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## The Icelandic Federalist Papers

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No. 11: Freedom of Religion

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# The Icelandic Federalist Papers

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## No. 11: Freedom of Religion

### To the People of Iceland:

Protection for freedom of thought, conscience, and religion is a foundation of democratic society, as Iceland recognized by ratifying the Universal Declaration of Human Rights and other major international human rights instruments.<sup>1</sup> You may think that there is no need for constitutional change regarding freedom of religion because this right is already guaranteed by the 1944 Icelandic constitution's express protection for freedom of religion. In fact, the changes set out in the proposed constitution, approved by a majority of those voting in the 2012 referendum, are appropriate and necessary for the increasingly multicultural and diverse modern Icelandic society.<sup>2</sup>

The proposed Icelandic constitution's express protection for "religion and a view of life" is broader than the "right to practice their religion" that is guaranteed in the 1944 constitution.<sup>3</sup> This expanded right expressly guarantees constitutional protection to adherents of nontraditional faiths and beliefs as well as to agnostics and atheists. Such broader protection is more appropriate for Iceland's increasingly diverse and multicultural society that includes not only adherents of many different religious associations, but also many nonparticipants in organized religions, as well as a large and growing percentage of nonbelievers. The approximately 71 percent of Icelanders belonging to the national Evangelical Lutheran Church in 2017 has dropped significantly from around 85 percent 10 years before.<sup>4</sup> A growing number of Icelanders (today about 10 percent) belong to a wide variety of other religious associations.<sup>5</sup> These include Free Lutheran churches, Roman Catholicism, the Ásatrú folk faith, Pentacostalism, and Zuism.<sup>6</sup> More and more Icelanders belong to no religious organization or have no religious beliefs.<sup>7</sup> Recent polls show that over 50 percent of Icelanders, even those who are members of religious organizations, consider themselves to be nonbelievers or atheists.<sup>8</sup> The apparent contradiction between the number

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<sup>1</sup> Universal Declaration of Human Rights art. 18, available at: [http://www.un.org/en/udhrbook/pdf/udhr\\_booklet\\_en\\_web.pdf](http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf) (Iceland was one of 48 countries voting in favor of the Universal Declaration of Human Rights in 1948); International Covenant on Civil and Political Rights art. 18 (ratified by Iceland on Aug. 22, 1979).

<sup>2</sup> This essay does not comment on the amendments to the proposed Icelandic Constitution later made by Althingi because the Icelandic people did not vote on those amendments.

<sup>3</sup> 1944 Icelandic Constitution, as amended, art. 63, available at: [https://www.constituteproject.org/constitution/Iceland\\_2013.pdf?lang=en](https://www.constituteproject.org/constitution/Iceland_2013.pdf?lang=en); proposed Icelandic Constitution, art. 18, available at: [http://stjornlagarad.is/other\\_files/stjornlagarad/Frumvarp-enska.pdf](http://stjornlagarad.is/other_files/stjornlagarad/Frumvarp-enska.pdf).

<sup>4</sup> Central Intelligence Agency, The World Factbook, Iceland (2017), available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/ic.html>

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Rick Noack, "In This Country, Literally No Young Christians Believe That God Created the Earth," *The Washington Post*, Jan. 23, 2016, at: [https://www.washingtonpost.com/news/worldviews/wp/2016/01/23/in-this-country-literally-no-young-christians-believe-that-god-created-the-earth/?utm\\_term=.266c1aa61eb2](https://www.washingtonpost.com/news/worldviews/wp/2016/01/23/in-this-country-literally-no-young-christians-believe-that-god-created-the-earth/?utm_term=.266c1aa61eb2).

of Icelanders holding no religious beliefs and the number of Icelanders registered as members of the national Evangelical Lutheran Church may be the result of the requirement of automatic registration in that church for all newborn babies in Iceland until 2013. At least some, and probably many, registered members of the Evangelical Lutheran Church are likely to be nonbelievers who have not taken the affirmative step of deregistering. The proposed constitution's expansion of constitutional protection beyond "religion" to "religion and a view of life" is more inclusive of the many belief systems held today by you and your fellow Icelanders.

The proposed constitution reiterates the 1944 constitution's protection of the right to remain outside religious organizations,<sup>9</sup> but also strengthens the protections given to the growing number of Icelanders who choose to do so, including atheists and ethical humanists. The proposed constitution removes the *sóknagjald*, or church tax set out in the 1944 constitution, which provides that "[a] person who is not a member of any religious association shall pay to the University of Iceland the dues that he would have had to pay to such an association, if he had been a member."<sup>10</sup> Although a 2009 law changed the recipient of these church tax payments from the University of Iceland to the state treasury (as permitted by the 1944 constitution), Icelanders who choose to exercise their right to remain outside of religious organizations are still required to make a church tax payment under the 1944 constitution.<sup>11</sup> The absence from the proposed constitution of the church tax requirement for those who do not wish to join a religious organization ensures fair and appropriate respect, more consistent with rights of equality and freedom of association, for the beliefs of those of you who choose to remain outside of religious organizations.

