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The Faroese People as a Subject of Public International Law

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Føroyskt Úrtak
Heiti: Føroyska fólkið sum partur í altjóða lóg. Í hesi greinini hjá tí íslendska lógkøna Guðmundi Alfreðssyni verður ført fram, at føroyingar eru fólk í altjóða lóg, og at teir eiga sjálvsavgerðarrætt úteftir. Hesin rættur er væl og virðiliga staðfestur í røð av altjóða lógtekstum og í atferð hjá londum og millumlanda stovnum.

Sjálvsavgerðarrætturin loyvir einum fólki sjálvum at avgera tess egnu altjóða støðu. Valið stendur millum sjálvstøðu, frælsan felagskap, og

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innliman. Framferðarhættir í lóg eru politisk avriggan av hjálandaveldi, frælsistøka, brot við ikki-umboðandi stjórn og loysing sambært sáttmála.

Fólk merkir íbúgvarnir í einum øki ella umveldi við egnum mørkum. Fólk merkir sostatt ikki tað sama sum minniluti, sum er lýstur grundað á tjóðskaparliga ella etniska samanseting. Rættindi hjá minnilutum viðvíkja verju innlendis uttan at nerta fullveldi ella umveldi.

Føroyingar lúka øll fyrilit fyri sjálvsavgerðarrætti, herundir landøki handan hav, tjóðskaparlig eyðkenni, tilvildarliga útilokan frá ST-listanum yvir hjálond, meðan Grønland var skrásett, væntandi virðing fyri fólkaatkvøðuni í 1946, serliga støðu í donskum rætti, siðvenju og orðingum, ið viðurkenna føroyskan rætt til samleika og sjálvstøðu. Danmark hevur viðurkent føroyingar sum fólk heldur enn minniluta. At gera slíkan skilnað hevur løgfrøðiligar avleiðingar.

Partur í altjóða lóg hevur avmarkaði rættindi eins og skyldur. Sjálvsavgerðarrætturin er knýttur at eini skyldu at samráðast eins og rættindum at venda sær til altjóða stovnar og onnur ríki. Til tess at slætta leikvøllin kann eitt fólk, ið vil brúka sjálvsavgerðarrættin, bjóða altjóða serfrøðingum uppí samráðingarlið sítt.

Meðan undirtøka á fólkaatkvøðu er avgerðandi, so eru lógarspurningarnir viðkomandi fyri støðu og verandi samráðingar Føroya. Verða samráðingarnar úrslitaleysar ella órímiliga seinkaðar, kann tað gerast rætt og rímiligt at lýsa sjálvstøðu einsíðugt. Í teirri støðuni verður viðurkenning frá øðrum londum týðandi, og eisini tá er altjóða lóg grundarlagið fyri tilgongdini.

English Summary

The article considers the Faroese right to self-determination and its implications. It is argued that the Faroese are a people under international law. This follows from the criteria established at international law, including overseas territory, national identity, arbitrary exclusion from the UN list of colonies, non-respect of the 1946 referendum, separate treatment in Danish law and practice, and frequent Danish statements accepting a Faroese right to identity and possible independence. As a people the Faroese are a subject of international law and have limited rights and duties, including a duty to negotiate and access to third parties. If the right to self-determination is pursued for the purpose of obtaining independence, unilateral action may be possible if negotiations are unsuccessful or

unreasonably delayed. In any event, international law reasoning is obviously relevant.

Introduction

By negotiating with the Home Rule Government about the legal status of the Faroe Islands, including possible transitional arrangements and future bilateral relations, the Danish Government has acknowledged that the Faroese are a people and not a minority. Such issues are not placed on the table out of generousity or kindness of the heart, since a people has the right of (external) self-determination.

The continued consideration of the Faroese as a national, ethnic or linguistic minority in Denmark is not under discussion, not even in the view of the Danish Government (at least not expressly). International instruments and the practice of States and international organizations do not foresee that minorities have the self-determination options; the rights of minorities are about protection within a State, without the interruption of the sovereignty and territorial integrity of that State.

