to the popularly approved constitution shortly after it stalled in Parliament. The interesting fact about this late proposal, which was otherwise never seriously discussed, was that it left out national ownership of natural resources and equal voting rights across the country, two principles specifically endorsed by the majority in the referendum (Gylfason personal communication, March 2015). I leave this late coming expertwritten draft outside the comparison.

legal editing. In theory, the Parliamentary Committee respected the letter of the referendum-approved proposal and simply attempted to make sure the text was in line with the outcomes of the nationwide referendum as well as respected Iceland's commitments to previously adopted international treaties. In light of the referendum results, one radical change was thus to reintroduce the mention of the Evangelical Lutheran Church as the national church of Iceland (as in article 62 of the 1944 constitution, which had been eliminated from the new proposal).⁹ This reversal was seemingly, though somewhat controversially, justified in light of the referendum results, in which 57% of the voters expressed a desire to retain a constitutional provision on the state church.

While this change was at least justifiable, legal experts more problematically altered other aspects of the original spirit of the proposal.¹⁰ Among the more egregious changes, the experts suggested a redrafting of the natural resource provision – article 34 – in a direction that favored the vessel owners (the “oligarchs” of Iceland) by making the

⁹ The original version of the proposal only contained in its article 19 a reference to a state church whose status the Parliament was made free to maintain or amend, conditional on any change to the status quo being approved by referendum.

¹⁰ For example, the group of experts decided to compile the content relative to the limits of various rights and liberties covered in different articles (articles 9–18) into one single article (article 9.2). The legal experts presumably thought that this amounted to a minor technical change. As it turns out, however, the Council of Europe's Venice Commission, a group of European legal experts who were asked to give their opinion about the final version of the constitutional draft, identified a problem with that very article by pointing out that grouping all restrictions to human rights irrespective of the differences between rights (e.g., between socioeconomic rights and group or so called “third generation” rights) was a source of confusion and substantive problems. The Commission worried, specifically, about “the risk that, under these circumstances, the general restriction formula be too open and inconclusive from the perspective of such rights.” See the final report of the Venice Commission, adopted on March 8–9, 2013, specifically p. 8. The report is available at: [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)010-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)010-e).

occasional use of natural resources for profit much cheaper than the Constitutional Council intended (Gylfason 2014: 17).

As a result of these substantive problems with the professional bill (P), as well as some procedural issues (it is not clear that the Parliament had any legitimate mandate to rewrite the constitutional proposal in the first place) and partly because I am also more interested in testing the epistemic properties of a text written by non-experts than an hybrid output, I focus here primarily on the referendum-approved version of the “crowdsourced” constitutional proposal (C). While the referendum-approved version could have used some light legal editing and – more questionably so – the reintroduction of the state church clause in the text, it seems that the Parliamentary Commission went too far in the rewriting process.

Let me add a word about the meaningfulness of comparing those drafts. It is certainly methodologically problematic to compare a constitution written in 1944 and a constitution written in 2011. For one, the standards for assessment have changed over time. We now generally value more democratic and open systems. We have also considerably expanded the list of rights we consider necessary to entrench in constitutions. By all those standards O is bound to fare worse than any of the more recent proposals (even though it was amended in 1995 to introduce a list of human rights absent from the original version). That said, it is interesting to see in what ways a contemporary proposal is able to improve on an old text. Indeed all three recent proposals (A, B, and C) objectively improve on the existing constitution.

Comparing A, B, C (and P to some extent) allows us to compare apples to apples – since all drafts were written at least within a few years of each other – although we do

have to take into account the fact that A and B came first and were used as templates for C. An improvement in C over O should only be considered an indication of the greater wisdom of a popular constitutional assembly if it was not also included in A or B (the experts that could also have rewritten the original constitution). The great similarities between A, B, and C, as we will see, indicate that the popular constitutional assembly was only marginally wiser than the expert committee that way. Nevertheless the marginal improvements turn out to be quite crucial. It is also worth keeping in mind that the expert drafts were themselves written on the basis of – or at least with the knowledge of – a fair amount of popular input (the input gathered during the National Forum 2010 and summarized in a report handed to the drafters). In that sense the work of the committee was not a pure product of insulated expert reflection.

