

A Review of Iceland's Draft Constitution

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The Comparative Constitutions Project

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Overview

In late 2008 and early 2009, thousands of Icelanders took to the streets in response to the largest banking collapse in history.¹ The participants in the so-called Kitchenware Revolution had many demands. A prominent one for many protesters was a new constitution to replace the document that they perceived as the root of their current political and economic troubles. The draft constitution currently under consideration in Iceland is the realization of that demand.

Here, we review the draft constitution that is proposed to replace the Icelandic constitution of 1944. Icelanders are poised to vote this next week in a non-binding national referendum on the merits of the draft, after which the legislature (Althingi) will take up the proposal. The focus of our analysis is on identifying novel or atypical elements of the draft and situating the draft's provisions with respect to those of both current and historical constitutions, including the Icelandic document of 1944. We draw from an original dataset (the [Comparative Constitutions Project](#)) that records elements of constitutions across a wide range of substantive areas for an extensive sample of contemporary and historical constitutions.

Background to the Proposed Draft

In the fall of 2010, twenty-five ordinary Icelanders were chosen by their fellow citizens to serve on a new constitutional council that would formulate a new constitution. The councilors sought wide participation, and Icelanders were able to follow the council's decisions and contribute suggestions through the internet using a rather novel set of crowdsourcing applications. On October 20, 2012, fifteen months after the constitutional council presented the draft constitution to Parliament, Icelanders will be asked to vote on aspects of the draft in a non-binding referendum. The referendum will include six questions, which ask voters for their general opinion of the draft as well as their opinion of particular elements such as the provision for natural resources, the role of the church, the electoral system for the legislature, and a provision regarding national referenda on legislation.

¹ "Cracks in the Crust." *The Economist*. December 11, 2008. Available at: http://www.economist.com/node/12762027?story_id=12762027.

Characteristics of the Draft

The draft produced by the commission is based on the 1944 Constitution, which itself has been amended several times. But there are a few notable differences between the two documents. The draft's preamble speaks in the name of "We, the people who inhabit Iceland" rather than a specific nation, and emphasizes the diversity of the population. Another change is that Article 19 does not define the Evangelical Lutheran Church as the state church, instead leaving the matter to be decided by law. Any change to that provision will have to go before the public in a referendum. There are also sections on local government and foreign affairs that are entirely absent from the 1944 constitution. Article 111 of the latter section, notably, requires that a binding referendum is required prior to "entry into international agreements that include the devolution of state power to international institutions," a clause that gives Icelandic citizens a veto on any attempt at integration into the European Union.

Elements of direct democracy appear throughout the proposed Constitution. Like the 1944 Constitution, the draft allows the public to vote on bills that have been returned to the parliament by the President,² but the draft also allows public a role in the determination of a state church and the approval of certain treaties. In addition, 10% of voters may demand a referendum on any bill within three months of its passage (Art.65), subject to certain exceptions listed in Art 67 (e.g. the budget). Voters may propose bills to the parliament (Art. 66). The parliament can presumably accept the proposal or put up a counter proposal for public referendum.³ The public is also involved in approving removal of the president by parliament (Art. 84) as well as constitutional amendments (Art. 113). Candidates for president must have the prior endorsement of 1% of voters (Art. 78). In short, the entire effort puts the public in conversation with their elected representatives.

The provision on natural resources, Art. 34, has been controversial because it states that such resources are the property of the state, and not available for sale to private parties. A licensing scheme is contemplated, with leases and licenses limited to a "modest period of time."

The draft constitution states that the form of government would be that of a parliamentary democracy. The system of executive-legislative relations is probably more similar to what Political Scientists categorize as "semi-presidentialism," in that there is a directly-elected executive who maintains non-trivial amounts of power as well as a prime minister. In this sense, the draft is very similar to the previous Icelandic constitution, which had carved out a rather unique balance of power among three executives: (1) a largely symbolic President of Iceland, (2) a prime minister who heads the cabinet, and (3) a President of the Althingi (legislature).

