

WHEN PUBLIC PARTICIPATION MATTERS:
THE 2010-2013 ICELANDIC CONSTITUTIONAL PROCESS

Public participation in constitution-making is now both an established international norm and a widespread practice. Among recent examples of participatory constitutional processes, one may count not only the subject of this article, the 2010-2013 Icelandic process, which arguably yielded the first “crowdsourced” constitutional proposal in the world; but also the 2012 Egyptian constitutional process, which asked the Egyptian public to comment on constitutional clauses online;¹ the 2012 Irish constitutional process, which mixed randomly selected citizens and elected politicians in the assembly in charge of proposing amendments to the constitution;² the 2011-2014 Tunisian constitutional process, which engaged in some amount of public outreach,³ as well as the Chilean reform process started in 2015, which, in the same spirit as these other processes, promised to “open up dialogue on the constitutional process to citizens.”⁴ A striking feature of these recent processes is how much they rely and depend on new technologies.

What does public participation mean for these new processes? Compared to older

¹ Tofigh Maboudi & Ghazal P. Nadi, *Crowdsourcing the Egyptian Constitution: Social Media, Elites, and the Populace*, 69 POL. RES. Q. 716, 716–17 (2016).

² D.M. Farrell, *The 2013 Irish Constitutional Convention: A Bold Step or a Damp Squib?*, in 75 YEARS OF THE CONSTITUTION OF IRELAND: AN IRISH-ITALIAN DIALOGUE 292 (Guiseppe Franco Ferrari & John O’Dowd eds., 2014)

³ THE CARTER CTR., THE CONSTITUTION-MAKING PROCESS IN TUNISIA 7–8 (2014).

⁴ Antonio de la Jara & Rosalba O’Brien, *Chile president seeks to clean up politics, embark on new constitution*, REUTERS, Apr. 29, 2015, <http://www.reuters.com/article/us-chile-politics-idUSKBN0NK1PA20150429>. See also Alexander E. Hudson, *When does Public Participation make a Difference? Evidence From Iceland’s Crowdsourced Constitution*, 10. POL’Y. & INTERNET, 185 (2017); Daniela Mohor, *Chile’s Living Room Lawmakers*, U.S. News & World Report, Aug. 1, 2016, <https://www.usnews.com/news/best-countries/articles/2016-08-01/chiles-living-room-lawmakers>.

constitutional processes, the novelty lies in the fact that public participation is now taken to entail more than the final act of voting yes or no in a public referendum on a product written by elites. It is even taken to entail more than the act of choosing the constitution-makers via elections. Public participation is supposed to happen in constitution-*making*, not just in constitution-approving, and this “making” must be direct rather than vicarious (involving ordinary citizens rather than just their elected representatives, as in the vast majority of what currently passes for democratic decisions). Or, to put it differently, it appears that our understanding of constitution-*making* has evolved to now mean having direct influence on the content and shape of the constitutional text itself, as opposed to just performatively bringing a ready-made text into existence or shaping it indirectly via elected representatives. The democratic will now is no longer supposed to exercise itself indirectly and at the end of the process, but from the start, throughout, and in more direct ways.

Of course, participation in constitution-making, as opposed to mere public ratification of a product shaped by elites or even elected representatives, predates the recent examples just mentioned. In some respects, Iceland, Ireland, Egypt, Tunisia, and (to a much lesser degree) Chile are merely more technologically empowered versions of previous participatory constitutional processes from a few decades earlier, which themselves built on the then rising ideology of public participation in constitution-making as a right.⁵ Concomitantly, countries such as Nicaragua in 1986, Brazil in 1988, Uganda

⁵ See Thomas M. Franck & Arun K. Thiruvengadam, *Norms of International Law Relating to the Constitution-Making Process*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 3 (Laurel E. Miller ed., 2010); Vivien Hart, *Constitution Making and the Right to Take Part in a Public Affair*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING

in 1995, South Africa in 1996, and Kenya in 2001 all sought public input on the constitution, usually in the form of written comments and face-to-face public consultations. Iceland, Ireland, Egypt, Tunisia, and Chile today would thus seem to merely implement the same goals with the aid of online tools.

In other respects, however, these recent constitutional processes are different. They do not just benefit from the digital revolution and the availability of new communication tools that shorten the distance between constituents and assemblies and render public consultation more feasible and efficient than the old off-line methods. These new processes are also characterized by a different set of underlying motivations and beliefs. In particular, they seek to include popular input or even the presence of ordinary citizens in the constitutional assembly (e.g., in Iceland and Ireland) for reasons that go beyond legitimation purposes, or reconceptualize legitimation altogether. They build on the assumption of the “wisdom of crowds” and the idea that ordinary citizens can be a source of information and knowledge, not just validation. The idea is no longer merely to include the people because it is their right to participate (though this is still a valid and advertised reason) but because it is, also, a smart thing to do, likely to result in better outcomes. From this perspective, participatory constitution-making is one more manifestations of the trend towards “open government.”⁶

20 (Laurel E. Miller ed., 2010); VIVIEN HART, *DEMOCRATIC CONSTITUTION MAKING* 5–7 (2003); Hassen Ebrahim et al., *PROMOTING A CULTURE OF CONSTITUTIONALISM AND DEMOCRACY IN COMMONWEALTH AFRICA: RECOMMENDATIONS TO COMMONWEALTH HEADS OF GOVERNMENT* (1999).

⁶ See e.g., BETH SIMONE NOVECK, *WIKI-GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL* (2009); BETH SIMONE NOVECK, *SMART CITIZENS, SMARTER STATE: THE TECHNOLOGIES OF EXPERTISE AND THE FUTURE OF GOVERNING* (2017).

Additionally, because the collective wisdom these participatory processes seek to tap is not merely aggregative but deliberative in nature, the goals sought by reformers are not mere public “consultation” as a one-way flow of information from the public to the drafters. It is public dialogue—a productive back and forth between both the drafters and the public as well as among the public itself. This back-and-forth, as we will see, was first attempted in the Icelandic case, where the Constitutional Council engaged in an iterative process of putting 12 successive constitutional drafts online, each time soliciting a new round of comments on a text modified in light of the previous round.

The different motivations correspond to a difference in execution. It is well known that the bags of mail about the constitution solicited from the South African population remained largely unopened by the constitution-drafters.⁷ After all, it did not matter whether the mail was actually read if consultation was an end in itself and the legitimization purposes were achieved by merely asking people to contribute their views. By contrast, in the case of Iceland, the participants’ online (and off-line) contributions were actually read by at least some of the constitution-drafters and made a measurable difference to the final text.⁸ Similarly, online comments on constitutional clauses, specifically those related to rights, influenced their final formulation in the 2012 Egyptian constitution.⁹

⁷ A real pity considering that polls estimated that 73 percent of South Africans were reached by the assembly’s campaign “You’ve made your mark, now have your say,” and that the public made two million submissions. Hart, *Constitution Making and the Right to Take Part in a Public Affair*, *supra* note 5, at 7.

⁸ Hudson, *supra* note 4.

⁹ Maboudi & Nadi, *supra* note 1, at 725.

Recent participatory constitutional processes thus assume a positive causal relation between public participation and the quality of constitutional processes' outcomes. Is this assumption justified? What the available evidence from large-*n* studies suggests is that there is "an association between processes that involve the public in the adoption of the constitution and the presence of rights and certain democratic institutions in the resulting document."¹⁰ This evidence confirms a pre-existing theory by Jon Elster that more democratic processes yield more democratic outcomes,¹¹ and is also "consistent with the case-study literature."¹² This empirical literature, however, tends to focus narrowly on participation as downstream referendums rather than as upstream consultation or participation at the drafting stage. As to the precise mechanisms by which participation is supposed to make for better constitutional outcomes, "many of the assumptions of proponents of participation remain untested, and the precise relationships between participation and desirable outcomes of interest remains underspecified."¹³ The authors thus call for "the careful work of case study literature to try to untangle the causal relationships."¹⁴

¹⁰ Tom Ginsburg, Zachary Elkins & Justin Blout, *Does the Process of Constitution-Making Matter?* 5 ANN. REV. L. & SOC. SCI. 201, 219 (2009). *See also* K. Samuels, *Constitution Building Processes and Democratization: A Discussion of Twelve Case Studies*, 668 (Geneva: IDEA, 2006).

¹¹ *See* Jon Elster, *Ways of Constitution-Making*, 123, 125, in *DEMOCRACY'S VICTORY AND CRISIS* (Axel Hadenius ed., 1997).

¹² Ginsburg, Elkins & Blout, *supra* note 11 at 219. The authors, however, emphasize that caution is needed before drawing conclusions about causality, as "it is likely that the association between public involvement on the one hand and rights and democracy on the other reflects the common impact of an unobserved variable," (*id* at 218) for example, an antecedent agreement among elites in favor of democracy, in which constitution-making is part of the process.

¹³ Tom Ginsburg, Justin Blout, Zachary Elkins, *the Citizen as Founder: Public Participation in Constitutional Approval* 81 TEMPLE L. REV. 361, 381 (2008).