After describing the contents and beneficiaries of the right of self-determination, it is argued in this article that the Faroe Islanders are a people under international law and that they are entitled to the exercise of this right. As a consequence, they are a subject of international law. That designation carries with it certain albeit limited rights and privileges as well as duties.

The Right of Self-Determination[2]

[2] In the external sense. A right of self-determination in the so-called internal sense, mainly with regard to autonomy or self-government, is not dealt with in this article. James Crawford concludes that the relevant developments in this sense "are still tentative (de lege ferenda), and they do not affect the established rules and practices with respect to self-determination and the territorial integrity of States." See "State Practice and International Law in Relation to Secession" in The British Yearbook of International Law 1998, Oxford: Clarendon Press, 1999, pp. 85-117, at p. 114. In the Lund Recommendations on the Effective Participation of National Minorities in Public Life, adopted by an expert meeting convened in Lund in May 1999 and published with Explanatory Notes in June 1999 by the Foundation on Inter-Ethnic Relations in the Hague and on the home page of the Organization for Security and Cooperation in Europe at "www.osce.org", the use of self-determination language in presenting standards on non-territorial and territorial autonomy is intentionally avoided. For an

In addition to general references in the UN Charter, a right of self-determination has been established in a series of international law instruments. These include the two International Covenants on Human Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, and the Vienna Declaration and Programme of Action. A more or less consistent practice of States and international organizations confirms the existence of this right in certain circumstances.[3]

A people is entitled to exercise the right of self-determination. A people in this context means the population of a distinct territorial or administrative entity with its own external, internal or natural boundaries. The emphasis on the geographical entity (the colony, the occupied territory) rather than the popular entity (the nation, the people, the ethnic group) is repeated in many international law texts[4] and confirmed in intergovernmental practice. This emphasis in the definition makes the term 'people' quite distinct from minorities and indigenous peoples which are defined as groups within metropolitan States on the basis of national or ethnic composition without the necessity of boundaries or a geographical base.

Through the exercise of the right of self-determination, a people determines its international juridical status. The usual situations which a people confronts are political decolonization, liberation of territories occupied in modern times (upcoming Palestinian Statehood, restoration of independence of the three Baltic States),[5] separation from a State with non-

attempt to sort out the multiple external and internal claims placed under the self-determination umbrella, see Guðmundur Alfreðsson, "Different Forms of and Claims to the Right of Self-Determination" in Self-Determination. International Perspectives, Donald Clark and Robert Williamson (editors), London & New York: MacMillan Press & St. Martin's Press, 1996, pp. 58-86.

3 There is plenty of literature on the subject. For a recent treatise, see Antonio Cassese, Self-Determination of Peoples. A Legal Appraisal, Cambridge: Cambridge University Press, 1995.

4 This trend emerges clearly from the decolonization and other self-determination processes, as evidenced, for example, by provisions in the UN Charter on trust and non-self-governing territories (rather than non-self-governing peoples) and by the title and text of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

5 Not applicable in the case of the Faroe Islands.

representative government practicing massive discrimination,[6] and separation by agreement (agreed national divorces in the Soviet Union, Czechoslovakia and Ethiopia/Eritrea).[7] These processes are to different degrees set forth in treaties or other international instruments and in relatively consistent practices of States and intergovernmental organizations, including case-law of the International Court of Justice.[8]

Relying on decolonization or other separation by agreement certainly establishes the strongest available self-determination claims, and they are most likely to succeed in relation to third States and in international forums. A presentation of a colonial situation, albeit mild and modern,[9] is therefore one avenue which the Faroe Islands ought to seriously consider. It squarely corresponds to the reality on the ground, namely long history of control

6 Stipulations to this effect are contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, in General Assembly resolution 2625 (XXV) of 1970, and the Vienna Declaration and Programme of Action as adopted by the 1993 World Conference on Human Rights. In democratic Denmark, taking into account the existence and broad functions of the Faroese Home Rule and with Faroese members seated in the Danish Parliament, this line of argument is hardly available to the Faroese.