One broad question has to do with how we might characterize the draft constitution with respect to some of the basic dimensions along which scholars typically compare constitutions. Figure 1 does just this with along four dimensions, each described below. In each panel in Figure 1, the Icelandic draft is compared to a select set of constitutions, drawn from those currently in-force in Europe as well as those

² Only one other Constitution has this feature: Monaco's Constitution of 1962.

³ As a general comment, we note that the constitution does not specifically state that the parliament *must* adopt the public proposal. So it is possible to read the article as merely requiring the parliament to vote on it, possibly rejecting it without proposing an alternative.

most recently drafted from any region. The vertical line indicates the mean for the given dimension across *all* constitutions currently in force.

- (a) Detail of the text. This quantity says something about whether the document is more of a “framework” document, which generally advance only broad principles, or whether the document takes up very specific aspects of governance. We measure it using the number of words in the constitution divided by the number of topics that it covers from our survey. Though it is slightly longer than the Icelandic constitution of 1944, the Icelandic draft is comparatively concise, compared with both the overall mean and the select constitutions displayed in the panel. The U.S. constitution is often considered to be one of the most concise, so it is notable that the Icelandic draft has even less detail than its U.S. counterpart.
- (b) Inclusiveness. This is a measure of the degree to which citizens are incorporated into decision-making, typically through referenda and initiatives. Given the changes described above, it is not surprising to see that Iceland’s constitution comes in as one of the most inclusive in history and well-above the mean of contemporary constitutions, a level at which the current document stands just below.
- (c) Legislative Power. This is an aggregate measure composed of thirty-two items which track the authority and autonomy of the legislature. Iceland’s Althingi is measured here as having the power well above average and equal to that of the U.S. Congress and the Spanish Parliament.
- (d) Rights. This is a measure of the volume of rights in the constitution, measured as the percentage of rights included in the constitution across 70 or so distinct rights that have been specified in constitutions since 1789. Iceland’s draft appears to be moderately rights heavy, as one might expect of a modern constitution. (The number of rights included in national constitutions has increased steadily over the years). The draft has noticeably more rights than does the current Icelandic constitution, but significantly less than does that of other recent constitutions such as those of Bolivia and Kenya. (See Table 1 for a right-by-right analysis).