¹⁴ Ginsburg, Elkins & Blout, *supra* note 11 at 218.

This article contributes to this on-going debate about the relationship between public participation and constitutional outcomes by offering one more case-study, the Icelandic case, in which public participation went beyond the classic upstream and downstream consultations recommended by normative constitutional theory (the “hourglass model” of Jon Elster¹⁵). The Icelandic case corroborates the predicted correlation between participation and rights provisions and democratic features in the resulting text. It also helps us identify the mechanism by which participation at the drafting stage likely caused such effects. The theoretical framework for the causal claim is the democratic theory framework known as “epistemic democracy,” whereby more inclusive decision processes (specifically more inclusive *deliberative* processes) are expected to make for better decisions.¹⁶ The paper simply applies this conceptual framework to the context of constitutional drafting.

The article is structured as follows. The first section describes the constitutional process itself. The second section analyzes the three key institutional innovations that make this constitutional process participatory in novel and even path-breaking ways: the National Forum, the Constitutional Assembly of amateurs, and the crowdsourcing phase. The third section takes advantage of the quasi-natural experiment nature of the Icelandic process to argue that the crowdsourced constitutional proposal proved at least marginally superior to competing drafts written by experts at the same time and credits this

¹⁵ Jon Elster, *The Optimal Design of a Constituent Assembly*, in COLLECTIVE WISDOM 148 (Jon Elster & Hélène Landemore, eds., 2012).

¹⁶ E.g. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (1996) Elizabeth Anderson, *The Epistemology of Democracy* 3 EPISTEME 8, (2006); DAVID ESTLUND DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK (2008) and HÉLÈNE LANDEMORE, DEMOCRATIC REASON: POLITICS, COLLECTIVE INTELLIGENCE, AND THE RULE OF THE MANY (2013).

superiority to the participation of the public at the drafting stage. The fourth section, finally, considers various objections to the generalizability of the Icelandic example, including the objections from size and homogeneity.

1. The 2008 crisis and the resulting 2010-2013 constitutional process

In the fall of 2008, all four of the Icelandic national banks collapsed and Iceland entered into a deep financial and economic crisis. This crisis in turn spurred political protests against a government perceived as incompetent and corrupt. The “pots and pans revolution” was born, with people protesting loudly with various kitchenware in front of the Icelandic Parliament during the winter of 2008–2009. While their main demands had little to do with a constitutional overhaul, the topic of constitutional change had been discussed for many years in Iceland. The change in political personnel the following spring brought to power proponents of such a constitutional change and gave the topic political momentum.

On June 16, 2010, the Parliament passed a constitutional act initiating the constitutional revision process. On November 6, 2010, a Constitutional Committee appointed by the Parliament organized a National Forum, which gathered 950 randomly selected individuals tasked with establishing “the principal viewpoints and points of emphasis of the public concerning the organization of the country’s government and its constitution.”¹⁷

¹⁷ Alexander Kok, *Icelandic National Forum 2010*, PARTICIPEDIA (Aug. 30, 2011, 11:17 AM), <http://participedia.net/en/cases/icelandic-national-forum-2010>.

The next step, the creation of a constitutional assembly, was a major source of controversy. Born as an assembly of twenty-five delegates elected by direct personal election in November 2010, this first assembly was then annulled in January 2011 by the Supreme Court, in light of various procedural irregularities in the election process. The government and Parliament decided to ignore the Supreme Court ruling and individually re-appointed the elected members by Parliament to a new body named the “Constitutional Council.”¹⁸ The plan was for the Council to produce a draft in three months (from April 6 to June 6) with the possibility of a one-month extension. In the end, the Constitutional Council used the one-month extension and the draft was presented to Parliament a few weeks later on July 29, 2011.

The last phase of the process began with a non-binding national referendum on the constitutional proposal. Held on October 20, 2012, the referendum garnered substantial participation—half of Iceland’s 235,000-strong electorate participated—and secured a two-thirds approval of the draft as the basis of a new constitution.¹⁹ The participation rate, however, was unusually low for Iceland, at about 47%. The Parliament, then asked to enact the draft into law, somehow ended up not voting on the draft bill, which has been languishing in legislative limbo ever since.

The reasons advanced for the failure of the draft to be passed into law vary. Some blame it on a fickle Icelandic public who, once the worst of the economic crisis had passed, failed to rally around the project of a constitutional reform no longer seen as

¹⁸ Except for one person who declined to join this new body and had to be replaced by the next person on the electoral list.

¹⁹ Among the other questions put to the people of Iceland was, for example, whether natural resources that were not already privatized should be declared national property. This clause was approved by 87% of the voters.

urgent or even needed.²⁰ The election of 2013 in fact awarded a decisive victory to those parties who had resolutely opposed the process. Others blame the outcome on the opposition, which arose, almost from the get go, from parties, politicians, and even academics threatened by the perspective of change or frustrated not to be given any control over it, as well as from powerful economic interests hostile to specific provisions of the new draft.²¹ Other explanations can be found, including the ambition of rewriting the constitution in its entirety, as opposed to merely amending some articles, and the failure by the Constitutional Council to maintain buy-in and good will from the larger political class. One salient aspect of the Icelandic constitutional process is the rift that seemed to have grown between the participatory elements of the process—the Constitutional Council of 25 non-professional politicians especially—and the rest of the incumbent political elites. Though members of the 2010 Parliament that started the constitutional process clearly embraced its participatory actors and aspects, other members of the political elites quickly moved to marginalize them in response (e.g., with the Supreme Court invalidating the elections to the Constitutional Assembly on what seems like rather tenuous grounds). The trust, good will, and support of the political elites

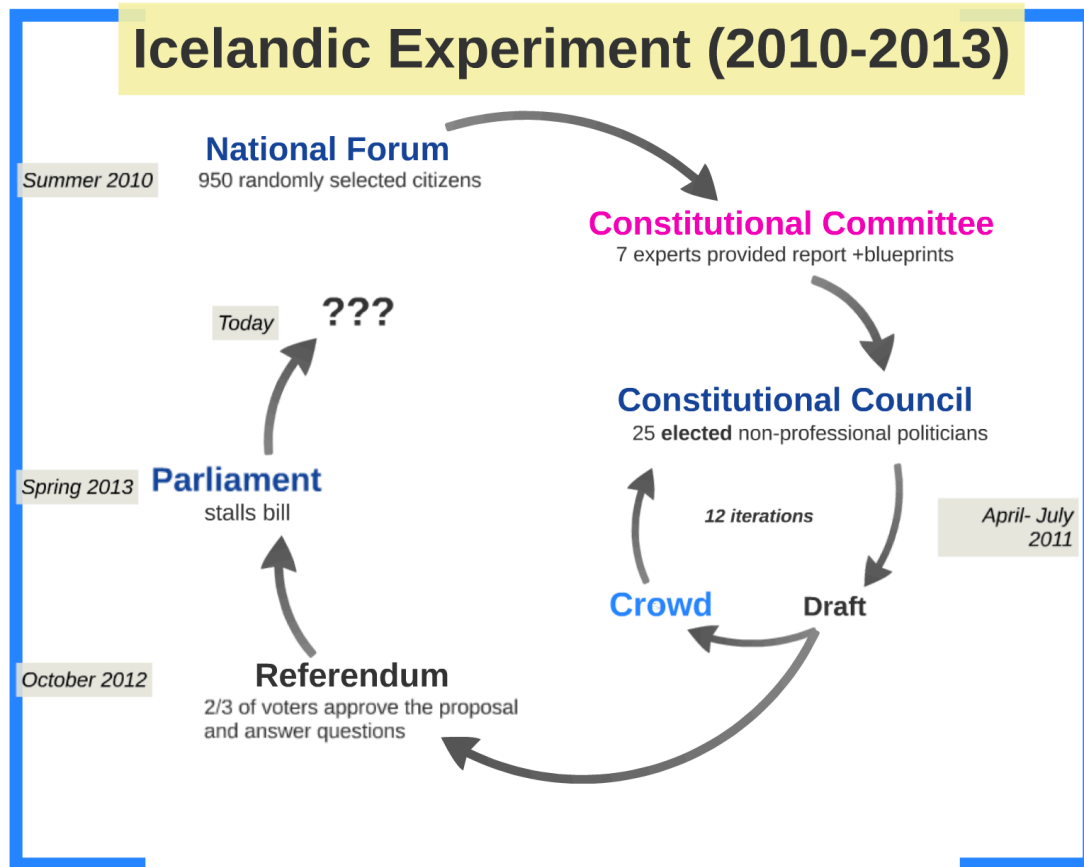
²⁰ See Tom Ginsburg & Zachary Elkins, *Stjórnarskrárgerð á tímum gagnsæis: Ísland í samanburði (Drafting constitutions in an era of transparency: Iceland in comparative perspective)*, in TILRAUNIR MEÐ LÝÐRÆÐI – ÍSLAND Í KREPPU OG ENDURREISN (EXPERIMENTS IN DEMOCRACY—ICELAND IN CRISIS AND RECOVERY) (Jón Ólafsson ed., 2014).