7 For key literature which covers non-colonial situations, see James Crawford, "State Practice and International Law in Relation to Secession" in The British Yearbook of International Law 1998, Oxford: Clarendon Press, 1999, pp. 85-117; and Thomas. M Franck, Fairness in International Law and Institutions, Oxford: Clarendon Press, 1995, in particular the chapter "Fairness to 'Peoples' and their Right to Self-Determination" at pp. 140-169.

8 In a judgement of 3o June 1995 in a case between Australia and Portugal about East Timor, the International Court of Justice in the Hague stated that, as far as the two parties were concerned, East Timor remained a non-self-governing territory and that her people had the right of self-determination. The case is available on the Court's site at "www.icj-cij.org". In the meantime, this conclusion is being realized in practice, see "www.un.org/peace/etimor/etimor.html".

9 Notwithstanding favourable human rights reputations, the Nordic countries do not have particularly good records when it comes to various population groups under their jurisdiction. See Lauri Hannikainen, "The Status of Minorities, Indigenous Peoples and Immigrant and Refugee Groups in Four Nordic States" in Nordic Journal of International Law, vol. 65, 1996, no.1, pp. 1-71; and Guðmundur Alfreðsson, "The Rights of Indigenous Peoples with a Focus on the National Performance and Foreign Policies of the Nordic Countries" in Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV), vol. 59, 1999, no. 2, pp. 529-542.

from overseas of a distinct people and Danish insistence on the final word in most aspects of the relationship. The decolonization avenue is especially relevant if the Danish agreement on self-determination is wavering.[10]

For the purposes of decolonization, the available options are independence, free association and integration.[11] These options also apply to other claims to (external) self-determination. The right of self-determination is not to be mixed with democracy as carried out in elections for governments. In the Faroe Islands, the self-determination option is being pursued by a democratically elected body of the people concerned, the Home Rule Government.

Popular support for the outcome of the self-determination exercise is required, but that democratic decision can be carried out properly in a referendum when the terms of a possible separation have been laid down. By negotiating the terms, it is obviously agreed or understood that the conditions for such an exercise exist, including the existence of a people.

The Faroese as a People

The Faroese people meets all the possible criteria which have been laid down in the course of the decolonization process as conditions for entitlement to the right of self-determination. In general, these criteria are also applicable or relevant to other situations involving the exercise of the right of self-determination:

- The Faroe Islands are a distinct overseas territory, far away from Denmark. In other words, the so-called salt water theory is applicable. In this respect, the situation of the Faroe Islands is quite different from groups which live within the metropolitan boundaries of States, as for example Quebec.[12]

10 As indicated, for example, by recent Danish denials of Faroese Home Rule access to the United Nations and NATO. For information, see the site "www.fullveldi.fo".

11 General Assembly resolution 1541 (XV) which adds selection criteria and procedural formulations to resolution 1514 (XV) of 1960 entitled "Declaration on the Granting of Independence to Colonial Countries and Peoples".

12 In the case "Reference re Secession of Quebec" from 1998, the Supreme Court of Canada found that "Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural

- The Faroese people possesses subjective and objective national identity and characteristics in abundance. The identity, history, culture, language and other characteristics are unique to the Faroese situation.

- In addition to centuries of remote control, the historical part encompasses discriminatory exclusion from (or non-inclusion on) the list of non-self-governing territories under Chapter XI of the UN Charter, while Greenland was so listed by Denmark after the War.[13] The historical part also includes the manipulation and non-respect of the results of a 1946 referendum on Faroese independence which received majority support. With reference to geography, identity and the history, the Faroese situation is strikingly similar to that of Iceland which did break away from Denmark and obtained international recognition.