Figure 1. Four elements of the draft constitution in comparative perspective

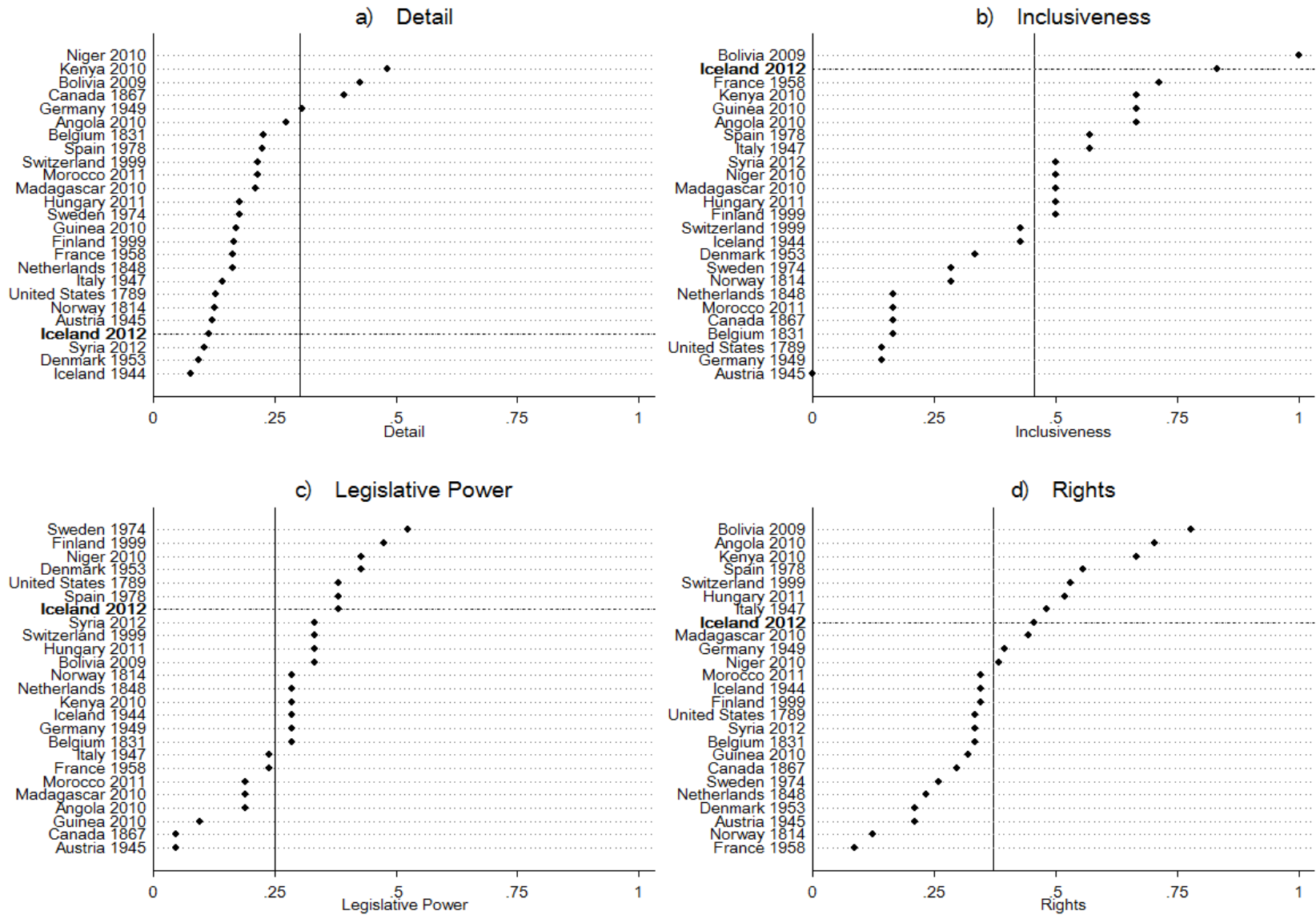


Table 1 summarizes the enumeration of rights in some detail. We mark those rights that are included in both the draft and current Icelandic constitutions, as well as the distribution of that right across *all* national constitutions written in specified eras.

The old draft contained 24 rights from our list, a number slightly above average, while the new draft has 31 rights.

We also note that the new draft now identifies a new set of categories protected from discrimination. Such categories now include disability, sexual orientation and genetic character as well as more conventional categories like age, race, and gender. The state is obligated to protect people against rights violations committed not only by state authorities, but others as well. (This is so-called horizontal rights protection.) Very few constitutions delve into the rights of the disabled and even fewer into sexual orientation. According to our records, only 25 constitutions have ever provided such protections for the disabled and only 7 have done so with respect to sexual orientation.

Table 1. Rights Provisions in Iceland's Constitutions

Right ⁴	Iceland's Constitutions (c. 2012)		Constitutions with Right (%)		
	In-Force	Draft	1789-1914 (n=122)	1915-1948 (n=104)	1949-2006 (n=350)
Freedom of religion	x	x	50	87.5	88.9
Freedom of association	x	x	43.4	85.6	87.4
Freedom of expression	x	x	68.9	83.7	86.9
Freedom of assembly	x	x	49.2	87.5	85.7
Freedom of opinion	x	x	60.7	71.2	76.3
Right to own property	x	x	49.2	67.3	75.1
Freedom of movement	x	x	54.1	56.7	74.9
Right to privacy	x	x	47.5	68.3	72.9
Protection from unjustified restraint	x	x	41.8	57.7	71.4
Punishment by ex post facto laws	x	X	56.6	45.2	70.9

⁴ Labels for rights are taken directly from the CCP Survey Instrument, online at comparativeconstitutionsproject.org. Rights are coded as "provided" or "not provided," with conditional provisions coded as "provided." Further information on this dichotomous coding is available from the authors.