²¹ See Thorvaldur Gylfason, *Democracy on ice: A post-mortem of the Icelandic Constitution* OPEN DEMOCRACY (June 19, 2013), <https://www.opendemocracy.net/can-europe-make-it/thorvaldur-gylfason/democracy-on-ice-post-mortem-of-icelandic-constitution>; Thorvaldur Gylfason, *Putsch: Iceland's crowd-sourced constitution killed by parliament*, VERFASSUNSBLOG (Mar. 30, 2013), <http://www.verfassungsblog.de/de/putsch-icelands-crowd-sourced-constitution-killed-by-parliament>.

towards the process and its main actors thus seemed to have vanished by the time the 2012 referendum came around. In any case, had the draft bill been passed, Icelanders would have had to vote in a second non-binding referendum on whether or not to adopt the new crowdsourced constitution in the Spring 2013, at the same time as parliamentary elections were held. The newly elected Parliament would also still have had to approve the new constitution.

The following illustration recapitulates the steps and participants in the constitutional process.²²

²² For more details on the process, see JÉRÔME SKALSKI, *LA REVOLUTION DES CASSEROLES: CHRONIQUES D'UNE NOUVELLE CONSTITUTION POUR L'ISLANDE* (2012); Baldvin Thor Bergsson & Paul Blokker, *The Constitutional Experiment in Iceland*, in *VERFASSUNGGEbung IN KONSOLIDIERTEN DEMOKRATIEN: NEUBEGINN ODER VERFALL EINES SYSTEMS?* (Kálmán Póczy ed., 2014); Hélène Landemore, *What is a Good Constitution? Assessing the Icelandic Constitutional Proposal*, in *ASSESSING CONSTITUTIONAL PERFORMANCE* 71, (Tom Ginsburg & Aziz Huq eds., 2016); Anne Meuwese, *Popular Constitution-Making: The Case of Iceland*, in *THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 469, (Denis Galligan & Mila Versteeg eds., 2012); Hannah Fillmore-Patrick, *The Iceland Experiment (2009-2013): A Participatory Approach to Constitutional Reform* DPC POLICY NOTE NEW SERIES # 02 (2013); Katrín Oddsdóttir, *Iceland: The Birth of the World's First Crowd-Sourced Constitution?*, 3 *CAMBRIDGE J. INT'L & COMP. L.* 1207, (2014); Silvia Suteu, *Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland*, 38 *B.C. INT'L & COMP. L. REV.* 251, (2015); Bjarki Valtýsson, *Democracy in Disguise: The Use of Social Media in Reviewing the Icelandic Constitution*, 36 *MEDIA, CULTURE, & SOC'Y* 52, (2014).



What is unique and striking about the Icelandic process is that, contrary to what has historically been the case in all known constitution-writing processes, a concerted effort at including the population at large in all its diversity was attempted at various steps. The Icelandic process strived to be as open as possible at every significant stage, and particularly at the crucial stage of drafting the actual constitutional text.²³

Constitutional processes are typically seen as processes best left to experts, at least when it comes to agenda-setting and actual writing of the constitutional proposal.

²³ Jon Elster, *The optimal design of a constituent assembly*, in *COLLECTIVE WISDOM: PRINCIPLES AND MECHANISMS* 148, (Hélène Landemore and Jon Elster eds., 2012).

Ordinary citizens are usually involved only at the very end of the process, in a referendum on whether or not they approve the proposed document. In the last few decades the practice and theory of “participatory constitution-making” have expanded to give people more of a say in the early phase of the process, through moments of “public consultation.” Constitutional scholars are ambivalent about the role of popular participation in constitution-making and usually conclude that while upstream and downstream moments of consultation are welcome, the writing phase must be kept closed and in the hand of professionals.²⁴ The Icelandic design, in that sense, is groundbreaking, violating a number of assumptions about the ideal shape of a constitutional process. I now turn to the analysis of the three main institutional innovations of the process: the National Forum of 950 (quasi-)randomly selected citizens, the assembly of amateurs, and the crowdsourcing moment.

2. Democratic innovations in the Icelandic process

This section emphasizes the novel participatory features of the Icelandic process. Three innovations were key: the 2010 National Forum, the constitutional council of non-professional politicians as constitution-makers, and the crowdsourcing phase the latter chose to engage in. These three features go beyond the classic features of previous participatory processes and ensured a genuine openness of the process to ordinary citizen.

2.1 The National Forum

²⁴ *Id.*

The 2010 National Forum is, arguably, the most original aspect of this constitutional process, although it was in fact the second iteration of a concept first developed by civil society in 2008. Shortly after the collapse of the Icelandic economy and the political revolution that ensued, a grassroots association self-labeled “the Anthill” had organized a large public event called a “National Forum” to discuss the future of Iceland. This earlier National Forum had gathered 1500 individuals, most of them randomly selected from the National Population Register, in a one-day exercise that consisted of articulating the values and priorities that should guide the renewal of government and public administration. The results of the first National Forum were made public and discussed in the news media and the larger public sphere.²⁵ The success of this first National Forum was such that Parliament decided to organize a second one, together with the Anthill organization, as the first step of the new constitutional process.

National Forum 2010 took place on November 6, 2010. The Constitutional Act prescribed that participants had to be randomly sampled from the National Population Register “with due regard to a reasonable distribution of participants across the country and an equal division between genders, to the extent possible.”²⁶ The Anthill group collaborated with Gallup Iceland, which then selected participants from the official directory of inhabitants by means of quota sampling, in order to ensure representativeness in age, gender, and geographical origin. The selected participants were contacted by letter and subsequently by phone. Because the response rate was low (20%), about 3,000

²⁵ Stefán Ólafsson, *Iceland’s Financial Crisis and Level of Living Consequences* WORKING PAPER NO 3:2011 (2011).

²⁶ Act no. 20/2010, ACT ON A CONSTITUTIONAL ASSEMBLY, ART. 29, ICELANDIC NATIONAL FORUM 2010, http://thjodfundur2010.is/other_files/2010/doc/Act-on-a-Constitutional-Assembly.pdf.

people had to be approached in order to yield the resulting 950 participants.²⁷

Furthermore, for each of the 1,000 seats offered, there were four backup candidates in the same age/gender/geographical location bracket so as to ensure that, should the first, or second, or third candidate decline to participate, there was someone relatively similar to replace them.²⁸ The selection process was thus technically near random sampling, subject to some self-selection, combined with stratified sampling.

The task of National Forum 2010 was to establish “the principal viewpoints and points of emphasis of the public concerning the organization of the country’s government and its constitution.”²⁹ After a day of brainstorming, the answers were compiled under eight different themes.³⁰ These findings were meant to inspire a constitutional draft reflective of the preferences of the Icelandic people.

According to the description of the event available on the internet,³¹ the participants of the Forum sat in small groups of eight at roundtables monitored by discussion leaders. These discussion leaders were all trained facilitators,³² who did not contribute any personal views and were merely there to ensure that everyone had an equal opportunity to voice their opinions. While the set-up lent itself to deliberation and the

²⁷Kok, *supra* note 18.

²⁸Thanks to Finnur Magnusson for this clarification. E-mail from Finnur Magnusson to Anonymous (Mar. 13, 2013,) (on file with author).

²⁹ Kok, *supra* note 18.

³⁰ THE MAIN CONCLUSIONS FROM THE NATIONAL FORUM 2010, <http://www.thjodfundur2010.is/frettir/lesa/item32858/> (last visited Aug. 21, 2017).

³¹ Kok, *supra* note 18.

³² A special word was created in Icelandic to refer to these “facilitators”—*L’oðs* (the closest meaning in English would probably be “pilot”)—so as not to imply that they were “leaders,” the only word available until then. Thanks to Finnur Magnusson for this information. E-mail from Finnur Magnusson to Anonymized (Mar. 12, 2013) (on file with author).

exchange of arguments, most of the discussions proceeded on the basis of brief speeches recorded by the facilitators. The tight schedule had been laid out by the members of a company named Agora that specializes in crowdsourcing. In the morning, the job of participants mostly consisted of brainstorming potential values and visions that were aggregated into eight main themes. The afternoon was spent on more concrete discussions between thematically specialized groups. This part of the event seemed to have been more deliberative, although its goal was simply to generate another ranking of the content proposals in terms of “importance” and “[positive] new ways of thinking.”³³ At the end, the participants distributed across various tables for the theme discussions returned to their initial table to share the experience of the afternoon. Based on these exchanges, each table drafted up to five recommendations, out of which each table voted on the three best.

At the end of the event, the organizers extracted a series of key values that the participants wanted to see become part of the new Icelandic Constitution. The procedure involved selecting one-sentence thematic answers to the question: “What do you want to see in the new Icelandic Constitution?”; asking table to jointly compose a sentence containing the most important input within the theme addressed by that given table; asking each table to vote on three answers to the question: “What are our recommendations, advice, and requests to those who will continue and finish the work towards a new constitution?”; and finally, asking the participants and facilitators for individual suggestions.³⁴

³³ Kok, *supra* note 18.