The expansion of freedom of religion to expressly protect a person's lack of religious belief, as well as a wide diversity of faiths and beliefs, is more consistent with major international and European human rights instruments, including the Universal Declaration of Human Rights (which Iceland voted to support in 1948), the International Covenant on Civil and Political Rights (ratified by Iceland in 1979), and the European Convention on Human Rights.<sup>12</sup> Icelandic law incorporated that last convention, and your constitution should be fully consistent with it.<sup>13</sup> One way in which the proposed Icelandic constitution achieves greater consistency with these human rights instruments is the inclusion of the right "to change religion or personal conviction."<sup>14</sup> The 1944 constitution does not expressly include such a right.

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<sup>9</sup> Proposed Icelandic Constitution, art. 18; 1944 Icelandic Constitution, as amended, art. 64.

<sup>10</sup> 1944 Icelandic Constitution, as amended, art. 64.

<sup>11</sup> *Id.* Frumvarp til laga um ráðstafanir í ríkisfjármálum. (Lagt fyrir Alþingi á 137. löggjafarþingi 2009); U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, July-December, 2010 International Religious Freedom Report for Iceland, Sept. 13, 2011, available at: [https://www.state.gov/j/drl/rls/irf/2010\\_5/168316.htm](https://www.state.gov/j/drl/rls/irf/2010_5/168316.htm).

<sup>12</sup> Universal Declaration of Human Rights art. 18, available at: <http://www.un.org/en/universal-declaration-human-rights/>; International Covenant on Civil and Political Rights art. 18, available at: <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf> (includes the right "to have or adopt [ ] religion or belief," which necessarily includes the right to change such religion or belief); European Convention on Human Rights, art. 9(1), available at: [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>13</sup> Act No. 62/1994, Lög um mannréttindasáttmála Evrópu (on the Ratification of the European Human Rights Convention), available at: <https://www.althingi.is/lagas/146b/1994062.html> (in Icelandic).

<sup>14</sup> Proposed Icelandic Constitution, art. 18. See also Universal Declaration of Human Rights, art. 18; International Covenant on Civil and Political Rights art. 18; European Convention on Human Rights, art. 9(1).

Also more consistent with these major human rights instruments is the protection that the proposed constitution gives to the way in which a person may choose to express religion, faith, or beliefs. The proposed constitution gives everyone broad freedom “to pursue religion or personal convictions individually or in association with others, publicly or privately.”<sup>15</sup> In contrast, the 1944 constitution does not specify that the right to freedom of religion includes both public and private manifestations of religion, nor does it provide that this right extends beyond religion to other nonreligious personal convictions. Like the other expansions of the right to religious freedom and freedom of conscience in the proposed constitution, these broadened provisions ensure fuller protection for the wide variety of belief systems increasingly held by you and your fellow Icelanders.

Given the recent and past history of violence in the name of religion, you might be concerned that the proposed constitution removes the 1944 constitution’s limitation on religious freedom for “preach[ing] or practise[ ] which is prejudicial to good morals or public order.”<sup>16</sup> But the proposed constitution still permits the government to limit religious freedoms “as necessary in a democratic society.”<sup>17</sup> This ensures that religious practices and manifestations of secular belief systems that are violent or destructive of democratic norms can be forbidden or limited by law. It also ensures that purely internal beliefs are absolutely protected from limitation by the state because, without overt action of some kind, pure thoughts cannot endanger democratic society and so it can never be necessary for purely internal thoughts or beliefs to be limited. And by tying permissible limitations to democratic necessity rather than good morals and public order, the proposed constitution avoids the danger that the government could seek to justify limitations on freedom of religion by invoking some old-fashioned view of morality that is no longer held by modern Icelandic society.

Since a substantial majority of Icelanders remain registered members of the Evangelical Lutheran Church, you may also have some fears about the provisions in the proposed constitution that are relevant to its status. You may be concerned that the proposed constitution no longer states that the Evangelical Lutheran Church shall be the national church of Iceland and “as such, it shall be supported and protected by the State” as provided in the 1944 constitution.<sup>18</sup> But the proposed constitution continues to ensure that the national status of the Evangelical Church is a matter to be decided democratically by the Icelandic people, to be exercised both through a vote by their representatives in Althingi and also through a referendum.<sup>19</sup> This dual direct and indirect democratic control of church status has not changed in the proposed constitution. Just as under the 1944 constitution, the proposed Icelandic constitution requires both a vote in Althingi and a referendum by Icelandic voters to change the national church’s status.<sup>20</sup> What the proposed con-

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<sup>15</sup> *Id.* See e.g., Universal Declaration of Human Rights art. 18 (providing that everyone has the “freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance”); European Convention on Human Rights, art. 9(1) (providing that the right to “freedom of thought, conscience and religion . . . includes “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”).

<sup>16</sup> 1944 Icelandic Constitution, as amended, art. 63.

<sup>17</sup> Proposed Icelandic Constitution, art. 18.

<sup>18</sup> 1944 Icelandic Constitution, as amended, art. 62.

<sup>19</sup> *Id.* arts. 62 and 79; proposed Icelandic Constitution art. 19.