3. Assessment

In the following I first offer a brief synthetic and overall assessment of the main and most striking characteristics of each constitutional benchmark. I then turn to the constitutional council's proposal (the "crowdsourced" one) and assess it more specifically in light of two of the normative criteria listed in Section 1: rights-heaviness and democraticity.

Holistic assessment

The original 1944 constitution possesses little of the distinct and personal character of future proposals. There is no preamble, the seven chapters do not have titles, and the list of institutions and rights have nothing particularly Icelandic to them. It introduces the country as a "republic" (the word democracy is nowhere to be found). The constitution is

all about the president and the Althingi, whose functions are the object of respectively Chapters 2 and 3 (which count twenty-eight articles each). Citizens and citizens' rights and freedom come last (Chapter 6 and 7), with eighteen articles (three for the religious freedoms, listed first, and fifteen for all the other rights). The list of human rights was in fact added by amendment in 1995. There is little to no consideration of children's rights, the environment, or animal protection. Some articles are downright dated, such as the article making it mandatory for people who do not pay fees to a religious association to pay it to the University of Iceland instead.¹¹ There is also no clear separation of power – the president jointly exercises legislative power with the Althingi and exercises executive power with the Cabinet and ministers, an issue that had long seemed problematic to many Icelandic commentators.

Most problematically, though, the 1944 constitution is not based on the democratic principle of one person, one vote. While it is compatible with strict political equality, it does not entrench it, and thus fails to protect it. In practice the 1944 constitution allows for the current voting system, which gives more weight to the votes of people living in certain districts. For example, after the 2013 Parliamentary elections the southwest district received thirteen representatives against eight for the Northwestern district, even though the Southwestern district has three times more people than the Northwestern district.¹² The apportionment of seats (which is determined by the electoral law) is clearly not proportional but the constitution does not say it has to be. The

¹¹ In fairness, this article also specifies that the latter provision can be amended by law, an amendment which was finally passed in 2005.

¹² Source: www.kosning.is/althingiskosningar/tolfraedi/skipting-kjosenda-eftir-kjordaemum/.

constitution only makes sure that the disproportion does not exceed a ratio of 1:2. The fifth paragraph thus states:

If the number of voters on the voting register represented by each parliamentary seat, allocated or distributed, becomes in one electoral district one half of the number represented by each parliamentary seat in another electoral district, the National Election board shall revise the number of seats representing each electoral district with the aim of reducing this difference.

At the limit, this allows the Northwest district to have 2,600 voters per seat against 5,100 voters per seat for the Southwest district. The vote of citizens in the Northwest thus counts for almost twice the vote of citizens in the Southwest. This situation, which results in the underpopulated countryside having a disproportionate voice in Parliament, has been a subject of debate and discontent among Icelanders for quite some time. One of the conclusions of the brainstorming that occurred during the 2010 National Forum upstream of the drafting process was the idea of a more equal voting system.

A and B

A and B are important to compare because they reflect respectively what appear to be a progressive and a conservative version of the same expertwritten draft. They are very much alike in structure and content (respectively nine and ten clearly titled chapters, with almost identical titles), except for some crucial divergences in terms of the authority of the president, the separation of powers, and the presence or absence of a state church clause. As a result, it looks as if A was written first and then B was copied and pasted from it but tweaked so as to reflect a different, on my reading slightly more conservative,

set of values.¹³ Only B has a preamble, though both proposals try to capture something about the Icelandic people, while proclaiming respect for the dignity of man, the environment, and a commitment to peace with other nations. Noteworthy is the fact that A uses “Iceland” as the subject. B uses “We, the People.” Only B says something about the “intention” of the polity, namely, to work “with other nations and promote peace.” Example A lists three “cornerstones” of Iceland, namely, “democracy,” “the rule of law,” and “respect for human rights.” B lists three slightly different ones: “democracy,” “human rights,” and “integrity.” A describes Iceland as a “free and sovereign republic.” B describes it as a “Republic with a parliamentary government.”