³⁴ See Kok, *supra* note 18. Strangely, the facilitators, all part of a 200 volunteer group and all commendable but not part of the random selection process, were given a voice on a

The output of the National Forum was synthesized in a 200-page report, along with expert recommendations and two blueprints for a constitutional proposal. These materials were transmitted to the 25 members of the Constitutional Council.

2.2 The Assembly of Amateurs

The second democratic innovation of interest in the Icelandic constitutional process was the constitutional assembly in charge of writing the draft. In many ways this constitutional body can be described as an assembly of “amateurs,” in the sense that it was open to ordinary citizens without prior experience of politics. Not only was being a member of the Constitutional Council a job open to ordinary citizens, it was a job from which professional politicians then in power were excluded by law. The idea was to maximize the presence of ordinary citizens in the Council. Perhaps as a result of this openness, 522 decided to run for election. Ultimately the 25 people who ended up winning a seat on the Council reflected an unusually diverse selection of profiles, *at least compared to more traditional constitutional assemblies*.³⁵ Instead of politicians appointed from among elected representatives or prominent political or administrative figures (e.g., the members of the constituent assembly created to produce a constitutional text for the European Union or the 2012 Egyptian Constituent Assembly³⁶), the Council included

par and aggregated with the randomly selected participants. This arguably forms another violation of the statistical representativeness of the National Forum.

³⁵ I emphasize this comparative point because in other ways the Constitutional Council was still elitist, as critics were quick to point out and as I'll mention where relevant. Comparably participatory processes are the South African, Ugandan, and the Tunisian constitutional processes. Devra Moehler *Participation And Support for the Constitution of Uganda* 44 J. OF MOD. AFRICAN STUD. 275 (2006).

³⁶ The composition of the Egyptian assembly is described in, e.g., Maboudi & Nadi, *supra* note 1, at 4.

mostly amateur politicians. Only two out of its 25 members were former Parliamentarians (though several also held positions in various parties during their involvement in the Council). The Council included 10 women and 15 men, meeting the required minimum of 40% women specified by Althingi.³⁷ The 25 also included: five university professors (one in economics, one in applied mathematics, one in ethics (also director of the University of Iceland Ethics Institute), one in politics (lecturer), one in theology (also a pastor)), two media presenters (one also a student), three physicians (one of whom also self-identified as a film-maker), a lawyer and radio presenter, one mathematician (working outside of academia), a farmer, a journalist, a manager, a pastor (distinct from the theology professor above), a reader of political science, the manager of the division of architecture at Reykjavik Art Museum, the chairman of an Icelandic video game developer and publisher, a theater director, a former museum director and teacher, a lawyer, a trade union chairman, a political scientist and university student, and a consumer spokesperson.³⁸

While remarkably inclusive of Icelandic diversity, the Constitutional Council, however, was clearly not descriptively representative along a number of dimensions. Only three out of the twenty-five members were from outside of Reykjavik, compared to some one third of the Icelandic population.³⁹ The academic community was

³⁷ One woman had to be moved up in the ranking for this to happen. Had fewer women been elected, up to six women closest to being elected under the regular method would have been declared elected to fulfill the quota.

³⁸ Wikipedia, *Icelandic Constitutional Assembly Election, 2010*, https://en.wikipedia.org/wiki/Icelandic_Constitutional_Assembly_election,_2010 (as of June 9, 2017, 21:56).

³⁹ About 211,000 out of 329,000 Icelanders lived on Jan. 1, 2015 in the greater metropolitan area around the capital city Reykjavík.

overrepresented. There was only one farmer, who also happened to be chairman of the Farmers' Association, one of the most influential trade unions and lobbying groups in Iceland. There was only one member of the working-class, the trade union chairman, who, though a former electrician himself and self-identifying as a member and a representative of the working class,⁴⁰ is nonetheless also the father of the internationally renowned singer Björk. In an otherwise ethnically and religiously homogenous country, the socio-economic dimension should perhaps have mattered more than it did and critics argued that there were too many highly educated, urban, wealthy individuals on the Council.

2.3 The crowdsourcing phase

The most original and directly participatory part of the drafting stage was the “crowdsourcing” phase, which included a series of 12 crowdsourcing moments. The twenty-five members of the Council, far from isolating themselves from popular input, regularly posted online the version of the draft they were working on. All in all, they posted twelve drafts, at various stages of completion. Anyone interested in the process could send feedback by posting comments on social media platforms like Facebook and Twitter, or by posting on the Council’s own webpage or using regular email and mail. Foreigners were free to participate if they could find a way (e.g., Google Translate) to overcome the language barrier. For example, an American citizen with a property in Iceland wrote on the Facebook page that she hoped the new constitution would take into account the interests of people in her situation.

⁴⁰ E-mail from trade union chairman to Anonymous (Aug. 15, 2016) (on file with author).

Roughly 3,600 comments were made online. Each of these comments started a conversation of various lengths, with many response threads following initial comments. Ultimately, only about 360 suggestions emanated from a population of 320,000 or so. As in most other crowdsourced policy or law processes, online participation involved a demographically skewed sample of participants – mostly older, educated white males.⁴¹ Ragnhildur Helgadóttir, a legal scholar at the University of Reykjavik, critically points out that “internet consultations during the drafting seem to have further empowered a politically strong group (native-born, middle-aged males) instead of the youngest voters or those who generally do not participate in politics.”⁴² She emphasizes that, by contrast, “traditional” consultation in Parliament drew a somewhat different group of people to the table,” including young people and women.⁴³ It is worth noting, though, that the traditional form of consultation by Parliament drew only 90 submissions (four times fewer than the online methods) from only 53 different individuals and legal entities. While online crowdsourcing does not tap the full diversity of a country’s perspectives, it helps increase the quantity of possibly relevant input by engaging participants who might not have been reached through any other existing means. Rather than a rival mechanism for public participation, crowdsourcing should probably be seen as a useful supplement to more classic consultation processes. Finally, unlike Parliamentary consultations, whose

⁴¹ See, e.g., Tanja Aitamurto, Hélène Landemore & Jorge Saldivar Gali, *Unmasking the Crowd: participants’ motivation factors, expectations, and profile in a crowdsourced law reform* 20 Information, Comm. & Soc., (2017) for a comparable crowdsourced policy process in Finland.

⁴² Ragnhildur Helgadóttir, *Which Citizens? – Participation in the Drafting of the Icelandic Constitutional Draft of 2011*, INT’L J. CONST. L. BLOG, Oct. 7, 2014, available at: www.iconnectblog.com/2014/10/which-citizens-participation-in-the-drafting-of-the-icelandic-constitutional-draft-of-2011/.

⁴³ *Id.*

impact on the final draft is not easily measurable, close to 10% of the online contributions to the various platforms consulted by the constitutional council made a causal difference to the final version of the text.⁴⁴ If only for this reason, the Icelandic innovation of crowdsourcing constitutional proposals is worthy of attention.

3. Was the constitutional proposal any good?

The participatory Icelandic constitutional process can only be inspirational if it was both causally responsible for the content of the proposal and resulted in a proposal of sufficient quality. Was the crowdsourced constitution substantially any good? The fact that it was approved by two-thirds of the voters 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.⁴⁵

The literature currently offers no unique and consensual benchmark of “goodness” for a constitutional text.⁴⁶ Legal scholars and constitutional theorists tend to focus on formal features such as “coherence.” The Venice Commission members, a group of European legal experts consulted by the Icelandic Parliament, thus pointed out inconsistencies between articles and institutional settings and suggested, on such grounds,

⁴⁴ Hudson, *supra* note 4.

⁴⁵ Unless Gylfason, *supra* note 25 (2013b); is right and the failure of the constitution is simply a coup of the politicians, which is plausible from his account. But I want to bracket this possibility for now.

⁴⁶ for an attempt at sketching an index-like standard, see Hélène Landemore, *What Is a Good Constitution? Assessing the Constitutional Proposal in the Icelandic Experiment*, in *ASSESSING CONSTITUTIONAL PERFORMANCE* (Tom Ginsburg, Aziz Huq, eds., 2016) and for a constructed standard of liberalism and smartness on the specific issue of religious rights, see Hélène Landemore, *Inclusive Constitution Making and Religious Rights: Lessons from the Icelandic Experiment* 79 *J. OF POL.* 762 (2017).

a potential risk of non-workability of the document as a whole. These concerns, emphasized in the Icelandic media, undeniably played some role in delegitimizing the proposal in the eyes of many.

But coherence is only one way in which a constitution should be assessed, a very academic and abstract one at that, and perhaps not the most essential or adequate for processes meant to involve a large number of people. Additionally, it is not clear that public participation (rather than lack of time, since the Constitutional Council was only given four months in total to draft the document) should be blamed for whatever lack of coherence was identified by the Venice Commission. It is also worth mentioning that the Venice Commission did not offer a comparable evaluation of the expert proposals, which leaves us unsure of the comparative performance of experts in this respect. Finally, according to Ginsburg, Elkins and Blount (2009: 215), when it comes to examples of “poor drafting, internal contradictions, or errors,” which abound in constitutions across the world, “no one has yet tied these directly to participation.” Nor is there, to my knowledge, indisputable evidence of a causal relation between lack of textual coherence and unworkability of a constitution in practice (though to be fair the connection sounds plausible).