- The Faroese people is called "det færøske folk"[14] and "et selvstyrende folkesamfund"[15] in article 1 of the Danish Home Rule Legislation for the

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and social development. In the circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally." The Court also observed that "Although there is no right, under the Constitution or at international law, to unilateral secession, that is secession without negotiation ..., this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession. The ultimate sucess of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession ...". On general aspects, the Court stated that "a right to secession only arises under the principle of self-determination where 'a people' is governed as part of a colonial empire; where 'a people' is subject to alien subjugation, domination or exploitation; and possibly where 'a people' is denied any meaningful exercise of its right to self-determination within the state of which it forms a part." The case is accessible at the site "www.lexum.umontreal.ca"; the first two quotations are from para. 154 and the third quotation is from para. 155.

13 Guðmundur Alfreðsson, "Greenland and the Law of Political Decolonization" in German Yearbook of International Law, vol. 25, 1982, pp. 290-308, and "Greenland" in Encyclopedia of Public International Law, Amsterdam: North Holland, published under the auspices of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg with Rudolf Bernhardt, vol. 2, 1995, pp. 623-625.

14 "The Faroese people". This term is not used in the Core Document forming Part of the Reports of the States Parties under international human rights instruments, see in particular paras. 12-13 and 37-38. Interestingly enough, in para. 23, the phrase 'Denmark proper' is used to distinguish Denmark from the

Faroe Islands, a choice of words which very closely reflects the international law terminology with regard to self-determination. In addition, in the Preamble to the same Legislation, reference is made to the special national, historical and geographical circumstances of the Faroe Islands.

- The Faroe Islands are frequently treated separately in Danish laws, administrative practices and foreign affairs. This is true for large things like non-membership in the European Union, Faroese membership in sub-regional organizations and their own international agreements, exclusion in some Danish treaty ratifications, etc., and for small or symbolic things like a flag, passport identification, postage stamps, etc..

- And finally, in addition to the Danish acknowledgement which flows from the ongoing negotiations on legal status, the Faroese right to separate existence and possible independence has been accepted over the years in a series of statements by leading Danish officials and politicians, including Prime Ministers.

Not a Minority

The Faroe Islanders are obviously different from the Danes as far as national and ethnic origins, language and culture are concerned. If Danish arguments to the effect that the Faroese are part and parcel of Denmark and that they do not constitute a people were to prevail, then the Faroese would have to be considered a minority within Denmark. When recently ratifying the European Framework Convention for the Protection of National Minorities, however, Denmark did not list the Faroese as a minority.[16]

Faroe Islands and Greenland. See also below on Danish reporting under article 1 of the International Covenant on Civil and Political Rights.

15 "A self-governing people's society" or something in that direction. In the above-mentioned Core Document forming Part of the Reports of the States Parties, it looks that the Danish Government has translated this term with repect to the Faroe Islands and Greenland as "each self-governing community", see UN document HRI/CORE/1/Add.58 of 29 June 1995, para. 38. This seems to be less than accurate translation which misses or deliberately drops the 'people' component in the said expression.

16 According to a declaration submitted on 22 September 1997, the Framework Convention "shall apply to the German minority in South Jutland of the Kingdom of Denmark", see Framework Convention for the Protection of National Minorities. Collected Texts, Strasbourg: Council of Europe Publishing, 1999, p. 74. See also a Danish State report under article 27 of the International Covenant on Civil and Political Rights in UN document CCPR/C/DNK/99/4 of 22 February 1999, paras. 241-242.

Likewise, when Denmark ratified the ILO Convention on Indigenous and Tribal Peoples in Independent Countries (Convention No. 169 from 1989), all the relevant references were to the Inuit in Greenland.[17]

If the Faroese are not a minority in official Danish parlance, the people classification is the only human rights opening left to them. Indeed, in State reports under the International Covenant on Civil and Political Rights, Denmark has informed the Human Rights Committee about human rights in the Faroe Islands under article 1 concerning peoples and the right of self-determination[18] rather than under article 27 concerning minority rights.