As per the recommendations that came out of the National Forum in 2010, both proposals further place the chapter on human rights at the front of the constitution (Chapter 2 in both cases, after the chapter on “Foundations”). The “progressive” proposal A puts Althingi before the president (Chapter 3 versus 4). B does the opposite. They both include a controversial article on collective ownership of natural resources. They both contain an article on the status of the Evangelical Lutheran Church. Draft A, however, skirts the issue by deferring the question of the status of the Evangelical Lutheran Church to a referendum. By contrast, B maintains it as the official Church of Iceland, while at the same time emphasizing that the state shall support and protect all lawful religious associations. Both A and B pay attention to new forms of discrimination the constitution

¹³ Gylfason also reports that of the four lawyers on the Constitutional Committee, two appointees of the then opposition parties now back together in government “were quite determined, and quarreled a lot as polar opposites, giving the other committee members the impression that they thought that they alone knew what to write” (personal communication, March 2015). In his view it is possible that Examples A and B were proposed to the council as alternatives they were supposed to choose between (Gylfason personal communication, March 2015).

should protect individuals from. A, the more exhaustive in that respect, thus lists discrimination on the basis of disability, sexual orientation, age and domicile, in addition to the original gender, religion, opinion, race, and color. B commits to the principle of equal votes (articles 50). A does not and simply follows the precedent set by O on that front.

The crowdsourced constitution (C)

The crowdsourced constitution includes nine titled chapters and is closest in structure to A. Additionally, it has a more extensive, richer, and more inspiring preamble than either A or B, starting with “We, the People, who inhabit Iceland” – clearly a combination of A’s reference to the country and B’s reference to the nation. It lists four core principles of the country: freedom, equality, democracy, and human rights (a list that is more logical and complete than the list of three principles in either A or B). It states, amongst other things, that the purpose of the Icelandic people is to create a just society as well as promote the welfare of the country’s inhabitants. It emphasizes the necessity to encourage the Icelandic culture and respect the diversity of the life of the people, the country, and its biosphere as well as promote harmony, security, and happiness amongst the Icelandic citizens and coming generations. Happiness, in particular, makes an entry in only this proposal. It is a direct and explicit borrowing from the American constitution.¹⁴ Finally, the preamble commits to work toward peace with other nations and respect for the earth and mankind. The poetic quality of its language, which transpires even in

¹⁴ The word was insisted on by Pastor Örn Jónsson, who justified his choice to me this way: “I pressed for including ‘happiness’ like in the American constitution. I can take the credit for that. Life should be good. I preach the Gospel, which means good news” (Skype interview, July 17, 2015).

translation, comes from the fact that an actual poet – Hannes Pétursson¹⁵ – was consulted by the two people who, for the most part, wrote the preamble. It should be acknowledged that the inclusion of a preamble in the proposal was a controversial issue within the Constitutional Council as some members saw the very idea of a preamble as “un-Icelandic” or “unScandinavian” (most Scandinavian constitutions don’t have one), while others felt rushed into endorsing the proposal, as the Council was running out of time at that point.

Unlike A and B, C characterizes Iceland as a “parliamentary democracy.” The term “democracy” or “democratic” occurs four times in the text. Iceland is in fact a semi-presidential regime, with both a directly elected president with non-trivial powers and a prime minister. Like A and B, C places “human rights” and rights relative to nature early in the document (Chapter 2, which is titled “Human Rights and Nature” – as opposed to “Human Rights” only in A and B) in a section that includes thirty-one articles. Like A and B, C includes an article on natural resources as collective property (article 34). It places the Althingi (Chapter 3) before the president (Chapter 4) and the ministers and the Cabinet (Chapter 5). There is a clear sense that the colorful articles and aspirations are put at the front of the constitution, and the final chapters are devoted to more technical, less inspiring sections (for example the chapter about foreign affairs and final provisions).