In what follows I propose to assess the crowdsourced constitutional proposal by two less formalistic and more substantive standards. I call these respectively “rights-heaviness” and “democraticity.”⁴⁷ “Rights-heaviness,” as I use it, measures how well a constitution is likely to do one of the essential things a constitution is supposed to do, namely protect individual rights. Heaviness here means both to the number and quality of

⁴⁷ These two criteria are also used in Landemore, *supra* note 23.

rights entrenched in the constitution. It seems plausible that how much a constitution details and entrenches individual rights, while not a guarantee that the regime built on such a constitution will respect them, should factor in our evaluation of its goodness. The second criterion is a common standard in the constitutional literature. Carey (2009) calls it “democracy” and characterizes it as “the most prominent among constitutional ideals” (Carey 2009: 156).⁴⁸ By “democracy” Carey means 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. This criterion has been recently relabeled, less elegantly but more accurately, as “democraticity,”⁴⁹ in order to characterize how far along on the continuum from less to more democratic a constitution is procedurally (by contrast to how rights-heavy it is).⁵⁰ 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, and is thus a plausible benchmark of goodness to use.

One interesting conjecture in the constitutional literature is that the more participatory a constitutional process is, the more rights and mechanisms for popular participation it should include.⁵¹ This is an intuitive claim well-worth testing in the context of the most participatory constitutional drafting stage to date. As it turns out,

⁴⁸ John M. Carey, *Does it Matter How a Constitution is Created?* 155, 156 in *Is Democracy Exportable* (Zolton Barany & Robert G. Moser eds., 2009).

⁴⁹ Landemore *supra* note 23.

⁵⁰ Contrary to Carey, Landemore proposes not to include consideration for rights, including human rights, under the democracy criterion, but files 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. *See* Landemore note 23.

⁵¹ E.g., Elster 1997, *see supra* note 12, at 123, 125.

testing this conjecture is facilitated by the quasi-natural experiment nature of the Icelandic experience, which allows us to compare the crowdsourced constitutional proposal to two constitutional proposals independently written by seven government experts at about the same time. As in a controlled experiment, we have two comparable processes: one that involves seven experts writing behind closed doors and one that involves public participation. Public participation here means both involving an (initially) elected constitutional assembly of non-professional politicians and opening up the drafting process to the larger public via crowdsourcing platforms.⁵² In other words, the treatment here is “public participation at the drafting stage,” which lumps together the participation of non-professional politicians on the Constitutional Council and the participation of the online crowd at various stages of the writing process. The “control” is the writing of rival drafts by experts behind closed-doors. If it can be shown that the proposal that benefitted from popular participation at the drafting stage is even only marginally better than the expert-written drafts along the two criteria of relevance (democraticity and rights-heaviness), then this should go some way towards proving the value of participatory constitutional processes, at least under the conditions met in the Icelandic case.

The quasi-natural experiment design offered by the Icelandic constitutional process is imperfect. An ideal comparison would have involved strictly independent

⁵² Please note that I do not include the off-line consultations organized by Parliament. Although the participants were arguably more diverse than the online participants (more female in particular), their number were small, the impact of their contributions impossible to trace at this point, and most importantly their participation took place *after* the Council had submitted to Parliament the version of the constitutional proposal I am assessing in this paper.

groups of drafters that would all have offered a final proposal meant to be submitted to a referendum and then to Parliament. Instead, the experts knew they were writing templates for the Constitutional Council. These imperfections are not so bad, given various mitigating factors, as to invalidate the lessons one can derive from the comparison.⁵³ This quasi-controlled experiment thus offers a close enough approximation of more formal comparisons between the few and the many used in epistemic democrats' models.⁵⁴

Let me now turn to the evaluation. Was the crowdsourced constitutional proposal a good constitution by the two standards of rights-heaviness and democraticity? 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?

In terms of rights-heaviness, the crowdsourced proposal includes thirty-one articles related to “human rights and nature,” which makes it more rights-heavy than the original constitution or the expert-drafts, yet only “moderately rights-heavy” compared to other constitutions worldwide according to external observers (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).⁵⁵ The Venice Commission praises the proposal for “new provisions [...] aiming both to extend the scope of protection and to

⁵³ See also Landemore *supra* note 48, (2017) for a defence of the set-up.

⁵⁴ See e.g., HÉLÈNE LANDEMORE, *Democratic Reason: the Mechanisms of Collective Intelligence in Politics*, COLLECTIVE WISDOM: PRINCIPLES AND MECHANISMS (Hélène Landemore and Jon Elster, eds., 2012); DEMOCRATIC REASON: POLITICS, COLLECTIVE INTELLIGENCE, AND THE RULE OF THE MANY (2013); Hélène Landemore, *Democracy as Heuristic: the Ecological Rationality of Political Equality* 23 THE GOOD SOCIETY 160 (2014) .

⁵⁵ Zachary Elkins, Tom Ginsburg, & James Melton, A REVIEW OF ICELAND'S DRAFT CONSTITUTION 3–10 (2012).

better reflect the international human rights obligation.”⁵⁶ The Venice Commission singles out in particular article 112 as being 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 rights.⁵⁷ The Venice Commission also notes that “the scope of protection has especially been widened by adding new socio-economic rights (articles 22–25), as well as more or less ‘collective rights’ (article 32–36), called by the explanatory bill ‘third-generation rights.’”⁵⁸

The proposal also includes novel rights, such as the right to the internet (article 15) and various socioeconomic and collective rights.⁵⁹ The proposal mentions explicitly “sexual violence” as a type of violence the state should protect individuals from. Unlike the original constitution or either of the expert drafts, the Council’s proposal also devotes a separate and extensive article to the rights of children. The proposal mentions still more sources of discrimination than the first expert draft, including genetic character, ancestry, and political affiliation. Finally, the proposal 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 the Council’s proposal calls “view of life” and “personal conviction.”⁶⁰

According to the Venice Commission, this extension of the scope of religious freedom as

⁵⁶ EUROPEAN COMM’N FOR DEMOCRACY THROUGH LAW (VENICE COMM’N), OPINION ON THE DRAFT NEW CONSTITUTION OF ICELAND 6 (2013).

⁵⁷ *Id.*

⁵⁸ *Id.*,

⁵⁹ These rights, while generous, may seem difficult to uphold, as pointed out by the Venice commission. *See id.* at 7.

⁶⁰ *Id.* at 11.

well as the inclusion of the right to change religion or faith form “a substantial improvement compared to the current Constitution.”⁶¹

It is worth looking in some detail at the religious rights provision.⁶² Article 18 of the crowdsourced proposal read as follows: “All shall be assured of the right to religion and a view of life, including the right to change their religion or personal convictions and the right to remain outside religious organizations. All shall be free to pursue their religion, individually or in association with others, publicly or privately. The freedom to pursue religion or personal convictions shall only be limited by law as necessary in a democratic society.”⁶³

This is one of four passages in the text where the reference to democracy or a democratic society is expressly mentioned (democracy is only evoked once in the 1944 constitution,⁶⁴ and three times in both expert drafts A and B). The necessities of “a democratic society,” a phrase possibly borrowed from article 9 of the ECHR mentioned above, are the only constraints on the freedom to pursue religion or personal convictions. Gone, by contrast, are the mentions of “public order” or “good morals” present in both the original constitution and the expert examples, which arguably considerably modernizes and liberalizes the text compared to all the others, including article 9 of the ECHR (which was written in 1951 and is not all that modern in many respects). The downside of eliminating any reference to public order and good morals is perhaps that it dis-aligns the proposal from the substance of an international convention with arguably

⁶¹ *Id.* at 11.

⁶² *See also* Landemore *supra* note 23.

⁶³ ICELAND DRAFT CONT. art. 18 (2011).

⁶⁴ CONSTITUTION OF ICELAND 1944.

quasi-constitutional status over Icelandic law— a point made repeatedly by the legal experts critical of the draft, who thought the Council went too far in rewriting the section on human rights, which they thought had been satisfactorily settled since 1995. There might have been pride of authorship interfering with the objectivity of the latter evaluation, however, as the person expressing this criticism is also the person responsible for that earlier amendment.

Second, the right to religion is put immediately in parallel with a right to a “view of life” and “personal convictions” that may or may not be of a religious nature.⁶⁵ In this respect, the group of 25 accurately reflected the general stance of tolerance toward various worldviews characteristic of modern Iceland (and Nordic countries more generally). The Council refused to see religion given a distinct and superior standing over philosophical views such as atheism or Buddhism. The Venice Commission, praised this part of the constitutional proposal for offering a more “open and comprehensive approach to the right of freedom of religion” in that it extends the scope of this freedom to “view of life” (or “philosophy”) and “personal conviction.”⁶⁶ 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.”⁶⁷ To the extent that the expert drafts strictly reproduced the content of the original constitution on that front, the Constitutional Council’s proposal is thus an improvement over them as well.

⁶⁵ ICELAND DRAFT CONT. art. 18 (2011) *translated in* Constitution Society of Iceland, constitutionproject.org.

