

# Inclusive Constitution Making and Religious Rights: Lessons from the Icelandic Experiment

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The 2010–13 Icelandic constitutional process offers a unique opportunity to test the predictions of epistemic deliberative democrats (as well as some constitutional scholars) that more inclusive processes lead to better outcomes. After briefly retracing the religious history of Iceland and the steps of the recent constitutional process, the article thus compares three constitutional proposals drafted at about the same time to replace the 1944 Icelandic constitution. Two of these drafts were written by seven government experts; the third one was written by a group of 25 lay citizens, who further crowdsourced their successive drafts to the larger public. The article suggests that on the question of religious rights the crowdsourced constitutional proposal indeed led to a marginally “better” (more sophisticated and more liberal) constitutional document.

Between 2010 and 2013 Iceland engaged in an unprecedented experiment in peace-time constitutional redrafting. The process included innovative participatory methods, including a national forum, an elected Constitutional Assembly of nonprofessional politicians, and the well-known use of online crowdsourcing for 12 successive drafts of the constitutional proposal. 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 gross domestic product (GDP), and spurred on by the new political personnel that came to power after the “pots-and-pans” revolution of 2008, this remarkably inclusive constitutional process ultimately led to a proposal that was approved by a two-thirds majority of the voting population in a (nonbinding) referendum in the fall of 2012. After further amendments by legal experts, the proposal was offered to *Alþing* (the Icelandic Parliament) as a bill to be discussed and voted on in the spring of 2013. To many commentators’ dismay, however, the bill was shelved at the 11th hour for reasons that

seem more political than substantive (Gylfason 2013b). Until recently, the constitutional proposal was considered dead by its opponents and “on ice” by its advocates (Gylfason 2013a, 2014).<sup>1</sup>

The Icelandic process, despite its uncertain fate at the time of writing, offers a unique opportunity to test some of the conjectures recently generated in the literature in deliberative democracy, as well as the literature on constitutional processes per se. One such conjecture in deliberative democracy is that more inclusive deliberative assemblies will generate epistemically superior outcomes—in the sense of generating smart and even morally superior outcomes (Landemore 2013).<sup>2</sup> Translated to constitutional processes—and assuming here that ordinary law making and fundamental law making are sufficiently similar—this conjecture implies that a constitutional proposal put forward by a more inclusive group of drafters should be better than the constitutional proposals generated by less inclusive ones.<sup>3</sup> A similar claim has recently been generated in the empirical field of large-N studies of

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1. The Panama Leaks in March 2016 seemingly opened a new path forward. After new massive protests caused the departure of the compromised prime minister, Parliament promised anticipated elections in Fall 2016. The newly popular Pirate Party (near the top of every opinion poll for over a year at that point) made it its main agenda to pass the constitutional proposal. For a while there seemed to be a small but nonnegligible chance that, if public mobilization did not abate, they might be able, once in power, to push it through.

2. This conjecture itself builds on the assumed epistemic properties of deliberation (e.g., Anderson 2006; Estlund 1997, 2009; Habermas 1996), those of judgment aggregation (e.g., Condorcet 1785; List and Goodin 2001), and those of the two mechanisms combined (Landemore 2013).

3. By inclusiveness here is meant the participation of a greater number of individuals in the deliberation leading to the production of a new law. In the context of an elected assembly, inclusiveness could imply both greater representativeness of the deliberating group and/or participatory mechanisms allowing for popular input.

constitutional processes, where popular participation at the drafting stage has been shown to entail higher levels of post-implementation democracy (Eisenstadt, Levan, and Maboudi 2015).<sup>4</sup> The latter claim itself refines the previously formulated conjecture, generated in the context of another large-N study, that more inclusive constitutional processes tend to yield more democratic, temperate, and durable political systems (Carey 2009). Such empirical claims would seem to justify the *de facto* trend toward more participatory, inclusive, and open constitution making observed in the last few decades (Saunders 2012), which Iceland is one of the most salient examples of.

The prediction about the greater epistemic properties of more inclusive constitutional assemblies and drafting stages runs against much of the established wisdom, including proponents of widely consultative moments upstream and downstream of the writing stage but limited and secretive writing sessions (per, e.g., Elster's [2012] "hour-glass" model) among a select group of drafters.<sup>5</sup> It runs against recent empirical evidence that popular participation in constitutional processes does not always increase levels of postimplementation democracy, at least for countries transitioning from authoritarian rule or recovering from war or severe institutional crisis (Saati 2015) and sometimes makes things worse, that is, yield less liberal results, for example, in the post-Communist world (Partlett 2012)<sup>6</sup> or the Arab world (Brown 2016).<sup>7</sup> It runs more generally against elitist theories of democracy, from James Madison to William Riker and beyond, for whom the point of representative law-makers of the ordinary or constitutional

kind is not so much to stand for the wisdom of the multitude as to substitute for it the more enlightened judgment of elected elites.

The reason why Iceland offers a unique opportunity to test the prediction that more inclusive assemblies produce better outcomes than exclusive ones is that the country underwent a quasi-natural experiment generated in the context of its 2010–13 constitutional process. During the Icelandic constitutional process, several drafts were written at about the same time—two by a group of seven government experts and one by the Constitutional Council of 25 lay people. This setup enables a meaningful comparison between the output of a small group of experts and the output of a group of non-experts meant to represent, broadly speaking, "the people."

There are, of course, limitations to this natural experiment pitting the expert few and the elected representatives of the many (to be analyzed in due course), but this article argues that they do not fundamentally threaten the relevance of the comparison. Rather, the difficulty is in producing concrete and plausible benchmarks translating the ideals of "smartness" and "moral rightness" (theorized by epistemic democrats from Cohen [1986] and Habermas [1996]<sup>8</sup> to Estlund [1997, 2009], Landemore [2013], Martí [2006], Misak [2000, 2004], Talisse [2009], and many others). The difficulty is made more acute by the fact that no tangible outcomes came out of this process (so far) besides the proposals themselves.<sup>9</sup>

This article assesses the intelligence of a decision by the level of sophistication and complexity of the reasoning that goes into generating it, combined with a subjective assessment of the decision's aptitude at solving the problem it is meant to address, especially in light of alternative solutions. As to the benchmark of a morally right outcome, in the specific context of Scandinavian countries where certain social trends can be observed and are generally seen as progress, a move in the direction of the general trend can arguably be defended as the morally superior one. For example, in a context where European Nordic countries (all of which have historically always had an official Christian state church) have been slowly moving—in the last 50 years or so—toward greater separation of state and church (as Sweden did in 2000 and Norway in 2012), it would appear that further entrenchment of a state church would be a moral regression while de-entrenchment of some form would be a moral progress, at least for the time frame and geographic zone we are concerned with.<sup>10</sup>

4. While Eisenstadt, Levan, and Maboudi's conjecture is explicitly about constitutional processes, the Icelandic case does not offer a perfect test-case for it. To the extent that the Icelandic proposal has yet to be implemented, the Icelandic experiment remains indeed inconclusive. One can, however, conjecture an effect to the extent that a causal relationship can be plausibly assumed to exist between the democratic content of written clauses in the text (what Landemore [2016] calls "democraticity") and actual levels of democracy later down the road.

5. See also Arato (1995); Elster (1995, 2000); Horowitz (2008, 2013); and Sunstein (2001) for a defense of constitution making as an elite affair that should be protected from popular involvement (cited in Maboudi and Nadi [2016], 3). See also Mallat (2015, 170), who upholds the elite theory even in light of the Icelandic example.

6. 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 played in the hands of charismatic politicians with authoritarian tendencies and ultimately led to constitutional dictatorships in many Central and Eastern European countries.

7. 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" (2016, 385). Brown sees publicity as a type of formal popular participation and generally blames the latter for its illiberal consequences in the Arab case.

8. At least as I read him. See also Jörke (2012).

9. The respective drafting processes can thus not be tested against their impact on the world upon implementation of their respective proposals, as would be required to measure "democracy" levels for example.