Like A, C favors a much clearer separation of power between the president and the Althingi (article 2). Like B, it maintains the default status of the Evangelical Lutheran

¹⁵ One of the most famous, celebrated, and widely translated of living Icelandic poets.

Church as the national state-supported church, but introduces the need to put any change to the status quo to a referendum (perhaps borrowing from B).

How rights-heavy and democratic is C?

In the following I propose to assess C by two of the normative standards from Section 1, namely, rights-heaviness and democraticity, while simultaneously comparing it to the competing proposals. I will not spend any time analyzing the standard of formal quality, though it seems to me that the proposal is strikingly clear, concise, and coherent. C is also much clearer than O according to native speakers, due to the archaic formulas that are to be found in the 1944 constitution. But in its formal qualities the crowdsourced proposal is not strikingly better than either A or B, which are equally clear, concise, and seemingly coherent.

I also leave outside of this analysis the ability of the proposal to channel and resolve conflict (the Gordian Knot factor) and the criteria of temperance, as they are hard to assess by a non-expert in constitutional matters and political systems, though I note that when it comes to temperance, C includes a separation of power already remarked upon and notoriously absent from O.

One can make quick work of the value fitness criterion since the work of the Constitutional Council was explicitly based on the findings of the National Forum of 2010, which places C at a considerable advantage with respect to O. C is also almost surely marginally superior to A and B in that respect as well, even though the Constitutional Committee wrote both examples on the basis of the results of the National Forum, if only because C was crowdsourced to the larger public during the drafting stage

and morally validated by a (non-binding) referendum. The only sticky point in terms of value fitness, perhaps, is the “state church clause” (article 19) since, as already mentioned, the results of the referendum were largely interpreted to indicate that the Icelandic people wanted to maintain a mention of the Evangelical Lutheran church as the national church in the text of the constitution (by 57% of the vote).

The adaptability criterion is also more successfully met in C than any other rival texts. Article 79 of O requires that for any amendment voted by Parliament, Parliament has to be immediately dissolved and new elections organized. The new Parliament in power has then to pass the resolution unchanged, which is then confirmed by the president of Iceland. In other words any amendment has to be voted upon twice, once by a Parliament that more or less commits suicide by approving the amendment, and another time by a new Parliament that may come to power with other preferences. Note also that there is no referendum planned about amendment proposals, except for one question, the status of the Church under article 62. In other words, the people are not to be directly consulted about any constitutional amendment proposal, except on the Church status.

O’s very high bar for change is partly what explains the failure of the 2010–2013 constitutional process in Iceland. By contrast, C, which was meant to replace O, would have made constitutional change much easier. According to its article 113, once Parliament has passed a bill to amend the constitution, the only required additional step is the organization, within a time frame of three months, of a referendum of all eligible voters for approval or rejection of the bill. In cases where Parliament is nearly unanimous about the proposed amendment (“if five-sixth of the members of the Althingi has passed

the bill”), the referendum can be canceled by Parliament and the bill turned into law nonetheless.

A and B are similar to C in that respect, except that A demands that in the popular referendum the valid votes represent at least 30% of all registered votes and B sets a supermajoritarian threshold for the vote in Parliament (2/3 of the Althing votes must be cast in favor of the amendment). Neither A nor B allows Parliament to pass an amendment without a popular referendum.

C would thus have been a much more adaptable constitution – perhaps too much so in fact. From that point of view, P (the version of C revised by legal experts) offers a compromise between O and C in that its article 113 follows C for the most part but crucially reintroduces O’s double parliamentary approval for bills aiming to amend the provisions of Chapter II of the constitution, namely, the chapter on Human Rights and Nature. This cautious move reflects the belief (apparently increasingly shared in the legal community) that not all parts of constitutions are equal and that some should be more difficult to amend than others. Indeed, in recent years there has been some scholarly attention to the idea that some provisions ought to be harder to amend than others, or even unamendable (Jacobsohn 2006; Ginsburg and Melton 2015; Dixon and Landau, Chapter 10). What this suggests is that there are trade-offs between too much rigidity and too much flexibility and that some nuanced solution like the one offered in P should probably be considered.

