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Faroese Law Review – Vol. 3, No. 1, May 2003

Frælsur Felagsskapur og Fyrisitingarrættindi

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Frælsur Felagsskapur

og

Fyrisitingarrættindi

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Kári á Rógvi, medritsjtóri

Grundin og bygningurin

Herfyri samtykti Føroya Løgting at grundlógararbeiðið skuldi fara í gongd aftur. Løgtingið hevði tá stutt frammanundan verið á grundlógaráðstevnu, har stórir og týðandi spurningar komu fyri, og har mangir áhugaverdir gestir úr mongum londum vóru við. Tíverri var tað ikki eitt samt løgting, ið atkvøddi fyri lógini. Tað vóru tær 17 atkvøðurnar hjá samgonguni móti teimum 15 hjá andstøðuni, sum gjørdu av málið. Hetta kann tykjast sera møtumikið, at tað bert er ein sera tepur meiriluti, sum vil hava eina nýggja stjórnarskipan. Serliga fyri útlendskar eygleiðarar má hetta tykjast løgið eftir eina ráðstevnu, har allir flokkar vóru við, og har tingformaðurin, ið er sambandsmaður og millum fremstu andstøðutingmenn, gekk á odda at fáa tingmenn at vera við í hesi samstundis fakliga og politiskt týðandi stevnu.

Tingfólk eru øll samd um, at ein grundleggjandi lóg skal smíðast. Tey eru samd um, at verandi stýrisskipanarlóg hevur brek og lýti, ið kunnu bøtast, umframt at hon fevnir ov lítið. Viðurskiftini úteftir, serliga verandi støða í ríkinum, og hvussu slík støða skal broytast, eru ov illa lýst. Rættindini hjá fólkinum í Føroyum, bæði sum *partur* av politisku skipanini og *mótvegis* skipanini, eru heldur ikki at finna í stýrisskipanarlógini. Alt frá fólkaatkvøðum til framsøgufrælsi til fyrisitingarlig grundrættindi manglar í teirri grundleggjandi lógini, teimum grundleggjandi viðtøkunum fyri landið Føroyar.

Vit kunnu valla vera ósamd um, at nógv er at gera. Vit hoyrdu frá Chimène Keitner, doktara í altjóða lóg, at sjálvsavgerðarrætturin er ómissandi, og at vit longu nú eiga at síggja ríkisstøðuna sum eina delegatión frá Føroyum til ríkið. Ein føroysk stjórnarlóg er tí líka nógv ein lóg hjá sambandsinnaðum, sum framhaldandi meta tað vera skilagott at lata ríkinum vald fyri teir fyrimunir, tað kann geva, sum

hjá sjálvstýrissinnaðum, sum nú ella seinni vilja taka aftur valdið frá ríkinum. Snøgt sagt eru vit í dag eitt land, sum kann gerast ein altjóða viðurkendur statur, um og tá vit sjálvi vilja tað. Slíkt land eigur at hava eina grundleggjandi stjórnarlóg við ella uttan samveldi.

Hví var úrslitið so 17 móti 15? Tí politikkur alt ov ofta er ósemja. Sambandsvongurin – javnaðarflokkurin og sambandsflokurin – royna partvíst eftir somu veljarum, og vilja ikki missa teir, hvørki til hvønn annan ella onkra triðja flokk. Fyri teir er føroyska orðið „grundlóg“ knýtt at ríkisgrundlógini. Enska orðið „constitution“ er eitt fakorð, ið merkir 'lóg fram um aðrar lógir í ávísari skipan, sum lýsir politisku stovnarnar og onnur grundleggjandi viðurskifti'. Ólukkuliga er tað føroyska orðið „grundlóg“ knýtt fyrst og fremst at Danmarks Riges Grundlov, so at ein føroysk 'grundlóg' fær dám av at vera knýtt at fullveldistøku og einum óheftum føroyskum ríki. Hetta er spell, tí navnið hevur lítlan og ongan týdning fyri innihaldið og týdningin hjá eini lóg.

Men samgongan er ikki stórt frægari. Tað var greitt, at lógin um grundlógararbeiðið fór at verða samtykt einmælt á løgtingi, um bert navnið á nevndini broyttist frá „grundlógarnevnd“ til „stjórnlógarnevnd“. Somu málsigu konnotatiónir gjørdu, at sjálvstýrisflokkarnir eru betur við eitt orð, sum smakkar meira av fullveldi enn eitt annað. Tað løgna er bert, at tað eru málsligar konnotatiónir úr einum øðrum máli – donskum – sum vekja kenslur hjá føroyskum tjóðskaparmonnum.

Jú, jú. Politikkur í skipanum við tingræði er nærum altíð 'vit móti teimum'. Men, hóast ósemjuna at síggja til, er tingið sjálvsama samt í hesum máli. Tað manglaði jú bara eittans orð í at fáa semju um lógina um grundlógararbeiðið. Tá nevndin byrjaði lív sítt, vóru andstøðuflokkarnir ímóti hvøji einastu áseting og hvørjum komma. Hesuferð hava teir fingið eina røð av innihaldsligum broytingum, og hava alment fingið viðurkenning fyri at hava arbeitt sera sakliga og ágrýtið í nevndini higartil. Tað var millum annað fyrrverandi tingmaðurin hjá javnaðarflokkinum, Hans Pauli Strøm, núverandi aðalskrivari hjá flokkinum, sum setti orð á ta tjóðskaparligu semju, sum ein stjórnarlóg undir verandi samveldisstøðu krevur.

Stjórnlógararbeiðið í grundlógarnevndini kann tí fara at ganga betur nú enn nakrantíð, um viljin er við. Í lógarritinum fara vit í øllum førum nú at prenta tilfar frá grundlógaráðstevnuni, umframt at vit loksins hava fingið í lag táttin um nýggjar lógir og lógbrotingar.