Most importantly, through ongoing negotiations on the legal status of the Faroe Islands, including the possibility of separation, Denmark is acknowledging that the Faroese constitute a people. Negotiations of this type would not have been available to a minority; neither Denmark nor other countries will lightly extend such treatment to minorities or for that matter to indigenous peoples.[19] Making the distinction carries legal consequences.

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17 See, for example, the opening statement by Development Minister Poul Nielson to a 1996 seminar as published in Støtte til oprindelige folk. Seminar om erfaringer og perspektiver (Support to Indigenous Peoples. Seminar about Experiences and Perspectives), Copenhagen: Udenrigsministeriet (Ministry of Foreign Affairs) and Danida, 1996, pp. 4-7.

18 See for example UN document CCPR/C/DNK/99/4 of 22 February 1999, para. 6. In Concluding Observations, also under article 1, the Human Rights Committee has stated its desire to have more information concerning the implementation of the Covenant in the Faroe Islands, see UN document CCPR/CO/70/DNK of 31 October 2000, para. 11. In an earlier set of Concluding Observations in UN document CCPR/C/79/Add.68 of 18 November 1996, para. 16, the Committee has expressed regrets about "the paucity of information about the Covenant and its implementation in the Faroe Islands". These observations fall in line with General Comment no. 12 of the Human Rights Committee from 1984, paragraph 4, see Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies in UN document HRI/GEN/1/Rev.3 (15 August 1997), p. 13: "With regard to paragraph 1 of article 1, States parties should describe the constitutional and political processes which in practice allow the exercise of this right."

19 James Crawford in "State Practice and International Law in Relation to Secession", The British Yearbook of International Law 1998, Oxford: Clarendon Press, 1999, pp. 85-117, very much emphazises the reluctance of the international community in accepting claims to the right of self-determination and the need for agreement between the parties for the successful exercise of the right. As compared with other claims, he is somewhat more generous with

An argument relying on supposed Faroese acquiescence of Danish sovereignty, if it were to be brought up, cannot be taken seriously. At no point following the 1946 referendum on and vote in favour of independence has the Faroese people or their chosen representatives, directly or indirectly, agreed to give up their status as a people and to become an underling through incorporation into Denmark.[20]

The Negotiations

The choice of the negotiation avenue is praiseworthy as compared with the use of violence. Indeed, it can be argued that there is today a duty for both the people and the State to negotiate claims to the right of self-determination, while the use of violence is generally not accepted.

As a subject of international law, a people in the pursuit of the right of self-determination should be entitled to levelling the playing field with the aim of establishing equal footing in negotiations concerning the people's future international status. The controlling or colonizing State should not set the rules alone. After all, as expressed in the Vienna Declaration adopted at the 1993 World Conference on Human Rights, the promotion and protection of all human rights, including the right of self-determination, should not merely be seen as an internal or domestic affair, but as "a legitimate concern of the international community".[21]

One method for establishing equal footing in self-determination negotiations would be for the Faroese side to call on international lawyers and other advisers to join the Faroese delegations to meetings with the Danish Government. If these are not forthcoming from the United Nations or other international organizations, they can be recruited individually. The presence of leading experts would cause a shift in tone and might change

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regard to decolonization, but also there he underlines the general practice of consensual secession. In comments on the Faroe Islands (pp. 108-109), after a brief historical account which expressly removes the decolonization context, he concludes that the "matter was throughout treated as internal to Denmark".

20 The mini-State argument will not work either. In Europe, the Faroe Islands as a State would be larger in both population and territory than Andorra, Liechtenstein, Monaco and San Marino. For a review of arguments for and against the creation of very small States, see Jorri C. Duursma, Fragmentation and the International Relations of Micro-States. Self-Determination and Statehood, Cambridge: Cambridge University Press, 1996.