10. John Madeley's study of the evolution of the 1804 Norwegian constitution, the oldest in Europe to date, also uses "liberalism" as a standard of

A combination of these various criteria—how “smart” (sophisticated and adaptive) and “liberal” a solution is—arguably offers a plausible benchmark of the “better” or even “right” answer for this particular experiment. In what follows, I emphasize the relative dimension of the better outcome, trying to ascertain in what ways a given solution improves on another one, rather than focusing on an ideal and absolute benchmark. The article thus follows a Senian strategy of focusing on local improvements rather than a Rawlsian strategy of aiming for global optima (Sen 2011).

The question that will interest us here is thus: How did the inclusiveness of the drafting stage affect the content of the constitutional proposal on the issue of religious rights? The case of Iceland is interesting on this issue because despite the homogeneity of its population (80% declare themselves Lutheran or some closely related Protestant sect), one of the controversial features of the constitutional text was precisely on the question of the status of the Evangelical Lutheran Church. Far from catering to the interests of the majority only, as proponents of the tyranny of the majority objection from Tocqueville onward would typically suspect, the more inclusively written and partly crowdsourced Icelandic constitutional proposal rather boldly removed the name of the Evangelical Lutheran Church from the constitutional proposal and went further than any of the other texts to accommodate minority religious and nonreligious preferences. This constitutional proposal thus offered what is arguably both a sophisticated and advanced liberal/democratic solution to the state-church question.

The article proceeds as follows. The section “A Few Facts about Iceland and Its Religious History” briefly reviews Iceland’s religious history. The section “A Remarkably Inclusive Drafting Process” describes the constitutional process that took place between the summer of 2010 and the stalling of the bill in Parliament in the spring of 2013, emphasizing the ways in which the drafting stage was uniquely inclusive. The section “Comparing Religious Provisions across Constitutional Texts (O, A, B, and C)” focuses on the textual output of this process with respect to the question of religious rights, contrasting it both with provisions on the same topic in the original constitution (which is still in place) and corresponding articles in the expert drafts written at the same time. The main conclusion is that the crowdsourced proposal contains a more sophisticated and more liberal solution to the question of state-church relations than either of the other texts. The section “How did inclusiveness lead to the ‘better’ solution?” traces the specific ways in which the diversity of the group of constitutional drafters in the Icelandic experiment generated

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moral progress, lumping under it the complex notion of secularism as well (Madeley 2016).

this marginally superior solution. The section “Interpreting the referendum results,” finally, analyzes the ambiguities of the 2012 referendum on the crowdsourced constitutional proposal.

### A FEW FACTS ABOUT ICELAND AND ITS RELIGIOUS HISTORY

Iceland is sometimes presented as the oldest parliamentary democracy in history (e.g., Bock 2002). Shortly after Viking settlers first occupied the previously uninhabited land in the ninth century, they established a form of governance centered around a parliamentary assembly (the *Alþing*). Christianity was also present from the earliest moments of Icelandic history, though the precise point at which it was introduced to the island is disputed. In any case, when Iceland was constituted as a republic in 930 CE, it was based on the pagan religion. In the late tenth century missionaries from the continent successfully spread Catholicism among the population. For the first five centuries the Icelandic church was thus Roman Catholic. The Icelandic Reformation took place in the middle of the sixteenth century, ending with the execution of Jón Arason, Catholic bishop of Hólar, and his two sons, in 1550, after which the country adopted Lutheranism.

Today, Iceland is predominantly Lutherean, and like Denmark and other Nordic countries, its state church is the Evangelical Lutheran Church. As of January 2015, Iceland’s population of 328,516 people includes 242,742 members of the Evangelical Lutheran Church, constituting 74% of the population.<sup>11</sup> Other Protestant sects close to the Evangelical Lutheran Church comprise another 10% of the population. There are a handful of Catholics, at 3.6% of the population; and a smattering each of Muslims and Serbian and Russian Orthodox who represent, respectively, 0.26% and 0.27% of the population. Only 5.6% of the population claims no religious affiliation. Despite these numbers, however, a majority of Icelanders see themselves as nonreligious or even downright atheists.

In terms of its constitutional history, Iceland had a fundamental written law as early as 1117, when it was first codified under the name of *Greytag* (*Grágás*) and throughout the brief period of independence known as the Old Commonwealth (Karlsson 2000, 21). After centuries of being under foreign (first Norwegian, then Danish) rule, a nineteenth century independence movement led to the restoration of the *Alþing* in 1844. Iceland gained sovereignty after World War I but continued to share the Danish monarchy until World War II.

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11. Though this is the vast majority of the population, this latter number is actually a sharp drop in membership from just 10 years ago, when the proportion of Evangelical Lutherans stood at 85%.

As Denmark was then also under Nazi occupation, Iceland freed itself from foreign control and declared itself a republic. The Republic of Iceland was thus founded on June 17, 1944, as a fully independent nation.

The 1944 Icelandic constitution, however, was originally only a slightly altered version of the one granted by Danish rulers in 1874, the so-called Constitution on the Special Affairs of Iceland. The “new” constitution was basically that older document with “King” replaced by “Elected President” and other limited changes (Árnason 2011, 344). The 1944 constitution was thus always intended as a temporary document and as a result has been described as a “mended garment” with the flavor of an “imposed constitution” (Bergsson and Blokker, forthcoming, referencing Levinson 2005). Politicians promised to revisit it at some later point to give Iceland a true custom-tailored document and various constitutional committees manned by top politicians attempted to do so at various points (Árnason 2011; Oddsdóttir 2014). Governments came and went over the years, however, without ever delivering on the original promise.

Since 1944, the Icelandic constitution has nonetheless been amended seven times, mostly due to changes in Icelandic constituencies and the conditions of voting eligibility. In 1991, bicameralism was replaced by unicameralism. In 1995, extensive modifications were made to the human rights sections of the constitution, which were reviewed in order to be modernized and aligned with international treaties and conventions. What has never been modified, however, is the increasingly contentious article 62 that entrenches the Evangelical Lutheran Church as the state church. Indeed, though the country is 90% Christian and, specifically, 74% Evangelical Lutheran, only a small majority of its citizens think that the majority is entitled to a constitutionally entrenched church state, and a greater majority is actually in favor of separation of church and state.<sup>12</sup>

Iceland is today both a deeply democratic and unusually religiously homogenous society. In the limited support for the state establishment of the Lutheran Evangelical Church,

12. Support for the separation of church and state was around 60% in the years 1998–2005, reaching 67% in the years 2002–3. Support dropped to 51% in 2007 (the precrisis year) but rose again after the 2008 crisis to an all-time high of 74% in 2009. It has stayed over 70% ever since (except for a dip to 62% in 2014). I borrow this information from an online article by Hjalti Hugason, a professor of theology and an Icelandic authority on the issue, whose numbers are taken from Gallup polls: <http://hugas.is/2016/02/samband-rikis-og-kirkju-tengsl-eda-adskilnadur/>. A corroborating graph by can be found at “sidmennt.is,” an advocacy group for the separation of church and state: <http://i0.wp.com/sidmennt.is/wp-content/uploads/ThrounARK-gallup.png>. The 2009 poll results are available at <https://capacent.is/um-capacent/frettir/2008/vidhorf-til-adskilnadar-rikis-og-kirkju/>.

we can see a clash between the democratic culture of the population at large and some of the religious provisions of the existing constitution, which itself was enacted on the basis of a document inherited from older Christian monarchies. The constitution of 1874, while guaranteeing religious freedom, also specified that the “Evangelical Lutheran Church is a national church and as such it is protected and supported by the State.” This provision was kept more or less word for word in the 1944 constitution of the Republic of Iceland.

At the turn of the twentieth century, however, an almost complete separation of state and church was enacted. In 1997, the Church handed over all of its land to the state in exchange for state salaries paid to its pastors. This quid pro quo in some ways means that the Church is no longer financially supported by the state, as the salaries to pastor can be seen as mere compensation for the land. In 2005, a change was further made by law to the constitutional article 64 about church tax dues or membership fees,<sup>13</sup> which now go directly to the State Treasury. In a Supreme Court decision from 2007, the court accepted that the state church get revenues from the state, which other religious organizations do not, based on the state church’s special duties.