Finally, regarding the expected durability criterion, Elkins, Ginsburg, and Melton plausibly credit the crowdsourced proposal with a life expectancy of sixty years (Elkins, Ginsburg, and Melton 2012). This hits the minimal bar of fifty years proposed earlier.

Comparatively one may note that O has de facto survived more than seventy-one years, although it is of course possible that this performance is entirely accidental, especially considering that this original constitution was always meant to be replaced early on.

Let me now focus on rights-heaviness and democraticity, namely, the degree to which the proposal expresses a commitment to a variety of rights and democratic values and principles. Those are two important criteria that can be assessed by a close reading of the text without mobilizing technical knowledge of the likely effects of political systems. Discussing them will also allow me to touch in passing on the “deliberative quality” of the political scheme set up by the proposal. Unsurprisingly perhaps, I conclude that C scores higher on those two criteria than O, A, or B.

“Rights-heaviness”

As already said, the proposal counts a total of thirty-one articles related to “human rights and nature.” According to external observers, Iceland’s proposal is “moderately rights-heavy” (where the measure is of the percentage of rights included in the constitution across seventy or so distinct rights that have been specified in constitutions since 1789) (Elkins, Ginsburg, and Melton 2012). The Venice Commission praises the proposal for “new provisions [...] aiming both to extend the scope of protection and to better reflect the international human rights obligation” (Venice Commission Remark 27). It singles out in particular article 112 as of “great importance” in that it stresses the obligations of Iceland under international agreements and requires that all holders of governmental powers respect rules on human right (Remark 26). The Venice Commission also remarks that “the scope of protection has especially been widened by adding new socio-economic

rights (article 22–25), as well as more or less ‘collective rights’ (article 32–36), called by the explanatory bill ‘third-generation rights’” (Venice Commission Remark 28).

C is definitely more rights-heavy than the existing constitution, which does not include for example the rights of children, right to a healthy environment, freedom of the press, right of petition, right to fair compensation, state duty to protect culture, right to life, right to health care, right to safe work environment, right to a reasonable standard of living, and the freedom to view government information that one finds in the new proposal. It is also substantially rights-heavier than A and B, since it includes a much more extensive list of rights relative to the environment, as in article 33, which states that “All shall by law be accorded the right to a healthy environment, fresh water, unpolluted air and unspoiled nature.” It includes rights that are not listed in either O, A or B, such as the right to the Internet (15) and various socioeconomic and collective rights that may even seem excessively generous and difficult to uphold (as pointed out by the Venice commission, Remarks 32–33). It mentions explicitly “sexual violence” as a type of violence the state should protect individuals from. Unlike O, A, or B, it also devotes a separate and extensive article to the rights of children. It mentions still more sources of discrimination than A, including genetic character, ancestry, and political affiliation. Finally, it offers a more “open and comprehensive approach to the right of freedom of religion” in that it extends the scope of this freedom to what C calls “view of life” and “personal conviction” and P rephrases as “philosophy” and “conviction.” According to the Venice Commission, this extension as well as the inclusion of the right to change religion or faith form “a substantial improvement compared to the current Constitution” (Remark 55).

The reason why C is more rights-heavy than the other texts can arguably be traced to the crowdsourcing moment. According to internal reports, the Council had originally set out to be as inclusive as possible on matters of human rights and specifically on matters of sexuality. Yet it took the influence of outsiders for them to write the text they ultimately wrote. Pastor Örn Jónsson thus reports that article 6, in particular, was influenced by emails, letters, and online posts from the transgender community, which made them realize that the first draft they had put on the Internet was not inclusive enough (personal communication, July 17, 2015).

The proposal came close to being even more inclusive and rights-heavy on one particular dimension, that of religious rights. Article 18 in particular was initially set out to include the following sentence: “All registered religious communities and life-views communities shall be protected by the State.” The intention was to transfer the protection ensured by article sixty-two in the current constitution to all registered religious and life-views communities. The sentence was cut out at the last minute because the group couldn’t come to an agreement on this issue and had to take a vote. The majority came down against keeping the clause, on the argument that it could be used to protect all sort of “life-views,” including that of neo-Nazis (Pastor Arnfridur personal communication, July 17, 2015).