<sup>20</sup> *Id.* It should be noted that the amendment of the national church’s status in Article 62 is an exception to the general provisions on constitutional amendment in the 1944 constitution, which do not permit amendments through ordinary legislative enactment.

stitution does is to make the status of the Evangelical Lutheran Church a matter of statute rather than constitutional structure.<sup>21</sup> The proposed constitution does this by providing that “[t]he church organization of the state may be determined by law.”<sup>22</sup> The current national status of the Evangelical Lutheran Church cannot change without two votes, the first in Althingi and the second by Iceland’s electorate.

You may be concerned that the proposed constitution does not have more explicit provisions for the separation of church and state. There is not currently a clear enough public mandate in Iceland for separation of church and state to include such a requirement in the proposed constitution.<sup>23</sup> Yet the proposed constitution’s changes to the national church’s status (from constitutional to statutory) make it easier for Icelanders to deepen the separation of church and state. That is, if in the future the Icelandic people wish it, they may exercise their democratic rights and remove the national church’s status, and replace it with nothing.

Moreover, a country’s choice to retain a national church comports with human rights norms. It is well-recognized as a matter of international human rights, and by the European Court of Human Rights, that the different histories and cultures of individual states require respect for a “margin of appreciation” that permits differing policies on the church-state relationships as long as other human rights (including freedom of religion, conscience, speech, association, and equality) are respected.<sup>24</sup> As the Supreme Court of Iceland has held, recognition of the Evangelical Lutheran Church as a national church in Iceland is compatible with freedom of religion and equality so long as there is no discrimination against adherents of other religions or nonbelievers.<sup>25</sup> The proposed constitution respects the long and significant history in Iceland of the Evangelical Lutheran Church, which has been the national church since 1874.

You also may be concerned that removing the Evangelical Lutheran Church’s constitutional status is inconsistent with the 2012 referendum, in which a majority of those voting (57 percent) answered yes to whether they would “like to see provisions in the new Constitution on an established national church in Iceland.” But this question was arguably very confusing in that it did not clearly ask voters whether they supported retaining the current national church. Another confusing aspect of this question is that it was the only one posed in the referendum that required a person who was entirely in favor of the constitutional proposal to vote no.<sup>26</sup> It is likely that some voters who supported the constitutional proposal mistakenly voted yes on every question. It is also likely that some of these voters supported a statutory national church status for the Evangelical Lutheran Church, but not necessarily continued constitutional status. A majority of 2012 ref-

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<sup>21</sup> Proposed Icelandic Constitution, art. 19. The currently applicable statute is Act 78/1887, Lög um stöðu, stjórn og starfshætti þjóðkirkjunnar (Law on the Status, Governance, and Functioning of the National Church, No. 78/1997), available at: <https://www.althingi.is/lagas/nuna/1997078.html> (in Icelandic).

<sup>22</sup> Proposed Icelandic Constitution, art. 19.

<sup>23</sup> Gallup polls from 2011 to 2015 show that around 70 percent of Icelanders supported separation of church and state. But the 2012 referendum vote in which 57.1 percent of those voting answered yes to the question of whether the constitution should contain provisions “on an established national church in Iceland” is inconsistent with those polls.

<sup>24</sup> See European Commission for Democracy through Law (Venice Commission), Guidelines for Legislative Reviews of Laws Affecting Religion or Belief, CDL (2004) 061, June 11, 2004, at 7.

<sup>25</sup> Judgment of the Supreme Court of Iceland, Oct. 25, 2007, Case No. 109/2007.

<sup>26</sup> Hélène Landemore has pointed out these problems with the referendum question in her article, *Inclusive Constitution-Making and Religious Rights: Lessons from the Icelandic Experiment*, 79 Journal of Politics 762 (2017), available at [http://www.academia.edu/27840220/Inclusive\\_Constitution-Making\\_and\\_Religious\\_Rights\\_Lessons\\_from\\_the\\_Icelandic\\_Experiment](http://www.academia.edu/27840220/Inclusive_Constitution-Making_and_Religious_Rights_Lessons_from_the_Icelandic_Experiment).

erendum voters supported the entirety of the proposed constitution, which included removing the Evangelical Lutheran Church's constitutional status. The vote in favor of the whole proposed constitution should be treated as the expression of what the Icelandic people really want. While the Icelandic people have clearly expressed their desire for direct democratic participation through referendum, as to any change to the Evangelical Lutheran Church's statutory status, it is not unreasonable to conclude from the 2012 referendum that Icelanders also favor removing that church's constitutional status in the proposed constitution.

As Icelandic Federalist Number 1 reminds us, we should not allow the perfect to be the enemy of the good.<sup>27</sup> In determining whether to throw your support behind the proposed constitution, you should focus not on whether it is a perfect document, but on whether it is better for modern Icelandic society than the 1944 constitution. I hope that you are convinced that the proposed constitution's provisions on religious freedom are a considerable improvement over those in the 1944 constitution.

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<sup>27</sup> The Icelandic Federalist Papers No. 1: Introduction (2017), available at [http://escholarship.org/uc/igs\\_ifp](http://escholarship.org/uc/igs_ifp).