Today the privileges of the Evangelical Lutheran Church as the state church of Iceland are thus mostly symbolic.<sup>14</sup> Nonetheless, a growing number of people feel that article 62, which explicitly entrenches the Evangelical Lutheran Church as “national church,” is outdated and violates the fundamental liberal and democratic principle of equal rights, at least if the state is to be strictly neutral toward religion and on a certain view of neutrality. Having a mention of a particular church in the constitution is seen by many as suggesting that non-Christian or non-Lutherans are not as much part of the nation and as protected by the state as they have a right to be. Icelanders are thus divided on whether or not there should be an official state church.

13. These fees are lump-sum taxes that individuals over 16 years of age are expected to pay to a registered religion or nonreligion. This new law provides for the church and registered religious organizations a certain proportion of income tax. Fees paid by a person listed in the National Church runs to the congregation that he/she belongs to. Fees from a person who belongs to a different registered religious organization run to the relevant religious association. Fees from persons who are neither in the state church or registered religious denomination used to run to the University of Iceland.

14. The Icelandic situation is thus different from, e.g., the status of the Church in Denmark, where the Queen still decides on things like the hymnbook to be used in churches. It is also different from the situation in Norway, where even after the 2012 law increasing the autonomy of the Church from the state, the Church remains tightly connected to individual communities. In Norway, municipal authorities are legally obliged to support the activities of the church and, among other things, pay for the reparation of its buildings. In Iceland the Church does not rely on the state for such things.



### A REMARKABLY INCLUSIVE DRAFTING PROCESS

The drafting stage of the Icelandic constitutional process was the central part of a longer process (2010–13), which itself deserves some introduction. Since the constitutional process as a whole has been described elsewhere in great detail (e.g., Bergsson and Blokker, forthcoming;<sup>15</sup> Fillmore-Patrick 2013; Landemore 2015; Meuwese 2012; Oddsdóttir 2014; Skalski 2012; Suteu 2015; Thorarensen 2017 Valtýsson 2014), I will rehearse here only the main features.

In the wake of the 2008 financial crisis, the Parliament of Iceland decided to launch a constitutional process to replace the existing document with an authentically Icelandic and more modern one. 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.”<sup>16</sup> After a day of brainstorming, the answers were compiled under eight different themes. Under “Country and Nation” the following desiderata were listed: “The image of Iceland shall be strengthened, multiculturalism encouraged *as well as the separation between state and religion*.”<sup>17</sup>

The next step was the election of a Constitutional Assembly of 25 members in November 2010. This first assembly, however, was annulled in January 2011 by the Supreme Court in light of various procedural irregularities in the election process.<sup>18</sup> This led to the appointment by Parliament of each elected member to a new body named the “Constitutional Council” (except for one person who declined to join this new body and had to be replaced by the next person on the electoral list). Over the course of four months (from April 6 to July 6), the Council of 25 members then produced a draft, which was presented to Parliament a few weeks later on July 29, 2011.

The last phase of the process consisted, first, of an advisory (nonbinding) national referendum on the constitutional pro-

posal. Held on October 20, 2012, the referendum garnered the participation of half of the 235,000-strong electorate of Iceland and secured a two-thirds approval of the draft as the basis of a new constitution. The Parliament—then asked to pronounce on the validity of the draft as a constitutional document—found a way not to vote on it.

The following illustration (fig. 1) recapitulates the steps and participants in the constitutional process.

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 and in all its diversity was attempted at various steps. The Icelandic process strived to be as wide open as possible at every important stage, particularly at the crucial stage of drafting the actual constitutional text.<sup>19</sup>

Just to emphasize here the inclusiveness of the drafting stage: first, being a member of the Constitutional Assembly itself was a job theoretically open to anyone, except for people already in power. The idea was to maximize the presence of ordinary citizens on the Constitutional Assembly. Perhaps as a result of this openness, more than 500 people (522 in total) 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.<sup>20</sup> Instead of appointed politicians chosen 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 Assembly<sup>21</sup>), the Constitutional Council was made up of mostly amateur politicians. Only two out of 25 were thus former parliamentarians (though several also held positions in various parties during their involvement in the Council). The Council consisted of 10 women and 15 men, meeting the required quota of 40% women specified by *Alþing*.<sup>22</sup> 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

15. See also the third part of Ingimundarson, Urfalino, and Erlingsdóttir (2017).

16. See Kok (2011).

17. See <http://www.thjodfundur2010.is/frettir/lesa/item32858/> [emphasis mine].

18. These irregularities, however, were arguably quite minor and many have seen in this decision of the Supreme Court a decidedly hostile and political move instigated by members of the Independence party, one of whom had unsuccessfully tried to get elected to the Constitutional Assembly in the hope of undermining it from inside and then took his case to the Court in order to undermine it from outside (Gylfason 2014).

19. See Elster (2012).

20. I emphasize this comparative point because it is true that in other ways the Constitutional Council was still elitist, as critics were quick to point out and as I’ll mention where relevant.

21. The composition of the Egyptian assembly is described in, e.g., Maboudi and Nadi (2016, 4).

22. 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.

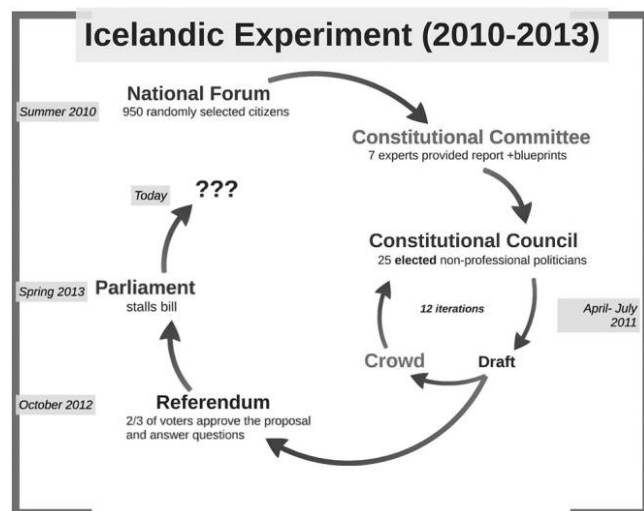


Figure 1. The Icelandic constitutional process

(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.<sup>23</sup>

While remarkably inclusive of Icelandic diversity, at least compared with historical precedents or comparable bodies in other countries,<sup>24</sup> the Constitutional Council, however, was clearly not descriptively representative along a number of dimensions. For example, only three of the 25 members were from outside of Reykjavik, compared to some one-third of the Icelandic population.<sup>25</sup> There is a clear overrepresentation of the academic community. There was only one farmer and only one member of the working class.<sup>26</sup> In an ethnically and religiously homogenous country, this socioeconomic dimension is one that should perhaps have mattered more than

23. Wikipedia. "Icelandic Constitutional Assembly Election, 2010." [http://en.wikipedia.org/wiki/Icelandic\\_Constitutional\\_Assembly\\_election](http://en.wikipedia.org/wiki/Icelandic_Constitutional_Assembly_election) (accessed January 1, 2014).

24. Notable exceptions are the South African, Ugandan, and the Tunisian constitutional processes (Moehler 2006).

25. About 211,000 of 329,000 Icelanders lived on January 1, 2015, in the greater metropolitan area around the capital city Reykjavik.

26. If one counts the trade union chairman, a former electrician himself who clearly and proudly sees himself as a member and a representative of the working class (personal communication, August 15, 2016). The fact that he also happens to be the father of the famous international singer Björk does not seem to have had any impact on his social status and self-perception.

it did, and critics argued that there were too many overly educated, urban, wealthy individuals on the Council.