⁶⁶ VENICE COMM’N *supra* note 57 at 11.

⁶⁷ *Id.*

While the superior rights-heaviness of the crowdsourced document on all competing proposal is undeniable, it has nonetheless weaknesses of its own, including excessive vagueness, resulting in a lack of clarity. The Venice Commission points out that it is “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.”⁶⁸ While the Venice Commission is mostly concerned here about the risks of disappointing the public, 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.

Turning now to the second criterion of quality, “democraticity,” one striking feature of the crowdsourced constitutional proposal 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, which 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 on state institutions. Most importantly, the democratic superiority of the crowdsourced proposal over all competitors is found in the degree to which it creates institutional avenues for popular participation.⁶⁹ Important elements of direct democracy are introduced in the crowdsourced constitution, allowing the public a role in the determination of the status of the Evangelical Lutheran Church as the 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

⁶⁸ VENICE COMM’N, *supra* note 57, at 7.

⁶⁹ See Elkins et al., *supra* note 56, at 2 (discussing the “[e]lements of direct democracy [that] appear throughout the proposed Constitution”).

European Union). The text also includes a “right of referral,” by which 10% of voters may demand a referendum on any bill within three months of its passage,⁷⁰ subject to some exceptions (such as the budget).⁷¹ Additionally, and most innovatively, the draft introduces what is elsewhere sometimes called a Citizens’ Initiative.⁷² This participatory mechanism allows 2% of the population to present an issue to the Althing, which the Althing is free to ignore, and 10% to present a bill to the Althing, which the Althing can either accept or make a counter-proposal to.⁷³ In the latter case, if the bill of the voters has not been withdrawn as a response, the Althing must present both the popular bill and the Althing’s counter-proposal to a referendum. The text also authorizes removal of the President by a 3/4th vote of the Althing, but only after a referendum.⁷⁴ It also permits a referendum for constitutional amendments after a simple majority in the Althing (although it is possible to adopt a constitutional amendment without a referendum by a 5/6th majority in the Althing).⁷⁵ Finally, candidates for President must have the prior endorsement of 1% of voters.⁷⁶

These elements of direct participation are rather distinctive of the crowdsourced constitution and have been internationally celebrated, including by the Venice Commission. Article 128 of the Venice Commission’s report thus 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

⁷⁰ A PROPOSAL FOR A NEW CONSTITUTION FOR THE REPUBLIC OF ICELAND [English translation], Art. 65 (Mar. 24, 2011).

⁷¹ *Id.* at Art. 67.

⁷² *Id.* at Art. 66.

⁷³ *Id.*

⁷⁴ *Id.* at Art. 84.

⁷⁵ *Id.* at Art. 113.

⁷⁶ *Id.* at Art. 78.

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.⁷⁷

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, thus proving inadequate both in terms of the specific socio-economic context of Iceland and its participatory and democratic tradition, as noted by the Venice Commission. The expert drafts are notably more participatory, but not to the same extent as the crowdsourced version. The first expert proposal, 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). The other expert proposal has an article in the chapter on national referenda specifying that 15% of the population can force the President to refuse to confirm an act of law or resolution of the Althingi and refer the matter to a national vote. Again, these participatory provisions are not nearly as expansive as those found in the crowdsourced document.

These elements of direct democracy arguably bleed into the criterion of “deliberative capacity”⁷⁸ in that they put “the public in conversation with their elected representatives.”⁷⁹ They render more porous and thus more effective the communication channels supposedly existing between the formal and the informal deliberative tracks of a

⁷⁷ VENICE COMM'N, *supra* note 57, at 23.

⁷⁸ See Landemore note 23; John S. Dryzek, *Democratization as Deliberative Capacity Building*, 42 COMP. POL. STUD. 1379, 1382 (2009). For Dryzek, “deliberative capacity” is “the extent to which a political system possesses structures to host deliberation that is authentic, inclusive, and consequential.” Dryzek, *supra*.

⁷⁹ Elkins et al., *supra* note 56, at 2.

properly functioning democracy.⁸⁰ The crowdsourced proposal—more so still than either of the expert drafts—meets the “democraticity criterion” along specifically deliberative lines.⁸¹

Last, but not least, another characteristic one may easily associate with “democraticity”—transparency—is a central theme in the Council’s proposal, to an extent unmatched by the expert texts “A” and “B”, let alone the original constitution. The word transparency is used three times in the Council’s proposal. 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.”⁸² 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

⁸⁰ JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (1996).

⁸¹ 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. *See, e.g.*, A PROPOSAL FOR A NEW CONSTITUTION FOR THE REPUBLIC OF ICELAND, *supra* note 58, at Art. 108.

⁸² ICELAND DRAFT CONT. art. 51 (2011) *translated in* Constitution Society of Iceland, constitutionproject.org.

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 using the word. A similar article, article 88, exists for ministers, who have a “duty to disclose information on their financial interests.”⁸³

I conclude that the 2011 Icelandic proposal was an improvement over the 1944 constitution and was also comparatively, though only marginally better than, the rival expert drafts in terms of both rights-heaviness and democraticity.

4. Causal Mechanism

The crowdsourced constitutional proposal proves marginally better than rival expert-written drafts along the two key dimensions of “democraticity” and “rights-heaviness.” Can we more precisely pinpoint this advantage on the greater public participation at the drafting stage? Here, I borrow a conjecture from the theoretical framework known as “epistemic democracy,” which traces the superiority of more inclusive deliberation to the presence of greater cognitive diversity, that is, the diversity of perspectives and heuristics used in problem resolution. The assumption is that including more people in a problem solving process, in other words, making the process more participatory, is likely to introduce more cognitive diversity and thus ensure better outcomes.

Why is cognitive diversity desirable in the context of problem-solving and why should it be desirable in the particular context of constitution-drafting? Specifically, why should we expect the cognitive diversity achieved via greater public participation at the drafting stage to help in the formulation of rights and democratic mechanisms? The

⁸³ *Id.*, at art. 88.

benefits of a cognitively diverse group for problem-solving in general are now relatively well established. Under certain conditions, cognitive diversity turns out to be more crucial to the problem-solving abilities of a group than does the average competence of its individual members.⁸⁴ Cognitive diversity is crucial because it allows the group to explore more of a given “epistemic landscape” and increases their chances of reaching its highest peak. A view emanating from someone who thinks differently, in this context, jolts other people out of their cognitive comfort zone and helps them enlarge and refine their understanding of a question by opening up vistas they would not have contemplated otherwise. Deliberating with diverse-thinking individuals takes people places, metaphorically speaking, that they would not have been able to reach on their own. By contrast, a more homogeneous group of smarter people might well end up stuck on a familiar and high, but ultimately suboptimal, peak of the landscape.⁸⁵

If we assume that problem-solving is sufficiently comparable to the task that constitution-drafters are engaged in, we can expect the benefits of cognitive diversity to apply to the task of constitution-making as well. From this perspective a group of 25

⁸⁴ See the “Diversity Trumps Ability Theorem” as first elaborated in Lu Hong & Scott E. Page *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 PROC. NAT. ACAD. SCI. U.S. OF AM. 385-89 (2004); for the final and authoritative version, see SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* 163 (2007).

⁸⁵ This advantage of diverse groups is something I have previously illustrated, such as through the example of a group of citizens aiming to solve an issue of recurrent muggings around a bridge in downtown New Haven. HÉLÈNE LANDEMORE, *DEMOCRATIC REASON: POLITICS, COLLECTIVE INTELLIGENCE, AND THE RULE OF THE MANY* (2013); Hélène Landemore, *Deliberation, Cognitive Diversity, and Democratic Inclusiveness: An Epistemic Argument for the Random Selection of Representatives*, 190 SYNTHESE 1185, 1209–31 (2012).

elected non-experts relying on the additional wisdom of the online crowd maximized such cognitive diversity in a way that the group of seven experts simply could not.

The available evidence suggests that greater public participation helped with the formulation of more expansive rights-provisions because it simply led to more individuals' interests and perspectives being taken into account. The 25 members of the Constitutional Council included, for example, a severely-disabled human rights activist Freyja Haraldsdottir, who is credited for influencing the human rights section of the crowdsourced proposal (and modifying it considerably from its last 1995 update). But even the greater diversity of the constitution-writers did not fully track the range of interests in the larger public. According to internal reports, the Constitutional 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 members of the Council to write the text they ultimately wrote. Pastor Örn Jónsson thus reports that article 6, which bars “discrimination, such as due to gender, age, genetic character, place of residence, economic status, disability, sexual orientation, race, colour, opinions, political affiliation, religion, language, origin, ancestry and position in other respects” was directly influenced by emails, letters, and online posts from, among others, the transgender community, which made members of the Council realize that the first draft they had put on the internet was not inclusive enough.⁸⁶

Opening up the draft to the larger public thus led to the introduction of a concern for transgender and children's rights, as groups representing transgender interests and child interests were able to voice their concerns about the initially less inclusive

⁸⁶ E-mail from Pastor Örn Jónsson to Anonymous (July 17, 2015) (on file with author).

formulations by the 25 Constitutional Council members (none of whom identified as transgender or was a child, despite many of them being parents).