While the superior rights-heaviness of C on all competing constitutions is undeniable, it has its weakness: excessive vagueness, resulting in a lack of clarity. The Venice Commission thus points out that is it “regrettable” that “most of the provisions concerned are worded in general terms, not providing sufficient clarity on whether and which concrete rights and obligations can be derived from them” (Venice Commission

report, Remark 32). While the Venice Commission is mostly concerned about the risks of disappointing the public, which is a valid concern, from our perspective the worry should be also that the constitution will not be “good” in the sense of having the kind of formal quality that ensures proper interpretability and thus usefulness.

“Democraticity”

One striking feature of C is that it put citizens’ rights at the forefront of the constitution. This is in keeping with the recommendations that emanated from the National Forum 2010, and were also followed by the expert drafts. Putting the Icelandic people and their rights first seems, symbolically at least, like a democratic improvement over the past emphasis over state institutions.

Arguably, though, the main democratic superiority of the crowdsourced proposal over O, which it shares with B but not A, is its explicit commitment to the principle of “one person, one vote.” Article 39 thus states explicitly: “The ballots of voters everywhere in the country shall have equal weight.” Similarly B states in article 50: “The weight of votes in nationwide elections and elections in each electoral district shall be equal.” By contrast Article 31 of the old constitution is compatible with the principle of equal representation but does not entrench it (see above). Since A’s article 22 is a strict copy-paste of that original article, it suffers from the same problem.

Additionally, C describes Iceland as a “parliamentary democracy” (article 1, my emphasis), not merely a “republic” like O or B. A also describes Iceland as a democracy but since it is not constitutionally committed to the principle “one person, one vote” (the

way B is), because it strictly follows O on the voting system, it clearly loses out to C on this dimension.

Finally, an explicit reference to democracy is made four times in the crowdsourced constitution (in the preamble, as one of the four “cornerstones” of Iceland, as well as in articles 1, 18, and 24), against no reference at all in the original constitution, two references in A (preamble and article 14), and three in B (preamble, article 14, and article 15).

Another striking democratic superiority of C over all competitors is the degree to which it creates institutional avenues for popular participation (see also Elkins, Ginsburg, and Melton 2012). Important elements of direct democracy are thus introduced in the crowdsourced constitution, allowing the public a role in the determination of the status of the Evangelical Lutheran Church as national church (any change to the status quo introduced by Parliament must be approved by referendum) and the approval of certain treaties (such as a treaty to enter the European Union). C also includes a “right of referral,” by which 10% of voters may demand a referendum on any bill within three months of its passage (article 65), subject to some exception (such as the budget). Additionally, and most innovatively, the draft introduces what is elsewhere sometimes called a Citizens’ Initiative (article 66). This participatory mechanism allows 2% of the population to present an issue to Althingi, which Althingi is free to ignore, and 10% to present a bill to Althingi, which Althingi can either accept or make a counter-proposal to. In the latter case, if the bill of the voters has not been withdrawn as a response, Althingi must present both the popular bill and Althingi’s counter-proposal to a referendum. C also allows the public to approve removal of the president by Parliament (article 84) as

well as constitutional amendments (article 113). Finally, candidates for president must have the prior endorsement of 1% of voters (78).

These elements of direct participation are very distinctive of the crowdsourced constitution and have been internationally celebrated, including by the Venice Commission.¹⁶ By contrast, the 1944 constitution contains only a provision to allow the public to vote on bills that have been returned to Parliament by the president. A and B are notably more participatory, but not to the same extent as C. A, for example, also has a Citizens' Initiative article (article 46), which allows 15% of the population to trigger a referendum on a bill (subject to some exceptions like the budget). B's article 94 in the chapter on national referenda specifies that 15% of the population can force the president to refuse to confirm an act of law or resolution of the Althing and refer the matter to a national vote. Again, these participatory provisions are not nearly as expansive as those found in C.