The most inclusive and directly participatory part of the drafting stage, however, was a series of "crowdsourcing" moments. The 25 members of the Council, far from isolating themselves from popular input, regularly posted online, for the world to see and for the Icelandic people to read, the version of the draft they were working on. All in all, they posted 12 drafts, all at various stages of completion. Anyone interested in the process could post comments and send feedback using social media like Facebook and Twitter or using regular e-mail and mail. In fact, foreigners themselves were free to participate if they could find a way (e.g., Google Chrome) to overcome the language barrier.

On the question of the state-church relation, the Constitutional Council saw its mission as implementing the desiderata laid out by the national forum: making sure that every citizen is equal in terms of religious rights, that all religions are equal, and that no religious movement is discriminated against, and reaching a consensual solution about the sensitive question of the relationship between state and church.<sup>27</sup>

The centrality of the religious issue for the constitutional process should not be underestimated. Thorkell Helgason reports that when he was campaigning for elections to the Constitutional Assembly (later turned Council), students stopped him from entering the University of Akureyri, saying he had to promise to abolish the state church. Another one of the Constitutional Council members, Dögg Harðardóttir, was elected after running a campaign in which the main thing she promised was to protect the status of the Evangelical Church as Iceland's national church. This is also the goal she announced in her first speech at the Council. During the crowdsourcing stage, the only really ugly moment happened when the Council started to test proposals about the state church separation they couldn't agree on, generating so many uncivil online comments that Council members had to step in and remind people of the guidelines.<sup>28</sup> So the question was undeniably contested both inside and outside of the Council.

## COMPARING RELIGIOUS PROVISIONS ACROSS CONSTITUTIONAL TEXTS

What was the textual output of such an inclusive group of drafters and how does it compare with the output produced by less inclusive ones? Before I proceed, let me rehearse the point of this comparison and discuss some of the limitations it inevitably suffers from.

27. Arnfriður, Skype interview, July 17, 2015.

28. Finnur Magnússon, Presentation at the Conference on the Future of Democracy, May 22, 2016, National Museum of Reykjavik, Iceland.

Recall that we are trying to assess whether the crowd-sourced proposal is in any way superior—better, smarter, and more “liberal”—to the proposals written by experts at about the same time. The quasi-experimental design offered by the Icelandic constitutional process, however, is far from perfect. An ideal comparison would have involved strictly independent 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. Additionally, in a perfect experiment the group of 25 “amateurs” would arguably have started from scratch, without the expert drafts being made available to them.

Nonetheless, the fact that the experts had to write in the knowledge that they were providing a blueprint for a distinct and democratically elected group of drafters, on top of writing on the basis of popular recommendations to begin with (the report based on the national forum) ensured that they were much more public-minded than they might have been otherwise. This setup gave them a chance to anticipate certain choices made by the more inclusive group. So if anything this element of the process may have at least partly stacked the deck in favor of the expert group.

As to the possible advantage that the group of lay people had by being given access to the experts’ drafts, it is arguably lesser than one might think and does not necessarily harm the validity of the comparison. First, the Council’s members’ distrust of experts and professional politicians made them disregard those drafts for the most part—at least that is what many members of the Council claim, and this is reflected both in the large discrepancies between the expert blueprints and the final version of the Constitutional Council’s proposal, as well as the expressed disappointment of some members of the expert group when they read the final version of the Constitutional Council.

Second, it is not clear that since the group of experts could avail themselves of the help of other external experts (including foreign ones that they had contacts with) and a number of other government-funded resources, the group of amateurs should have deprived themselves of the use of these particular expert-written texts and the rest of the whole report as a source of knowledge, especially since, as one member put it, “we didn’t have any money to consult [other] experts.”<sup>29</sup> The important thing is that the drafts provided by experts were not meant to be binding in any way.

29. Gundmundur Gunnarsson (interview conducted at his home in Reykjavik on May 23, 2016).

Third, the expert members of the Constitutional Committee had an entire year to write their report and the constitutional drafts included in it, which is about four times the amount of time that the Constitutional Council was ultimately allotted. While it is unclear how much time specifically the experts devoted to the drafting of the constitutional blueprints (compared to writing the rest of the report), the experts still started with an enormous advantage in terms of the maturation of their thinking and the possibility to evolve toward consensual solutions.<sup>30</sup> If anything, then, the comparison setup works in favor of experts, not the more inclusive group.

All in all, because of such mitigating factors, the setup of this quasi-controlled experiment offers a close enough approximation of more formal comparisons between the few and the many used in epistemic democrats’ models (e.g., Landmore 2012, 2013, and 2015). If the inclusively written provisions on religious rights turn out to be “better” in some way than those contained in the expert drafts, this improvement could be plausibly attributed, at least in part, to the greater inclusiveness of the drafting stage.

Let me now lay out the relevant comparison points: the religious provisions in the original 1944 constitution and in the expert drafts that served as templates for the final text. I first offer a minimal introduction and commentary of the relevant articles in these texts before proceeding to a deeper comparative analysis after the crowdsourced constitution is introduced.

### The 1944 Constitution (O)

On religious rights the 1944 constitution only contains a short chapter 6 (on the national church) that includes three articles: article 62, 63, and 64. In article 79 (in chap. 7) are provisions on how changes of these specific provisions call for a referendum. Article 62 of the 1944 constitution is the most controversial article to date. It states that “The Evangelical Lutheran Church shall be the National Church in Iceland and, as such, it shall be supported and protected by the State. This may be amended by law.”

The characterization of the Evangelical Lutheran Church in the text is as a “national” church as opposed to a “state” church,<sup>31</sup> which invites some clarification. The concept of

30. The initial parliamentary bill had planned six months for the Council’s work, but for budgetary reasons only three months plus a one-month extension were ultimately approved (see also Meuwese 2012).

31. Þjóðkirkja in the original, where þjóð is for “nation.” According to my sources, “in Icelandic the term ‘National Church’ is always used, ‘State Church’ never” (Jón Olafsson, Philosophy Professor at the University of Iceland, e-mail communication, July 6, 2016).

a “national” church is ambiguous, yet it is the most widespread characterization of state churches in Scandinavian countries (though the term “folk church” or “people’s church” is sometimes also used). The idea of a national church can be defined as that of “a church that is concerned with a nationwide mission of the gospel and nationwide service to the community” and “understands that its mission is to the whole nation, to the whole population considered as a great community (or a community of communities)” (Avis 2001, 15).

In theory, a national church need not be a state church, nor does it necessarily depend on legal establishment, as any church could decide to serve the whole nation without state recognition and/or funding. In practice, though, this is hardly sustainable, and most national churches have been at least somewhat financially supported by the state. Another distinction is that between an established church and a state church. An established church is, technically, any church supported and protected by the state, whereas in the most demanding definition, a state church is a church “where national and religious identity coincide and national government and church government are one and the same” (Avis 2001, 16). The most common understanding of a state church, however, is that of a church that is officially recognized and established by the state, however symbolically. The existence of a state church is thus compatible with extreme degrees of de-establishment. In the following I use the term state church in that broader, more common sense and consider the Evangelical Lutheran Church a national, state, and established church. Specifically, it is the fact that the Icelandic state recognizes and is meant to explicitly support and protect, seemingly over and above any other church, the Evangelical Lutheran Church that arguably makes it a state church—and thus creates the controversy. Article 63 is a statement about religious freedom per se stating that: “All persons have the right to form religious associations and to practice their religion in conformity with their individual convictions. Nothing may, however, be preached or practiced which is prejudicial to good morals or public order.”