Meanwhile, the group of 7 experts did not include either a disabled or a transgender person or a child, or their representatives (though they had the advantage of including the constitutional lawyer responsible for the 1995 amendment of the 1944 constitution that introduced human rights into the text to align it with international treaties). The expert-written drafts thus do not reflect as much of a concern for the rights of the disabled, transgender, children, and other vulnerable categories. This suggests that no matter how good and inclusive the intent of smaller, less diverse groups, it is likely that they cannot quite “see” and explore the entire landscape of possible and relevant rights-provisions the way more inclusive and more diverse groups can. When it comes to rights and their formulation, involving more people will have the effect of increasing the number of perspectives taken into consideration and thus the number of rights offered in the resulting text. It may also lead to an inflation of rights, though this seems to have been kept within reasonable limits by the constitution-makers in this case.

How did the cognitive diversity introduced by greater participation impact the democraticity of the proposal? Here the evidence is less clear-cut, though, here too, a greater diversity of perspectives plausibly helped the drafters come up with a more expansive interpretation of the National Forum’s demand that the new constitution should include new avenues for citizens’ participation. For one thing, the 25 members of the Constitutional Council went for a more expansive definition of those participatory rights and mechanisms than did the experts. More research would be needed to figure out, how, exactly, the deliberations among the 25 Constitutional Council members and their

interactions with the online crowd and members of the public more generally led them to such formulations.

A plausible case can thus be made that public participation at the drafting stage in the Icelandic case made the resulting document better in a substantive sense, in that the proposal included more rights and democratic mechanisms than would have been the case without public participation.⁸⁷ A plausible mechanism accounting for this effect of public participation is the greater diversity of perspectives ensured by the greater number of participants in the process, via both the design of a 25-member (initially) elected Constitutional Council and their use of crowdsourcing techniques to consult the larger public. This corroborates other findings that find the Icelandic constitution is also more “liberal” and “smart” in the way it addressed difficult religious rights issues.⁸⁸

5. Objections

The Icelandic example of public participation in constitution-making is inspiring on many levels. Its generalizability, however, is far from obvious. Iceland is a best case scenario, taking place in a rather stable democracy, one of the wealthiest, most educated countries in the world, and one with the highest Internet penetration in the world. The fact that the process worked there (or rather almost worked) does not guarantee that it would work anywhere else. Second, the Icelandic process is ultimately, only a partial success story and indeed, if one chooses to look at it this way, a partial failure. Although

⁸⁷ A hypothesis somewhat precluded by Elster himself, since he recommends making the drafting stage itself rather less than more participatory (for reasons that have to do with the various biases and pressures introduced by popular participation at this crucial stage).

⁸⁸ See e.g., Landemore, *supra* note 23.

it produced a viable and even good constitutional proposal, this proposal was never passed into law.

The empirical lesson of Iceland as this article intimates it—that more participation is a good idea—thus needs to be made with caution. Producing a good constitutional text is only a first step. If an equally important second step is implementing the constitution in a feasible way, then the Iceland experience may well suggest that when there is too much participation, or at least too much participation of a certain kind, then it is possible that the incumbent politicians will not implement the constitution.⁸⁹ More research needs to be conducted to explore the ways in which the rift between actors of the constitutional process and incumbent political elites harmed its potential. Some suggest that one of the reasons why the proposal could be produced to begin with was because political parties were prevented from, or refrained from, entering the process.⁹⁰ But many signs indicate that, on the other hand, losing the good will of the political class and the support of parties may have cost the Constitutional Council its credibility and a chance for their crowdsourced proposal to make it through Parliament.

Even if we assume that the Icelandic design could have accommodated incumbent elites better than it did, many authors have cautioned against public participation in constitution-making processes in a variety of contexts. William Partlett documents how the use of extraordinary “constituent” assemblies (distinct from ordinary legislatures) and popular referenda—characteristic of what he calls “popular constitution-making”—too often play in the hands of charismatic politicians with authoritarian tendencies and led to

⁸⁹ I thank Reviewer Number Three for this particularly helpful point.

⁹⁰ See *e.g.*, Hudson *supra* note 4.

constitutional dictatorships in many Central and Eastern European countries.⁹¹ Nathan Brown argues that in the Arab world the increasing publicity of constitutional processes from the second half of the twentieth century onward gave “a boost to the Islamic inflationary trend in constitutional texts”.⁹² “Publicity” is characterized by Brown as a type of formal popular participation and blames it for illiberal consequences in the Arab case. Abrak Saati, finally, after studying twenty cases of participatory constitution building in post-conflict states, transitioning states and countries having experienced a severe institutional crisis, concludes that the benefits of participation in constitutional processes are, simply put, a “myth.”⁹³

Such warnings should certainly be heeded when considering exporting the Icelandic model. That said, participation in these earlier case studies had a much looser sense and did not necessarily measure up to high standards of democracy (from the use of “referenda,” which are easy to turn into plebiscites to the practice of “publicity,” which only partially empowers citizens). In any case, it is plausible that the Icelandic design is mostly likely to be replicable in already stable and advanced democracies, rather than newly born ones and transitioning regimes.

There are two objections to the generalizability of the Icelandic case that are less well-taken and that I would like to briefly touch on: the size and homogeneity objections.

⁹¹ William Partlett, 2012 *The Dangers of Popular Constitution-Making*. 38 BROOK. J. OF INT’L L. 193 (2012).

⁹² Nathan Brown, *Islam and Constitutionalism in the Arab World: The Puzzling Course of Islamic Inflation.* in CONSTITUTION WRITING, RELIGION, AND DEMOCRACY 385 (Asli Bali & Hanna Lerner, eds., 2016)

⁹³ Abrak Saati, *The Participation Myth: Outcomes of Participatory Constitution Building Processes on Democracy*, (Apr. 30 2015) (Ph.D. dissertation, Umeå University) <http://umu.diva-portal.org/smash/get/diva2:809188/FULLTEXT01.pdf> (accessed April 10, 2017).

Do we have any reasons to think that the Icelandic democratic design would work for larger countries and less homogeneous populations?

5.1 The objection from size

Modern Iceland is a tiny nation of 329,000 people. The objection from size is thus rather natural. Yet, in some respects, it is the least intelligible. Indeed, on the face of it, the Icelandic combination of various democratic innovations (a National Forum, a Constitutional Council made up of regular citizens, the use of crowdsourcing platforms and social media, etc.) seems perfectly scalable. There may be issues of data manageability for the drafters seeking direct popular input in large countries where the crowdsourcing moment would be likely to generate hundreds of thousands or even millions of comments. But this is something that new technologies, such as data-sensing software, or trained armies of analysts who would sift through and organize the input, could arguably take care of so that the constitution-drafters would only have to digest a manageable amount of structured information. Mark Tushnet remarks that the Icelandic exercise in constitution-making put an end to the idea that inclusiveness of the population can only be done vicariously, via the representativeness of the drafting body. Instead, the Icelandic example showed that it is possible to open up the process to all interested in joining it, via the technique of crowdsourcing. As he puts it, “[o]ne can imagine similar crowdsourced drafting processes even for nations larger than Iceland.”⁹⁴

5.2 The objection from homogeneity

⁹⁴ Mark Tushnet, *Constitution-Making: An Introduction*, 91 TEX. L. REV. 1983, 1994 (2013).

The question of whether homogeneity of the population is a prerequisite for this kind of experiment to work is the real crux of the matter. First, however, let me point out that we tend to assume a little too quickly that the causal relationship between homogeneity and democratization goes only one way, namely that a certain degree of homogeneity is what renders possible greater democratization of institutions. But it is entirely possible that the causal arrows goes the other way as well, from democracy to greater homogeneity.

Consider Iceland's own history of the way it converted to Christianity at a time when growing religious pluralism threatened to destroy the community. The medieval chronicler Ari Thorgilsson in his *Íslendingabók* (book of Icelanders) written in the 12th century recounts how Icelanders peacefully switched from paganism to Christianity in the summer of 999 (or 1000).⁹⁵ At the time, the population was becoming increasingly divided between traditional pagans and the growing number of Christian converts. The King of Norway, who had vested interests in seeing Iceland turn to Christianity, got increasingly frustrated at the pagans' resistance and was ready to use violence to enforce swift and full conversion of the island. Two local chieftains, however, convinced him to let them try a more peaceful method. They spoke at the annual Althing that year and, according to Thorgilsson: "it is said that it was amazing how well they spoke." Seemingly impressed by their arguments, Icelanders then entrusted the decision about what to do to their heathen priest and chieftain, Thorgeir Thorkelsson of Ljósavatn. After one night of meditation (perhaps more), Thorgeir called the assembly and rendered his conclusion that Icelanders should embrace Christianity for the sake of unity and social

⁹⁵ A translation is available here: <https://en.wikisource.org/wiki/Translation:%C3%8Dslendingab%C3%B3k>. The key passage is in chapter 8.

peace. Thorgeir's argument was that Icelanders should "not let those prevail who are most anxious to be at each other's throats, but reach such a compromise in these matters that each shall win part of his case and let all have one law and one faith. It will prove true, if we break the law in pieces, that we break the peace in pieces too" (Karlsson 2000: 33). Thorgeir then concluded that all men should become Christians and be baptized. He also decreed that pagan sacrifice, the exposure of infants, and the eating of horseflesh (all pagan practices) would be tolerated for the time being if practiced in private (Karlsson 2000: 33; see also Winroth 2012: 135). The people agreed and many were subsequently baptized.