These elements of direct democracy arguably bleed into the criterion I earlier called "deliberative capacity," to the extent that they put "the public in conversation with their elected representatives" (Elkins and Ginsburg 2012: 2). They render more porous and thus more effective the communication channels that are supposed to exist between the formal and the informal deliberative tracks of a properly functioning democracy

¹⁶ Article 128 of the report states: "The Venice Commission welcomes the clear intention that underlines the above-mentioned provisions, namely, to enhance citizens' opportunities to influence legislation and more generally the decision-making on issues of key interest of the public. It finds this aim entirely legitimate and understandable in the specific socio-economic and political context of Iceland, and recalls that, this is also a part of a certain tradition of direct participation that exists in Iceland."

(Habermas 1996). C – more so still than either A or B – thus meets the “democraticity” criterion” along specifically deliberative lines.¹⁷

Last but not least, another characteristic one may easily associate with “democraticity” – transparency – is a central theme in C, to an extent unmatched by A and B, let alone O. The word transparency is used three times in C. Article 15 on the right to information states that

Public administration shall be transparent [...] Information and documents held by public authorities shall be available without exception and the access of the public to all documents collected or paid for by public authorities shall be assured by law. A list of all cases and documents held by public authorities, their origin and content shall be open to all.

Article 16 requires “transparency of ownership” in the media. Article 51 finally aims to make contributions to candidates and their associations fully public. The goal is “to keep costs moderates, ensure transparency, and limit advertising in an election campaign.” At least two other articles explicitly aim for transparency, even if they do not contain the word. For example, Article 29 prohibits members of the Althingi from participating in deliberation on parliamentary business that concerns their special interests, or those of persons with close ties to them. Article 50 on disclosure of conflicts of interest for Althingi members and their duty to provide information on their financial interests similarly aim at transparency, without the word. A similar article, article 88, exists for ministers, who are under a “duty to disclose information on their financial interests.”

¹⁷ Beyond the deliberation between government and citizens, the draft promotes intergovernmental deliberation, with for example article 108, which makes it a duty of the national government to consult local government for issues related to them.

Conclusion

Confronted with the task of assessing whether the crowdsourced Icelandic constitutional proposal of 2012 would have made for a “good” constitution, but deprived of any empirical measures of the success of a proposal that was never implemented to begin with, this chapter followed the distinct strategy of trying to offer some plausible ex ante criteria susceptible to guide the assessment of constitutional proposals in general and then applying some of those to the particular case of the Icelandic proposal. I offered a total of nine such criteria – formal quality, conflict resolution propensity (Gordian Knot factor), rightsheaviness, democraticity, temperance, deliberative capacity, value fitness, adaptability, and durability. I also added a tenth bonus feature of “inspiration.” Further research would need to deepen the justification of the normative criteria proposed, including by arguing why constitutional “goodness” must include (as it does in my account) considerations of justice. Further research would also need to flesh out the way in which all these criteria inter-relate. Doing so would require distinguishing between the different types of criteria invoked, from the more universal (conflict resolution, temperance) to the more particular (democraticity, deliberative capacity). It would also require specifying the ways in which the combination of these criteria should or should not be made context-sensitive so as to take into account, for example, the history or level of economic development of the considered country (or organization). All in all, what these tasks require is the development of a proper philosophical framework for what a good constitution is.

Applying some of these criteria to the specific case of Iceland proved challenging and interesting in various ways. I suggested that the crowdsourced draft scored high on

criteria such as formal quality, temperance, deliberative capacity, value fitness, and adaptability. I documented through a more thorough analysis that the text scored highest than competitors on “rightsheaviness,” and “democraticity.” I thus conclude that the Icelandic proposal was in many respects an improvement over the 1944 constitution and was also comparatively better in important ways than the rival expert drafts. By most of the criteria proposed here the crowdsourced constitutional proposal was overall a good constitution, which would have been made better if the constitutional council had been given more time to sort out some remaining issues. Whether it would have a successful one, once implemented, is of course a matter of further speculation.

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