This article is meant to express a fundamental religious right and protect minority groups, and because of this it is important to compare it with the stipulations of the 1951 European Convention on Human Rights (ECHR), which were integrated to the 1944 constitution through the human rights amendments of 1995. Article 9 of the ECHR, on “freedom of thought, conscience, and religion” reads as follows:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either

alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice, and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

As one can see from the comparison, article 63 of the updated 1944 Icelandic constitution is much terser and limited in its scope, applying exclusively to formal religions as opposed to any kind of “belief” (as per the ECHR formula). In fact, as it turns out, the provisions regarding freedom of religion in both articles 63 and 64 were not reformulated to be in line with the ECHR, being “exceptions in this respect” according to Björg Thorarensen, the constitutional lawyer who helped write the 1995 amendments, as “these provisions were only slightly amended in 1995 (only a few words) and are still based on their initial formulation.”<sup>32</sup> According to Thorarensen, the words “public order” and “good morals” were in the original 1944 version and form thus a direct import from the first constitution of Iceland of 1874 (then in article 46), as directly translated from article 81 of the Danish Constitution of 1849. As a result of this exclusive focus on public order and good morals as legitimate reasons to curb religious freedom (by contrast with “such limitations necessary in a democratic society” from the ECHR), the article comes across as rather dated, lending itself to possibly very conservative readings of citizens’ religious rights. Article 64 broadly aims to prevent discrimination on the basis of religion. It reads thus: “No one may lose any of his civil or national rights on account of his religion, nor may anyone refuse to perform any generally applicable civil duty on religious grounds. Everyone shall be free to remain outside religious associations. No one shall be obliged to pay any personal dues to any religious association of which he is not a member.”

The main point of article 64 is to ensure protection from discrimination on the basis of one’s religions and frees non-members of religious associations, including the state church, from mandatory membership (formerly required under Danish law) and all financial obligations. Yet the article in the same breath makes it impossible to use conscientious objection as a reason not to perform one’s civil duties and it does not explicitly extend protection from discrimination to non-religious beliefs.

32. Björg Thorarensen, personal e-mail communication, July 4, 2016.



The last article worth mentioning in the original constitution is article 79, which introduces another brief reference to the Evangelical Lutheran Church under provisions pertaining to constitutional amendments. The article specifies that “If *Alping* passes an amendment to the status of the Church under article 62, it shall be submitted to a vote for approval or rejection by secret ballot of all those eligible to vote.”

### 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). Their authors were the seven members of the Constitutional Committee, individuals taken “from a range of fields (law, literature, natural science, and social science)” (Gylfason 2013b, 7), two of whom were constitutional lawyers, including one who had been on the expert committee in charge of writing the 1995 amendments to the human rights section of the 1944 constitution.

The writing of these drafts can thus be characterized as the opposite of participatory and inclusive, since at most seven people had a hand in it. That said, the Constitutional Committee had also been in charge of organizing the national forum upstream of the constitutional process, preparing the nationwide election of 25 representatives to the Constitutional Assembly tasked with writing a new constitution, and also preparing the ground for the Constitutional Assembly by offering an analysis of the 1944 constitution and gathering information on foreign constitutions and other relevant material. In other words, the Constitutional Committee was well informed of the preferences of the nation—as summarized in the report they wrote based on the national forum. The writing of these drafts was thus exclusionary but at least informed by popular input. In particular, the experts were well aware that an important result of the national forum was the desire for greater de-entrenchment of the Evangelical Lutheran Church. Let us now see the solutions they offered.

The expert-written draft titled “A” contains a single article on religious rights, article 13, which reads as follows:

All persons have the right to form religious associations and to practice their religion in conformity with their individual convictions. However, nothing may be preached or practiced which is contrary to good morals or public order.

No person may forfeit civil or national rights in any measure on the grounds of religion, nor may any person avoid any civic duty on such grounds.

All persons shall be free to remain outside religious associations. No person shall be obliged to pay personal dues to any religious association of which such person is not a member.

This article is essentially a mash-up of article 63 and paragraphs 1 and 2 of article 64 of the original constitution. The experts did not display much originality on this front, even keeping the ancient reference to “public order” and “good morals.” They also markedly failed to expand the article to cover beliefs beyond religious ones.

One noteworthy subtraction, however, is the removal of any reference to the Evangelical Lutheran Church and the role of the state in supporting and protecting it. This proposal thus offers a radical break, in a crucial part, from the original constitution by not entrenching any state church at all. As a result the proposal also moved the mention that people are free from obligation into any kind of membership to articles pertaining to rights of association (article 15).

This major subtraction is, however, compensated by the creation of an article on the amendment procedure relative to church affairs. The paragraph, a carbon copy of the second paragraph of article 79 in the original 1944 constitution, thus reads: “If the *Alping* approves an amendment to the Act on the status of the Evangelical Lutheran Church as a National Church, the act shall be submitted to a vote of the entire electorate of the country for approval or rejection” [emphasis mine].

What the experts behind example A did then is take the paragraph relative to Church affairs in O’s article on referendums and turn it into an autonomous article that doubles as an almost in-passing acknowledgment of the legal status of the Evangelical Lutheran Church as “national church.” As a result, the article can be interpreted as recognizing the de facto status of the Evangelical Lutheran Church as quasi-state church (a church singled out as having a particular status in the law) but without entrenching it constitutionally (the document no longer says the state supports and protects it) and maintaining the necessity to put any amendment to its current legal status to the people at large.

This solution goes some substantial way toward de-entrenchment, as the Evangelical Lutheran Church is no longer established as a state church in the constitution, and no mention whatsoever is made of it being supported and protected by the state. This solution embodies the liberal ideal of state neutrality, a central tenet of liberal thinking since at least the late 1970s. A neutral state is one that does not “reward or penalize particular conceptions of the good life but, rather . . . provide[s] a neutral framework within which different and potentially conflicting conceptions of the good can

be pursued” (Kymlicka 1989, 883), generalizing from Ackerman [1980]; Dworkin [1978]; Nozick [1974]; Rawls [1971]; and Larmore [1987], among others). On the most mainstream view, neutrality is not defined in terms of the outcomes of state laws and policies on different religions (what Kymlicka calls “consequential neutrality”), but in terms of the kinds of justification the state is allowed to make to support its policies and laws (what Kymlicka calls “justificatory neutrality”).

In keeping with this understanding of neutrality, proposal A refrains from recognizing or endorsing a particular church or religion above others. Yet at the same time the introduction of article 47 counterbalances this somewhat by acknowledging the name and historical and legal status of the Evangelical Lutheran Church. The downside of this otherwise rather ingenious solution is the creation of a specific article on referendums on church affairs and the choice of placing in that separate article the coy recognition of the status of the Evangelical Lutheran Church as church of the nation.

The second expert draft also contains a single article on religion, article 17, which is also a mash-up of articles 63 and 64 from the original constitution. It reads:

All persons have the right to manifest their religion or beliefs, alone or in company with others, but nothing may be preached or practiced that is contrary to good morals or public order.

No person may forfeit civil or national rights in any measure on the grounds of religion, nor may any person avoid any civic duty on such grounds.

*The Evangelical Lutheran Church is the National Church of Iceland, but the State shall support and protect all lawful religious associations.*

All persons are free to remain outside religious associations and no person shall be required to pay fees to an association of which he or she is not a member [emphasis mine].

By contrast with example A, example B preserves an explicit mention of the Evangelical Lutheran Church and entrenches it constitutionally as a state church in that central article, on the model of O. Example B, like A, also preserves the nineteenth century reference to good morals and public order found originally in O. It is even harsher than O in a way, in that it does not allow individuals to avoid their civic duty on religious grounds under any circumstances (whereas in the 1944 constitution the caveat “generally applicable” preceding “civic duty” allows for a more flexible interpretation). Example B, however, differs quite crucially from O in that the text now extends support and protection to *all* lawful

religious associations and thus no longer gives a privileged status, in that regard, to the Evangelical Lutheran Church.