Right ⁴	Iceland's Constitutions (c. 2012)		Constitutions with Right (%)		
	In-Force	Draft	1789-1914 (n=122)	1915-1948 (n=104)	1949-2006 (n=350)
prohibited					
Right to trade unions	x	x	4.1	32.7	69.4
Right to counsel			11.5	20.2	64
Principle of "no punishment without law"	x	x	54.1	58.7	63.7
Right to life		x	23.8	39.4	60.3
Presumption of innocence in trials	x	x	5.7	8.7	60.3
Prohibition of torture	x	x	28.7	26	58
Prohibition of cruel or degrading treatment	x	x	25.4	25	57.7
Right to public trial	x	x	33.6	42.3	57.7
Freedom of the press		x	44.3	54.8	53.4
State duty to protect culture		x	3.3	25	52.6
Right of petition			73.8	73.1	46.9
Right to fair compensation		x	4.9	16.3	43.7
Rights of children guaranteed		x	2.5	22.1	43.1
Prohibition of slavery	x	x	50.8	27.9	42.6
Protection of stateless persons			14.8	16.3	42
Right of government to deport citizens			7.4	19.2	40
Right to protection from self-incrimination			40.2	35.6	39.7
Right to choose	x	x	34.4	41.3	39.7

Right ⁴	Iceland's Constitutions (c. 2012)		Constitutions with Right (%)		
	In-Force	Draft	1789-1914 (n=122)	1915-1948 (n=104)	1949-2006 (n=350)
one's occupation					
Right to strike			1.6	13.5	39.1
Right to health care		x	0	13.5	38.3
Right to rest and leisure			3.3	32.7	37.4
Prohibition of double jeopardy			12.3	19.2	36.6
State duty to provide health care			1.6	19.2	35.7
Right to a fair trial	x		4.9	4.8	32.9
Trial in native language of accused			0	6.7	31.4
Right to redress in the case of false imprisonment	x	x	9.8	14.4	30.9
Right to appeal judicial decisions	x	x	10.7	11.5	30.6
Jus soli citizenship			59	44.1	30.5
Right to inheritance			3.3	16.3	28
Right to safe work environment		x	4.9	14.4	26.6
Right to establish a business			23	32.7	26.3
Provision for matrimonial equality			0	12.5	26
Right to a speedy trial			5.7	7.7	24.3
Prohibition of censorship	x	x	47.5	37.5	24
Separation of church and state			3.3	17.3	24
Right to found a family			0.8	13.5	23.7

Right ⁴	Iceland's Constitutions (c. 2012)		Constitutions with Right (%)		
	In-Force	Draft	1789-1914 (n=122)	1915-1948 (n=104)	1949-2006 (n=350)
Right to examine evidence/witnesses			11.5	4.8	23.1
Prohibition of capital punishment	x	x	19.7	34.6	22.9
Right to marry			8.2	20.2	22.6
Right to self development			0.8	1	22.3
Right to protect one's reputation			13.9	11.5	21.7
Limits on child employment			1.6	26	21.1
Protection of intellectual property rights			39.3	34.6	20.9
Right of pre-trial release	x		23	19.2	20.9
Right reasonable standard of living		x	0	13.5	20.9
Right to shelter			0.8	6.7	19.4
Freedom to view government information		x	1.6	1.9	18
Provision of health care at state expense			0	3.8	16.9
Right to renounce citizenship			1.6	6.7	16.6
Right to free market			3.3	6.7	16.6
Right to conscientious objection			2.5	0	14.9
State duty to provide employment			0.8	13.5	14.9