This peaceful transition to Christianity is astonishing. From Thorgilsson's account, it appears that the Icelanders chose to convert to Christianity on the basis of something like "the forceless force of the better argument," as expressed in the public speeches of the two Christian chieftains and the heathen priest and chieftain. The proposal to switch was thus argued for and justified to the whole community, before the law was passed. While Thorgilsson's account leaves out the reactions of the participants in the assembly and the way the decision was ultimately made (it is not clear whether a vote took place or whether the heathen priest simply decreed the new law), it appears as if the community put no fight against the decision and something like a general consensus to endorse it prevailed. Iceland might thus be one of the very few countries in the world, if not the only one, that was Christianized by something like public consent. As a result of what appears to be as close to a consensual decision as was probably possible in the 10th century, today's Iceland is 90% Christian. Perhaps as an additional result of this early

commitment to equality and consensus, Iceland is also one of the most tolerant and open societies in the world.

Consider also the history of Switzerland, a country characterized both by a long tradition of direct democracy, including frequent popular votes, and by the coexistence of a great number of linguistic, cultural and religious minorities. One of the American Anti-Federalists gives us a possibly prescient hypothesis as to how these two features are related in his reply to the Federalists' constitutional proposal. Judging their proposal inimical to his own preferred model of direct democracy, Mercer evokes Switzerland as a much better model of a system, "where the people personally exercise the powers of government."⁹⁶

Mercer first dismisses various claims invoked by his opponents to invalidate Switzerland as an example for Americans:

But we are told that Swisserland, should be no example for us...they are few in number it is said—this is not true—they are more numerous than we are—They cover a small spot of territory—this is also not true... But it is also said they are a poor, frugal people—as to their poverty that is likewise untrue.⁹⁷

More importantly though, Mercer quickly zooms in on the main advantage of Swiss practices: the fact that they allow for the peaceful management of a great deal of disagreement and religious divides:

they [the Swiss] soon banished the daemon of discord, *and Protestant and Papist sat down under the peaceful shade of the same tree*, whilst in every surrounding State and kingdom, the son was dragging the father, and brothers, their brothers, to the scaffold, under the sanction of those distinctions. Thus these happy Helvetians have in peace and security beheld all the rest of Europe become a common slaughterhouse.⁹⁸

⁹⁶ A Farmer, *Essay V*, MD. GAZETTE, Mar. 1788.

⁹⁷ *Id.*

⁹⁸ *Id.*

Mercer thus traces the peaceful coexistence of plural communities in Switzerland, at a time where civil wars were tearing apart the rest of monarchical Europe, to the practice of self-rule.

One may also want to contrast contemporary Switzerland and Belgium. Where modern Switzerland is “a paradigmatic case of political integration,”⁹⁹ Belgium is profoundly divided between its two linguistic communities, to such a point that partition is a plausible future. Why the difference? It can arguably be traced to another crucial difference, namely the fact that whereas Switzerland is to this day “the most elaborate system of direct mechanisms in the world, with numerous popular votes held every few months,” Belgium by contrast is “one of the very few European states that provide for no popular vote processes at all.”¹⁰⁰ In other words, the lack of mechanisms for popular voice and vote may well explain the greater incapacity of Belgium at dealing with pluralism.

These two brief histories are suggestive. Iceland’s history could be read as pointing to an interesting possibility, namely that *political* practices and processes of egalitarianism, deliberation, and consensus created Iceland’s cultural, social, and even religious homogeneity—rather than the other way around. What Switzerland’s history suggests is that to the extent that diversity subsists, it is rendered more manageable by the

⁹⁹ Markus Freitag & Carolin Rapp, *Intolerance Toward Immigrants in Switzerland: Diminished Threat Through Social Contacts?* 19 SWISS. POL. SCI. REV. 425, 425 (2013), citing KARL DEUTSCH, DIE SCHWEIZ ALS EIN PARADIGMATISCHER FALL POLITISCHER INTEGRATION (1976).

¹⁰⁰ Daniel Moeckli, *Referendums: Tyranny of the Majority?*, in DO REFERENDUMS ENHANCE OR THREATEN DEMOCRACY?, SWISS POL. SCI. REV., (Francis Cheneval & Alice el-Wakil, eds., forthcoming 2018).

use of democratic practices, perhaps especially of a more participatory nature. In other words, a certain degree of cultural, social, and religious homogeneity could well be the result of a widespread commitment to broad democratic principles, rather than a limiting precondition for it. If true, this conjecture would have important implications for answering the objection from homogeneity. Indeed, it could imply that democratizing the political process could ultimately bring people closer together, culturally and socially, perhaps even religiously, rather than worsen existing divides.

Regardless of whether this conjecture is plausible, there is evidence that quality deliberation on sensitive political issues can occur even on the background of deeply divided societies. Deliberative processes have been successfully implemented in divided societies such as South Africa, Turkey, Bosnia, Belgium, and Northern Ireland. In a recent survey article, Curato et al. thus document “growing empirical evidence that deliberative practices can flourish in deeply divided societies to good effect, be it in association with, or at some distance from, power-sharing arrangements.”¹⁰¹ Under the right conditions, deliberation in divided societies can help to bridge the deep conflicts across religious, national, racial, and ethnic lines.¹⁰²

¹⁰¹ Nicole Curato, John S. Dryzek, Selan A. Ercan, Carolyn M. Hendriks and Simon Niemeyer, “Twelve Key Findings in Deliberative Democracy Research.” *Daedalus* 146(3) 2017: 33.

¹⁰² E.g., Ian O’Flynn, Ian. 2007. “Divided Societies and Deliberative Democracy,” *British Journal of Political Science* 37 (4) (2007): 731–751; Robert C. Luskin, Ian O’Flynn, James S. Fishkin, and David Russell, “Deliberating across Deep Divides,” *Political Studies* 62 (1) (2014): 117; Bora Kanra. 2009. *Islam, Democracy, and Dialogue in Turkey: Deliberating in Divided Societies*. Aldershot, United Kingdom: Ashgate; George Vasilev 2015. *Solidarity across Divides: Promoting the Moral Point of View*. Edinburgh: Edinburgh University Press.

It is not thus impossible to imagine that an inclusive constitutional process would be feasible even in heterogeneous countries. Not only that, one could argue that it is precisely in that kind of context that inclusiveness would be most needed, as a key condition of the legitimacy of both the constitutional process and its outcome.

Finally, distant observers may be prone to overestimate the consensual nature of Icelandic politics. Iceland certainly is not Lebanon, Israel, or even the United States in terms of polarization. Yet, as in many other countries, the surface homogeneity reveals, upon closer inspection, much more underlying, factional-like disagreement. These disagreements were also reflected on the Constitutional Council, where intense discussions about the National Church or even more trivially whether or not the constitutional text should include a preamble, led to bitter rivalries, intrigues, disputes, accusations, and often tears. Again, it is in the use of certain procedures—including non-obviously “political” ones, like singing together at the beginning and end of meetings as well as going out for drinks after particularly unpleasant interactions, that the Constitutional Council members found a way to remain united even in the face of deep disagreement and to produce a text that they could all stand by.¹⁰³ It is worth noting, in that respect, that the expert group couldn’t agree among themselves and settled instead on producing two distinct documents, suggesting that finding consensus is a matter of procedures and commitment, not just of pre-existing homogeneity.

While Iceland’s nearly ideal democratic circumstances, small size and population homogeneity can be used as objections to the value of the lessons that can be derived

¹⁰³ All these details were reported to me in private conversations with various members of the Constitutional Council.

from it, it is probably too soon to conclude whether its democratic constitutional design could be successfully replicated elsewhere. Only time and further experimentation will tell.

6. Conclusion

The modern Viking saga of Iceland's constitutional process is worth taking seriously because it provides evidence that public participation can matter and make a concrete difference in terms of the quality of constitutional processes output. Not only did the citizens of Iceland have a say at various points of the process, including upstream and downstream consultation, but they were crucially able to affect the drafting stage and shape the document itself. The paper has further argued that public participation at the drafting stage, in the Icelandic case, mattered, in the sense that it was not merely symbolic but made a measurable difference to the outcome (the constitutional proposal).

The Icelandic case thus supports the reasonability of the trend toward greater public participation in constitutional processes observed in the last decades and shows the further reasonability of making this participation matter at the drafting stage specifically.

Notice, also, that the results of this analysis are rather conservative in that in the comparison between the expert-written and the crowdsourced proposals, both groups benefitted from the input of the National Forum. This suggests that still less participatory processes, such as those conducted without any kind of prior consultation are likely to do even worse than they did in this particular example.