Example B thus offers another interesting solution to the fairness issue raised by the privileged status of the Evangelical Lutheran Church as state church. Instead of seeking to implement liberal principles by de-entrenching the church, this proposal aims to achieve state neutrality through equalization of outcomes, by extending and thus equalizing protection and support from the state to *all* religions (along the lines of “consequential neutrality” as defined above). While this solution also goes some way toward greater equality between religions, this proposal is arguably less liberal than the one found in example A. However symbolic, the recognition by the constitution of the Evangelical Lutheran Church as church of the nation still singles it out as a church officially endorsed by the state, seemingly over and above all others. As a commentator puts it of antisestablishmentarian movements<sup>33</sup> more generally, a problem with this approach is the risk of creating a sense of marginality or exclusion in minority religious-cultural groups. Even in the case of a so-far still very homogenous country like Iceland, this risk is real, “particularly in an age when religious pluralism is growing as a result of increased migration flows and the growth of ‘new religious movements’ of different kinds, religious-cultural differences can resonate and aggravate other, more threatening conflicts” (Madeley 2003, 21). Other scholars specifically emphasize “the potential discriminatory consequences in holding public office or in civil equality” of constitutional recognition of a particular church or religious faith, even when, they insist, this recognition is purely symbolic and countered by practical measures of state equality neutrality and equality of religions and believers (Sajó and Uitz 2012, building on Durham 1996). Therefore, for this reason as well, example B’s solution seems overall inferior to example A’s.

### The crowdsourced constitutional proposal (C)

The constitutional proposal by the Constitutional Council, was written over a four-month period (from April 6 to July 6, 2011) by the 25 Constitutional Council members in the constitutional process recounted in the section “a few facts about Iceland and its religious history.” The proposal 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.

33. Antisestablishmentarianism can be defined as “a matter of opposing, or at least not supporting, the destruction of an existing establishment” (Madeley 2003, 20).

The latter one, which I call the “professional” version (P), is a supposedly improved version of the proposal after it was given to parliamentarians and experts for both review in light of the referendum results and careful legal editing. In theory, these revisions respected the letter of the referendum-approved proposal and simply attempted to make sure the text respected Iceland’s commitments to previously adopted international treaties. In practice, things became more complex, and aspects of the original spirit of the proposal were occasionally corrupted by the legal experts.<sup>34</sup>

So let us first consider the unadulterated text originally produced by the 25 Council members. Their text counts two articles pertaining to the question of religious rights: articles 18 and 19. That is one more article than either drafts O, A, or B. The first article is about religious rights per se; the second is about the status of the state church.

Article 18 reads 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* [emphasis mine].

Several things are worth noting here. First, 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<sup>35</sup> 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,” which arguably considerably modernizes and liberalizes the text compared to all the others, including article 9 of the ECHR (which after all 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 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.<sup>36</sup>

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. In that respect, the group of 25 accurately reflected the general stance of tolerance toward various worldviews characteristic of modern Iceland (and Scandinavia in general). The Council refused to see religion given a distinct and superior standing over philosophical views such as atheism or Buddhism. The Venice Commission, a group of European legal experts from the Council of Europe who were asked to give their opinion about the final version of the constitutional draft, 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.” 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” (2013, remark 55). To the extent that drafts A and B merely reproduced the content of draft O on that front, draft C is thus an improvement over them as well.

It is probably worth mentioning that article 18 was initially meant to include the even more liberal statement: “*All registered religious communities and life-view communities shall be protected by the State*” [emphasis mine]. The intention was to transfer the protection ensured by article 62 in the current constitution to all registered religious and life-view communities. The sentence was cut out at the last minute because the group could not come to an agreement on this issue and had to take a vote (a rare occurrence), which resulted in just one vote missing for the proposition. The argument of the opponents was that this clause was too open and would risk being used to protect all sorts of “life-views,” including that of neo-Nazis.<sup>37</sup> Yet this addendum would have merely put the constitution in harmony with the spirits of the times, which produced just two years later (in 2013) a new law on church and religious movements titled “Law regarding religious movements and view of life movements.” According to Pastor Arnfriður, “we were right in 2011!”<sup>38</sup>

34. See Landmore (2015) for examples.

35. In article 73 on freedom of opinion, thought, and conscience, where limitations to such freedom are permitted only when “deemed necessary and in agreement with *democratic traditions*” [emphasis mine]. This formulation is a 1995 update to the original text as per the formulation found in article 9 of the European Convention on Human Rights.

36. This is the opinion of Björg Thorarensen, one of the constitutional lawyers who designed the 1995 amendments and the main author behind proposal A (in-person interview at the Law School of the University of Iceland, May 23, 2016).

37. Arnfriður, Skype Interview, July 17, 2015.

38. The “we” here refers to the minority in the Council that day, which, he implies, would have turned into a majority a few months down the line.

Turning now to the most controversial article, article 19 reads as follows: “The *relation of the state and church* may be provided for by law. Should *Alþing* change the law on the *relation of state and church*, that law must be put to a national referendum for approval or rejection.”<sup>39</sup>

In the Icelandic, the italicized parts in the first and second sentences correspond to the antic wording “*kirkjuskipan ríkisins*” (church organization of the state), which comes closest in meaning to “relation of the State and the Church(es).”<sup>40</sup> The solution embodied by this article (which is not so obvious upon first or even second reading) is to defer the decision of defining the relation between church and state to Parliament, all the while maintaining the current status of the Evangelical Lutheran Church as state church by ensuring that no change can be made to it without it first being approved by national referendum. Here the proposal seemingly picks up the solution offered in draft A, which is not to entrench a state church in the Constitution but let the status quo prevail unless amended through a process initiated by Parliament and validated by a referendum.

Now, is this solution an improvement over those offered in the expert proposals? I would argue that, first, this solution is at least marginally smarter than either of those produced by the experts, because it presents advantages present in each of them, without their problems. Like proposal A and unlike proposal B, proposal C avoids officially entrenching a state church and mentioning a special duty on the part of the state to protect and support it while allowing the status quo to persist but allowing for the possibility of change, conditional on popular approval. Like proposal B and unlike proposal A, however, proposal C offers a centralized solution contained in one single article, as opposed to distributing the solution over an article on religious rights and another article on amendment referendum on church affairs. Additionally, proposal C is also marginally more liberal than even draft A on the question of state-church relation, in that *it removes the name of the Evangelical Lutheran Church* from the text, going one step further in severing the ties between the Icelandic state and the Evangelical Lutheran Church. If greater de-entrenchment is

one of the standards used to measure the betterness of the solution, then proposal C is clearly (however, marginally so) better than either proposals A or B.

One could, of course, object to a solution that ultimately consists in not deciding and kicking the can down to a Parliament and a majoritarian referendum, when a constitution is precisely supposed to settle issues and crucially preserve minorities from the possible tyranny of the majority. This sort of ambiguous and undecisive solution is usually deemed acceptable and even normatively desirable in the context of deeply societies. But why should a religiously homogenous and consensual society like Iceland employ this last resort trick?

Several things are worth noting here. First, it is important to remember that the more liberal of the two expert solutions (A) also consisted in kicking down the can to Parliament. Even if proposal C is not ideal from an absolute point of view, the more relevant point of comparison is whether it does better or worse than the expert proposals. Second, while Iceland is indeed homogenous and consensual overall, it is quite bitterly divided on that question of the state church. So if profound division is the relevant criterion here to be entitled to use the last resort solution of deferral to Parliament, one could argue that Iceland was divided enough. Finally, there was never a real danger of deferral to Parliament harming rather than benefiting religious minorities in the Icelandic context, making it more appealing that it perhaps is in other contexts (such as India, Indonesia, or Israel) where religious orthodoxies are, if anything, on the rise, not on the wane. Rather than entrench a majoritarian religious norm, the solution offered by draft C leaves open the possibility that as Iceland continues to follow the seeming Scandinavian trend of growing secularization and support for state-church separation, it might ultimately decide to cut the cord between church and state entirely.

Still, one might ask why de-establishing the Evangelical Lutheran Church fully was not the best, most liberal solution of all, in light of which the solution of deferring to Parliament could indeed be seen as weakly rather than strongly “liberal.” Considering the fluctuating state of public opinion and the tensions on that sensitive question, however, deciding not to decide for the time being was a way to keep most options open and indeed none of the proposals went as far as removing all mention of a national church altogether. The results of the 2012 referendum (on which more soon) would seem to suggest that this was a correct instinct. Additionally, constitutional theory suggests that moderate levels of deferral and ambiguity are more likely to allow for enduring constitutions (Dixon and Ginsburg 2011). There is even some empirical evidence that at least in the context of deeply divided nations “permissive” constitutions that use strategies of consti-

39. I depart here from the translation of draft C available on the Internet that I have otherwise used thus far as it is particularly unclear in that article and follow instead a translation suggested to me by Jón Olafsson (professor of philosophy at the University of Iceland, personal e-mail communication, July 6, 2016). The more literal translation awkwardly reads: “The church organization of the state may be determined by law. In cases where *Alþing* amends the status of the church of the state, the matter shall be referred to the referendum of all qualified voters in the country for approval or rejection.”