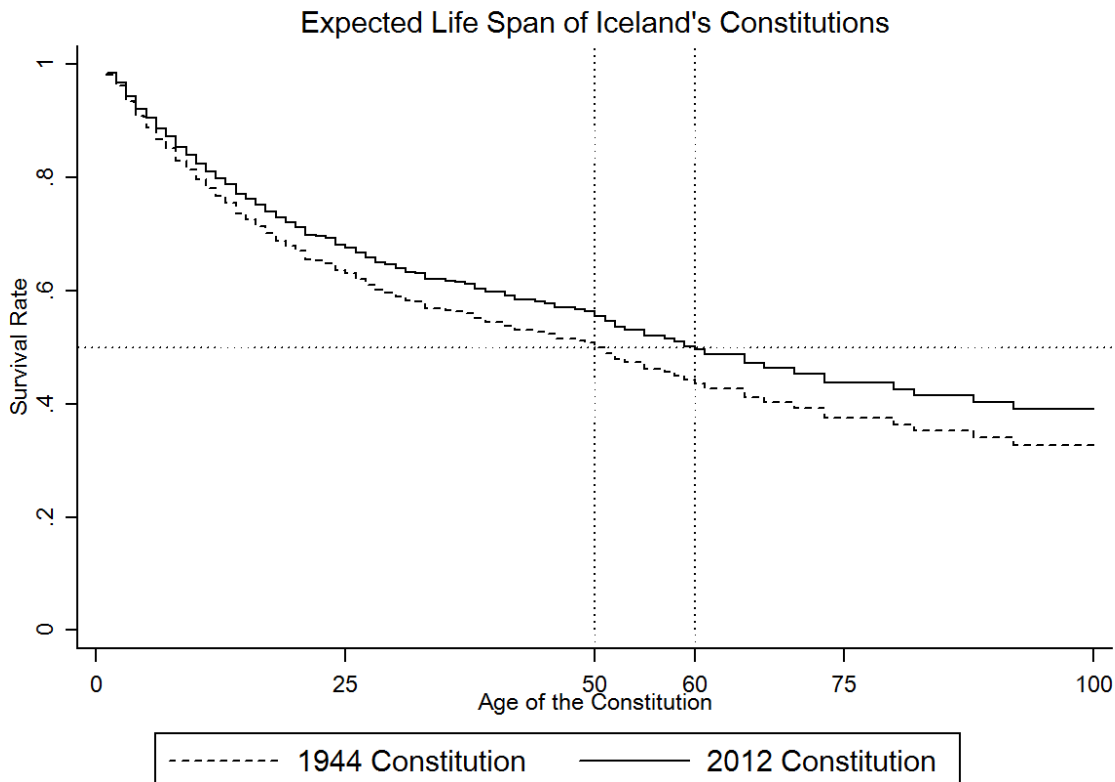
Right⁴	<u>Iceland's Constitutions (c. 2012)</u>		<u>Constitutions with Right (%)</u>		
	In-Force	Draft	1789-1914 (n=122)	1915-1948 (n=104)	1949-2006 (n=350)
Jury trials required			36.9	22.1	14.3
Right to transfer property			17.2	8.7	13.7
Dentention of debtors forbidden			10.7	20.2	13.4
Right to self determination			0	8.7	12.6
Special priviledges for juveniles in criminal process			0.8	3.8	10.9
Protection of consumers			1.6	1.9	10.6
Right to enjoy the benefits of science			0.8	0	10
Right of testate			8.2	4.8	7.4
Prohibition of corporeal punishment			32	21.2	7.1
Right to bear arms			8.2	3.8	1.4
Right to same sex marriage			0	0	0

Life Expectancy

Constitutions generally do not last that long. In a book we published recently, *The Endurance of National Constitutions*, we found that for all national constitutions, the median life expectancy is 19 years, meaning that it will likely be suspended or replaced after that period. In that sense, the 1944 Icelandic constitution has outlived expectations. Still, the 1944 draft has a few attributes in its favor (namely, its flexible amendment procedures and relatively inclusive attributes – two key risk factors) and, in fact, our actuarial model predicts a 50-year lifespan for the document (see Figure 2). The figure indicates the probability (the vertical axis) of surviving to a given age (the horizontal axis).

If the current process goes forward on schedule, the 1944 document will have lived for 69 years. For what it is worth, the proposed draft has an even longer life-expectancy of 60 years, taking into account its various provisions. Of course, this is but an estimate and we make it based on its textual elements alone. Still, drafting the right text has been found to be surprisingly important for constitutional mortality.

Figure 2. Expected Life Span of Iceland’s 1944 Constitution and 2012 Draft Constitution



Conclusion

Iceland's constitution-making process has been tremendously innovative and participatory. Though squarely grounded in Iceland's constitutional tradition as embodied in the 1944 Constitution, the proposed draft reflects significant input from the public and would mark an important symbolic break with the past. It would also be at the cutting edge of ensuring public participation in ongoing governance, a feature that we argue has contributed to constitutional endurance in other countries.

For more information on this report or the Comparative Constitutions Project, contact tginsburg@uchicago.edu