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## The Icelandic Federalist Papers

### Title

No. 12: Constitutional Amendments

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## No. 12: Constitutional Amendments

### To the People of Iceland:

Constitutions are intended to be enduring documents. Written in a particular climate, constitutions structure a country's government and reflect the country's values at the time of drafting. Yet change is inevitable. Governments change. Rights change. Political parties change. Transportation, medical, and communication technology are all subject to change and, sometimes, rapid advancement. Change thus becomes an imperative part of any constitutional dialogue.

People of reason cannot readily anticipate the developments or threats of the future. As James Madison explained,

That useful alterations will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults.<sup>1</sup>

The average lifespan of a constitution is less than 20 years.<sup>2</sup> Thus, even though constitutions are drafted by one generation with plans of binding future generations, that rarely happens. New ideas, new regimes, or dramatic changes within a country help spur on a new constitution. Flexible amendment mechanisms help protect against wholesale redrafting. Properly articulated, a well-drafted amendment provision helps ensure a constitution's longevity without jeopardizing the people's rights. At its core, the amendment process provides prophylaxis against both too frequent change and stasis.

As St. George Tucker explained in Blackstone's Commentaries:

Nor can we too much applaud a constitution, which thus provides a safe, and peaceable remedy for its own defects, as they may from time to time be discovered. A change of government in other countries is almost always attended with convulsions which threaten its entire dissolution; and with scenes of horror, which deter mankind from any attempt to correct abuses, or remove oppressions until they have become altogether intolerable.<sup>3</sup>

Iceland's first constitution dates from 1874.<sup>4</sup> Limited in scope, it was based largely on the 1849 Danish constitution.<sup>5</sup> When Iceland gained its sovereignty in 1920, it drafted a new consti-

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<sup>1</sup> <http://press-pubs.uchicago.edu/founders/documents/a5s6.html>

<sup>2</sup> <http://clp.usc.edu/assets/docs/Ginsburg2.pdf>. Thomas Jefferson thought that "Every constitution . . . naturally expires at the end of 19 years." Letters of Thomas Jefferson, Thomas Jefferson to James Madison 6 Sept. 1789, available at <https://founders.archives.gov/?q=Project%3A%22Jefferson%20Papers%22%20%226%20September%201789%22&s=1511311111&r=2#TSJN-01-15-0376-fn-0015>.

<sup>3</sup> <http://press-pubs.uchicago.edu/founders/documents/a5s11.html>

<sup>4</sup> <http://sff.is/en/legislation/legal-system-iceland>. The 1874 constitution was presented to Iceland by the Danish King. See Hjortur Torfason, *Influential Constitutional Justice: Some Icelandic Perspectives* (2009).

tution but did not deviate far from the Danish model. Iceland's current constitution, approved in June 1944, retains much of the earlier 19th century iterations. It is currently one of the 15 oldest constitutions in the world.<sup>6</sup>

The existing constitution has a typically Scandinavian amendment provision.<sup>7</sup> It places the amendment process largely in the legislative body, with one notable exception. Currently, amendments may be raised during regular or extraordinary sessions of Althingi.<sup>8</sup> The process, however, requires two sequential legislative bodies to agree to any constitutional amendment: Any amendment proposal (no matter how small) accepted by Althingi results in its immediate dissolution, followed by a new general election. If the new legislature "passes the resolution unchanged, it shall be confirmed by the President . . . and come into force as constitutional law." Only when Althingi amends Iceland's state church status will the issue be presented to the voters for consideration.<sup>9</sup>

Due to this onerous process Iceland's 1944 constitution has only been revised seven times.<sup>10</sup> While not as inflexible as Japan's 1946 constitution, which has never been amended, Iceland's 1944 constitution is comparable to the American model in its rigidity. Having far surpassed the average constitutional lifespan, the time is ripe for Icelanders to embrace change. An important improvement in the proposed constitution is a more direct democratic approach to the amendment process.<sup>11</sup> Amendments passed by Althingi require voter approval, unless Althingi approves the measure by a five-sixths supermajority.<sup>12</sup> A separate amendment provision addressing

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<sup>5</sup> The Danish Constitution bears influences of other countries' constitutions, including both Belgium and the United States—two countries whose early constitutions, ratified in 1831 and 1789 respectively, are still in force. Still, there does not appear any method for the people to directly raise an amendment. If the goal is to increase public participation, one might expect to see some method where the electorate could have an increased say in what amendments are raised. Otherwise, the legislature continues to have primacy in the constitution's future and may be reluctant to propose amendments against their own self-interest. For example, it is unlikely that a legislator would seek to decrease her influence or position by proposing term limits.

<sup>6</sup> Countries with older constitutions include: United Kingdom (1215); United States (1789); Norway (1814); Netherlands (1815); Belgium (1831); New Zealand (1852); Canada (1867); Luxembourg (1868); Tonga (1875); Australia (1901); Mexico (1917); Liechtenstein (1921); Lebanon (1926); and, Ireland (1937).

<sup>7</sup> [http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2348&context=law\\_and\\_economic\\_s](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2348&context=law_and_economic_s)

<sup>8</sup> See Iceland Constitution, 1944, Article 79, available at <http://www.government.is/constitution>, which states:

Proposals to amend or supplement this Constitution may be introduced at regular as well as extraordinary sessions of Althingi. If the proposal is adopted, Althingi shall immediately be dissolved and a general election held. If Althingi then passes the resolution unchanged, it shall be confirmed by the President of the Republic and come into force as constitutional law.

If Althingi 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.

<sup>9</sup> *Id.*

<sup>10</sup> <http://sff.is/en/legislation/legal-system-iceland>

<sup>11</sup> The proposed constitution is available at [http://stjornlagarad.is/other\\_files/stjornlagarad/Frumvarpenska.pdf](http://stjornlagarad.is/other_files/stjornlagarad/Frumvarpenska.pdf)

<sup>12</sup> *Id.*

the state church is found in Article 19.<sup>13</sup> Maintaining the current constitution's approach, *any* change in the state church's status must be approved by direct vote of the people.<sup>14</sup> In this regard, Article 19 preserves the status quo and exempts the proposed five-sixths supermajority rule from any amendment altering the state church.

The proposed constitution strengthens the role of ordinary citizens in the amendment process. Instead of vesting exclusive amendment power in Althingi, the proposed constitution places that power in the people—with a narrow, supermajority legislative exception. While some might question whether this new approach gives too much flexibility and power to the voters, instead it functions as a direct democratic check on legislative activity. Only in the rare supermajority instances would voters be removed from the process.

The proposed amendment process replaces the second legislative step with voter approval. This new formula gives the people a say in the amendment process. This approach is increasingly common in modern constitutions.<sup>15</sup> Iceland's old constitution, seldom-changed and difficult to amend, is long overdue for comprehensive reform that brings it into the modern world along with its people.

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<sup>13</sup> Article 19 provides: “The church organisation of the state may be determined by law. In cases where Althingi 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.”

<sup>14</sup> *Id.*

<sup>15</sup> *Supra*, note 6.