40. The Icelandic text also does not really specify whether Church is in the singular or plural. Most people lean toward the singular.



tutional ambiguity, ambivalence, and vagueness, like those of Israel, India, or Indonesia, tend to correlate with more democracy down the line than more “restrictive” constitutions, such as the aggressively secular Turkish one (Lerner 2013).<sup>41</sup> All things considered, therefore, the Constitutional Council’s solution appears wise in its cautiousness and at least marginally better than the expert solutions.

### HOW DID INCLUSIVENESS LEAD TO THE “BETTER” SOLUTION?

How did the Council come up with this particular solution? The story is worth recounting in part because it belies the suspicion one may have that the Council simply improved on the solution found in expert-proposal A. Though it is clear the Council members must have been influenced by it, the story they tell is one of independent discovery. The story also arguably offers another illustration of how the inclusiveness of the group helped them move closer to a more democratic and more liberal solution than either the status quo or the expert solutions.

The kernel idea for this article seems to have been the brain child of Pawel Bartoszek (2015), one of the few conservative-leaning Council members (he self-declares as center-right), who is also, as his non-Icelandic sounding last name suggests, of Polish descent and thus culturally Catholic. I only mention Bartoszek’s political and religious background because it seems telling that the idea for article 19 should have come from someone representing both a religious and political minority in the country and on the Council.<sup>42</sup> Pawel Bartoszek was not initially on the committee in charge of drafting the religious articles (as a mathematician he was part of the committee on the electoral system, together with Thorkell Helgason, the other mathematician in the group). But when he was exposed to their proposal in the plenary, he felt that they were in a stalemate. Their proposal was to let the voters decide whether to leave the issue relatively unchanged or remove the clause on the Evangelical Lutheran Church as state church. In his view, the stalemate was due to the fact that three of the Council’s most religious members (Dögg Harðardóttir, then di-

rector of the Akureyri nursing homes, Arnfríður Guðmundsdóttir, a university professor of theology and also a pastor, and Örn Bárður Jónsson, a pastor) had been chosen to (or rather volunteered to serve on) that committee. Pawel did not like their idea for a number of reasons. In his own words: “First of all, I thought we were basically presenting an unfinished document. Second, I hate the idea of plebiscites/referenda on religious issues. Third, I thought that if the getting rid of state church clause were to be approved (by voters) it would render the [existing] state church illegal (as a state institution), and I thought that the necessary work to cut that cord needed to be taken on by Parliament and not by us” (personal communication, June 22, 2015).

During breaks between sessions, Pawel started mentioning another idea he had, which would avoid committing the constitutional proposal to any kind of state church while protecting the current status of the Evangelical Lutheran Church. Here is how he proposed to phrase the article, which he says he loosely based on section 76 of the Finnish constitution:<sup>43</sup> “The position, governance and practices [NB: nonreligious ones] of the Lutheran Evangelical National Church may be stipulated by law.”<sup>44</sup>

His rationale for offering such a formulation was that the new wording did not oblige the state to support one religion above others. The wording “position, governance and practices” was in direct concordance with the existing “law on position, governance and practices of the national church,” making it clear in his view that no de facto change would be needed. Keeping the phrase “national church” in the constitution meant that there would still be a reference to the function of the Evangelical Lutheran Church as “national church” in the constitution but without entrenching its privileged position or status. Unlike draft B, which aimed to mitigate entrenchment by extending the same privileges (support and protection) to all religious associations, this solution aimed to entrench no privilege whatsoever.

The Committee responsible for the religious articles within the Constitutional Council went back to work on the basis of that proposal. They kept the core idea of retaining a de facto state church while removing its de jure privileges from the constitution. Additionally, they decided to remove the name of the Evangelical Lutheran Church from the text. They added, however, some new provisions (which Pawel didn’t

41. The impact in terms of religious freedom is mixed, the permissive constitutions favoring freedom *of* religion over freedom *from* religion and the restrictive ones the opposite trade-off. But the net gain of permissive constitutions seems to be to allow for the flourishing of democratic practices and institutions (Lerner 2013). It is unclear whether these findings would translate to a country like Iceland, but on the face of it the choice of a permissive as opposed to a restrictive constitutional framework presents some advantages.

42. Upon reading this characterization of himself, Pawel not only did not disagree with it, but he added that his inspiration for the article had been, in effect, the Polish constitution.

43. Section 76 of the Finnish constitution reads: “(1) Provisions on the organisation and administration of the Evangelic Lutheran Church are laid down in the Church Act. (2) The legislative procedure for enactment of the Church Act and the right to submit legislative proposals relating to the Church Act are governed by the specific provisions in that Code.”

44. In the original: “Í lögum má kveða á um stöðu, stjórn og starfshætti hinnar lútersk- evangelísku þjóðkirkju.”

approve of). For example in the final proposal the state has rather broad provisions to establish religion. Recall the constitutional formula: “The *relation* of church and state may be provided by law” [emphasis mine]. Some of the Council members felt that the term “relation” was more general than “position, governance, and practices,” thus giving more scope for the interpretation of the article. The Council also went back to the idea contained in the old constitution of a referendum requirement to any change to the status of the state church. Pawel disliked both ideas, in particular the latter, which ran against his distaste for referenda on religious matters. Despite his reservations, Pawel, with a majority of the Council, voted for the article. Even the professor of theology and the pastor on the Council were reportedly satisfied with the compromise.

Here it is important to emphasize another superiority of the inclusively written proposal over the experts ones. It offers a unique, consensual solution to the state church conundrum.<sup>45</sup> By contrast, the group of seven experts offered two different solutions, with no obvious ways to integrate them into one. In interviews, members of the Constitutional Committee rationalize this outcome as a deliberate choice on their part to offer a variety of choices to the Constitutional Council (a kind of A/B testing). What emerges from various interviews with both insiders and outsiders, however, is a more classic tale of competing egos, unable or unwilling to compromise. It is true that if they had been incentivized to (the way the Council certainly was), the experts might have come up with a unique solution and in that sense a setup that allowed them the easy way out of offering as many solutions as there were disagreements does not fully prejudice of experts’ ability to reach a decision. Nonetheless, it is quite remarkable that 25 ordinary citizens managed to offer to this highly divisive issue (as well as many others) a solution that was voted on unanimously within a four-month time window, whereas seven governmental experts with a year on their hands seemingly could not.<sup>46</sup>

One explanation for this feat is that the council members did not want the constitutional proposal as a whole to be stranded on that article alone, and the majority of its members were primed for a compromise. A few hardliners initially

45. This one solution triumphed over two alternatives that were also briefly considered. One was to put two clauses on the table—one with a state church, one without a state church—and let the referendum decide which one should make it into the constitution. The other was a sunset law recognizing a state church but requiring a referendum on whether or not to keep it after five additional years of public debate. Skype interview with Arnfriður, July 17, 2015.

46. The same inability seems to have plagued the many, many expert committees who had been at work on various proposals since 1944.

argued that it was against Icelandic democratic principles to privilege any particular church as a state church. But even those came around during the debates. So instead of choosing between expert draft A (no state church but a sneaky recognition of the Evangelical Lutheran Church, by name, as national church in a specific article on referenda relative to church affairs) or expert draft B (the Evangelical Church supported and protected as state church but protection and support extended to all religious associations), they came up with the above article.