21 Para. 4 of the Vienna Declaration, in UN document A/CONF.157/23 at p. 4.

the substantive emphasis. Not able to understand Danish, these experts would lead to a more neutral linguistic ground, either through the use by all of English or through simultaneous interpretation from Danish and Faroese into a third language.

If the negotiations are unsuccessful or unreasonably delayed, the possibility of a unilateral declaration of independence will arise. In those circumstances, it is important that the legality and legitimacy[22] of the Faroese claim and conduct be well-argued and well-founded in law and fact.[23]

Access to International Organizations

As a subject of international law holding the right of self-determination and bearing the duty to negotiate the claim, good arguments can be brought forward to the effect that the Faroese people ought to be able to gain access to and a hearing from international organizations and third States. There is nothing automatic about that, however, as States are the dominant players in intergovernmental forums and the States, for understandable reasons of self-preservation, continue to be reluctant towards self-determination claims.[24]

Under international law, States and not peoples have access to the International Court of Justice in the Hague. On decolonization issues, access to and resolutions in the Fourth Committee of the General Assembly and the Committee of Twenty-Four are decided upon by States. In human rights law, under the International Covenant on Civil and Political Rights and its First Optional Protocol, the Human Rights Committee has not been authorized to receive complaints by peoples relating to article 1 of the Covenant on the right of self-determination; the Protocol only allows individuals and not peoples to file petitions. The European Convention on Human Rights, which forms the basis for access to the European Court of Human Rights in Strasbourg, does not refer to peoples and it is silent on the right of self-determination.

22 Language borrowed from the Supreme Court of Canada in the Quebec case, see note 12 above.

23 On the question of recognition in such a situation, in particular collective recognition, see John Dugard, Recognition and the United Nations, Cambridge: Grotius Publications Limited, 1987.

24 See quotation to James Crawford in note 19 above.

Despite the State reluctance towards self-determination claims, international law considerations will nevertheless have an impact at the international level. Bodies of the United Nations, such as the Secretary-General, will not ignore solid legal arguments. The same holds true for other international organizations. This applies not least to decolonization claims where the solidarity of decolonized States and peoples will enter the picture, also if and when the question of collective recognition arises following a unilateral declaration of independence.

In addition, as to policy considerations, for Denmark which likes to see herself as a model of democracy and an exporter of human rights to other parts of the world, the outright denial of a Faroese claim to the right of self-determination and the blocking of their access to international organizations is a potential source of embarrassment. Relating to both human rights protection and conflict prevention, Denmark's ability to criticize other countries for refusing to accept an international role with regard to other human rights situations and self-determination claims would be seriously hampered.

Concluding Remarks

The international law arguments are obviously relevant to the current negotiations between the Faroe Islands and Denmark and to their outcome. The law can be a useful tool for the Faroese negotiators. The Faroese side can and should strengthen their position, in both law and politics, by making use of the right of self-determination in general and decolonization and agreed negotiations leading to a possible separation in particular.

Peoples entitled to the right of self-determination are subjects of public international law, albeit with more limited capacities than States which constitute the primary subjects. Peoples have rights, duties and international standing in terms of access to international organizations, at least as far as decolonization is concerned. On repeated occasions, the United Nations and regional organizations like the Organization for African Unity have officially dealt with peoples' representative organs for the purposes of self-determination and granted access to 'liberation movements', even before the peoples concerned have democratically elected their leadership or decided on the choice of the prescribed options.

Through the ongoing negotiations and on the basis of several sound legal arguments, the Faroese can legitimately be seen as a people and Denmark has actually acknowledged them as such. The question in the current

negotiations is therefore about how and when, not whether, the Faroese will exercise the right of self-determination. The available options are independence, free association and integration, and it is for the Faroese people to choose between them in a referendum.