Another benefit of inclusiveness might have been not just in the diversity of perspectives (e.g., that of a culturally Catholic Council member who looked to the Finnish and Polish constitutions) but in the diversity of skill sets brought to the table. It appears that one of the members of the Council, Gudmundur Gunnarsson, was particularly instrumental in helping the Council close discussions and reach agreement toward the end of the process, even as debates were constantly reopened and time was running short. An electrician turned head of the labor unions for all Icelandic electricians—as well as, incidentally, Björk’s father<sup>47</sup>—Gunnarsson is quick to minimize his contribution to the debates in the Constitutional Council. On his view the only two aspects in which he made a difference were, first, his access to the labor movement, which was a source of free expertise on some topics (though he acknowledges that the labor movement was not particularly supportive of the constitutional process overall). His other contribution, he claims, was “my experience with time-constrained decisions and how to make a decision on the basis of a thousand proposals. That’s what we do when coming up with wage deliberations.”<sup>48</sup> The group of constitutional amateurs turned out to have in its midst someone who helped bring deliberations to a close, a skill that was seemingly absent from the group of experts and must have played a role in helping the Council come up with a consensual solution to the question of state-church relationships.<sup>49</sup>

## INTERPRETING THE REFERENDUM RESULTS

What happened afterward, when the constitutional proposal was put to a referendum in the fall 2012 is a little confusing. On October 20, 2012, voters were asked to answer several questions about the proposal, including one pertaining to

47. I found out about this (to me) startling fact only on my third trip to Iceland, which says something about the lack of star-worshipping there is in that country, especially compared to the United States.

48. Interview at Gunnarsson’s home, May 23, 2016.

49. Unfortunately, none of my interviewees, including Gunnarsson, could seem to remember the exact way the ultimate consensus was negotiated. They were all in any case very reluctant to attribute credit for outcomes to any single individual in particular.

article 19. The result was widely interpreted as rejecting the idea of not having the Evangelical Lutheran Church constitutionally entrenched as state church, contradicting the spirit of article 19. Upon closer look, however, the message sent by the referendum result on that particular issue is far from clear. First, it should be mentioned that only 49% of the voting population turned out to vote in the referendum (a relatively low figure by Icelandic standards) and most people only answered the first question.<sup>50</sup> But second, here is how the question—number 3 out of six questions on the ballot—was put to voters: “Would you like to see provisions in the new Constitution on a/the national church in Iceland?”<sup>51</sup>

A majority (57.1%) answered yes. According to Pastor Örn, there is no question that the result should be interpreted as invalidating the Constitutional Council’s choice of removing any mention of the Evangelical Lutheran Church in the constitutional proposal. In his view, it signals that the majority was not quite ready to let go of its Christian traditions, even as more and more people want to strengthen religious freedom and the church-state separation. As he puts it, “We may have been wrong according to the majority, but this is what progress will bring in the future.” In other words, the constitutional proposal was too much ahead of the Icelandic people.

A more skeptical view of the referendum result consists in pointing out some of the problems with the way the question was phrased (by the parliamentary commission later in charge of reviewing the draft). First, the question required a negative answer in order to be interpreted as support for the proposed change in the new constitutional proposal. As Thorkell Helgason puts it, it meant that if you were 100% behind the new constitution, you had to vote: yes, yes, *no*, yes, yes, yes. A minimal understanding of human psychology suggests that this is highly confusing. It would have been better to structure the questions such that 100% support for the constitutional proposal came out as a series of yes, with no negative answer interspersed in the middle. It is likely that some people did not answer the question properly just because they did not know what “no” or “yes” would mean.

Further, the question was not clearly phrased as asking people to support the Evangelical State Church as the constitutionally entrenched state church. The language of the text of the question asked in 2012 is ambiguous as to whether it applies to “the” state church or “a” (any) state church. It is true that the information sent by the government to all voters made it quite clear that the question was about the current

state church, not just any state church and so most people probably understood it that way.<sup>52</sup> Nonetheless, one cannot exclude the possibility that some voters interpreted the question as asking them whether they would like to have some mention of a state church in the constitution, which in a way the new proposal offered. Further, article 19 is a provision on a state church. A “yes” vote could have been a yes to article 19. Finally, there might be a majority support for a symbolic state religion—a “national” or “people’s church” as the Scandinavian languages usually put it—but not a state-supported and protected church as an institution. Many Icelanders are for a national church while rejecting the idea of a state-run institutional system behind that church.

Whether the mistakes in voting due to the confusing nature of the question amount to more than 7.1% of the votes, in which case the result of the referendum would have been in favor of the “no” and thus easy to interpret as supporting article 19, is hard to tell. But some calculations based on a plausible distribution of votes among the various religious groups do not reveal this as implausible. The calculations even suggest that about half of the members of the Evangelical Lutheran Church voted not to keep the current clause on the state church in a new constitution.<sup>53</sup>

This controversy in the referendum is important because it led government decision-makers to change article 19 and revert entirely to the provisions of the existing constitution. The parliamentary commission thus rewrote the controversial article by replacing the first sentence of article 19 of the new constitution with the content of article 62, but keeping the second part of article 19, which is as said before identical to the relevant part of the former article 79. Thus, article 19 of the proposal now reads as follows: “The Evangelical Lutheran Church shall be the national church of Iceland, and the government shall support and safeguard it accordingly. This provision may be changed by law. Should the *Alþing* approve a change in the church organization under clause 2, the matter shall be submitted to a vote for approval or rejection by the entire electorate of the country, by a secret ballot.”

Some consider that the failure of article 19 to gather proper support during the referendum signals that the Council was not inclusive enough in the sense that it was unrepresentative, including too many secular liberals and not enough conservative and religiously minded people, whose views and preferences would have ensured a better fit between the content of

50. See [hagstofan.is](http://hagstofan.is).

51. The word “*þjóðkirkja*” in the original can read either as “the” or “a” national church.

52. See [http://www.thjodaratkvaedi.is/2012/spurningar-a-kjorsedli/spurning\\_nr\\_3.html](http://www.thjodaratkvaedi.is/2012/spurningar-a-kjorsedli/spurning_nr_3.html).

53. This is according to Thorkell Helgason, a former Council member, a mathematician (MIT PhD, 1971), and emeritus professor in the department of mathematics at the University of Iceland (personal communication, July 2015).

the proposal and the preferences expressed in the referendum on that particular issue. Another interpretation is that given how flawed the referendum question was, it is almost impossible to conclude anything from the vote on that particular question.

## CONCLUSION

Whereas the original constitution, written by a small number of bureaucrats, entrenched the Lutheran church as a state church, the new constitutional proposal (at least before it was amended post-referendum by a parliamentary commission) does not mention the Evangelical Lutheran Church by name and defers any change to the status quo to Parliament. It also substantially expands the protection allowed by the article on religious freedom to a much wider range of personal beliefs and rejects limitations of freedom of religion in the name of “public order” or “good morals,” preferring instead limitations required in the name of democratic principles and necessities.

Meanwhile, the solutions put forward by two contemporary expert drafts, while perfectly reasonable, seem ever so slightly less sophisticated, either because of the awkwardness of placing the recognition of the status of the Evangelical Lutheran Church as national church in a separate article on referendums (A) or because of a too great adherence to the status quo (B). The expert solutions also seem less liberal overall, in that they do not include non-strictly religious life-views as worthy of protection under the article on freedom of religion, and they stick to the dated vocabulary of “public order” and “good morals” as possibly legitimate reasons to curb religious freedom. Finally, the Council’s solution has the merit of offering one unified solution, against the two incompatible solutions offered by experts.

The Icelandic process, though just one small and partly confusing case, thus seems to confirm, or at least does not disconfirm, epistemic democrats’ prediction of a positive correlation between inclusiveness in the writing-part of the process and smarter as well as morally superior outcomes. The moral superiority is here especially to be found in the expansion in the scope of religious rights provisions. The Icelandic experiment should thus give moderate hope to the proponents of more participatory and inclusive constitutional processes. It remains unclear, however, to what extent these findings travel to societies with a religiously much more divided citizenry, and further research is surely needed on the question.

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