Kári á Rógvi, editor

The Base and the Building

A short while ago the Faroese Parliament resolved to resume the constitutional work of the Faroes Constitutional Committee. The entire Parliament had before that attended the Constitutional Conference where the Faroese and several important scholars from a number of other countries debated many important questions. Alas, it was not a united Løgting – Faroese Parliament – that sanctioned the enabling statute. Only the 17 votes of the Governing Coalition voted in favour against the 15 opposition votes. This can appear disheartening that only a small majority wants a new constitutional arrangement. Foreign observers, especially, may be puzzled since amongst others the Speaker of Parliament, who is an opposition Unionist, attended the Constitutional Conference and held up Parliamentary proceedings for its duration.

Actually, the lawmakers overwhelmingly agree that new constitutional law shall be drafted. The present Constitutional Act – the internal Faroese constitution in Faroese called Stýrisskipanarlógin – can be both improved and extended in scope. External relations, most importantly the relationship with the Danish Realm, and possible changes to those relations are too poorly described. The Rights of the People of the Faroes, both the privileges of being part the political structure and the immunities from the super structure, are missing at present. Also conspicuous by absence from the Basic Law of the Faroes are a number of fundamental principle from popular referenda to freedom of speech to administrative rights, so important in a country with relatively weak courts.

There can be little dispute on the point that much needs to be done. At the Constitutional Conference we heard from the perspica-

cious Dr. Chimène Keitner, who urged us to view the current position within the Danish Realm as a delegation of power *from* the Faroes *to* the Danish Realm, based on the imperishable and continuous nature of the right to self-determination. A Faroese Constitution is advantageous for the Unionists intent on continuing the Union of the Realm as well as those Nationalists who favour full independence at some point or other. In short, we are today a land with the potential of becoming a recognised sovereign state at such time as we decide ourselves. Such a land must have a constituting basic law with or without a wider constitutional union.

Why, then, was the score 17 to 15? Because politics all too often is discord. The Unionist Party and the Social Democratic Party are to some degree courting the same voters. To them the Faroese word „grundlóg" is connected to the Union of the Danish Realm. The English word „constitution" is a term of art meaning 'the superior law in a given political structure that defines the political bodies and other important principles of government' -and is used to describe a plethora of documents. Unfortunately, the Faroese word „grundlóg" is in the minds of the Faroese foremost connected to the Basic Law of the Danish Realm. Therefore, a Faroese „grundlóg" is associated with the break-up of the Realm. This is regrettable, as the name is of little consequence for the content and importance of a law. It, nonetheless, meant that the Unionist side of Parliament voted against drafting a „grundlóg", but would have favoured the same statute if the Committee were instead charged with drafting a „Governing Act". The majority was equally astute in their insistence on a word that tastes more of sovereignty than another. The curious thing is that linguistic connotation from an alien tongue arise such feelings in Faroese Nationalists.

Anyway, politics in Parliamentary Systems almost inevitably lead to 'us against them'. In remains, however, that the Faroese Parliament is in unusual agreement on the substance of this matter. Only one word now divides the Faroese and the opposition has achieves considerable substantial concessions and much praise for its constructive role in the Constitutional Committee word so far. Indeed, the former Social Democratic MP Mr. Hans Pauli Strøm, currently Secretary General of his party, was the one who formulated the National Accord that a Faroese Constitutional Document needs in the current constitutional-union context.

The work on the Framework of Governing of the Constitutional Committee can be expected to progress better than ever – if their is a will. The Faroese Law Review will in any event start the publication of the material from the Faroese Constitutional Conference. Also, we have now at long last undertaken to provide short notes of comment on recent Faroes statutes.

At halda FLR

Ætlanin hjá ritstjórnini fyri 2003 er, um umstøðurnar verða til tess, at geva út 3 rit, og sum áður fráboðað verður kostnaðurin fyri at gerast haldari kr. 300,00 fyri árgangin

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Sp/f Agnar á Dul, Agnar á Dul, skrás. grannskoðari hevur grannskoðað ársroknskapin hjá Føroyskt Lógar Rit fyri 2002, sum ritstjórnin hevur set upp. Grannskoðanin hevur ikki givið orsøk til nakað fyrivarni.

Dr. Chimène Keitner[1]

Associate Statehood: Principles and Prospects

This paper explores the spectrum of status options available to small polities under international law. It focuses on the status of free association, which comprises a range of options between the extremes of full independence and integration into a larger state. It provides an overview of free association arrangements to which the United States is a party, and it suggests how some aspects of these arrangements could serve as useful models for the Faroes. It also indicates some considerations that might enter into a decision to construct a formal free association relationship, and the steps that could be taken to move in this direction.

CONTENTS

[1] Dr. Chimène Keitner is a specialist in international law, with a focus on national self-determination. She was a speaker at the International Conference on International Identity in Nuuk, Greenland in 2002, and has often appeared as a conference participant and panelist. Dr. Keitner has published articles in the fields of international law, U.S. domestic law, and political science. She holds degrees from Yale (J.D.), Oxford (D.Phil., International Relations), and Harvard (B.A.).

Introduction

The story is sometimes told of a traveler who, lost in the back roads of Ireland, stops to ask a farmer how to get to Dublin. The farmer scans the horizon, scratches his head, and replies: „Well, if I were you, I wouldn't start from here."

Any attempt to reconfigure the international political map must take account of its present configuration—accidental, illogical, or unjust as that configuration may be. The widespread affirmation of a right to national self-determination opened a window of opportunity for reshaping the international status quo. That window is still open, despite the caveats and qualifications that have inevitably attached to this revolutionary doctrine. I have been asked to chart for you the range of possible destinations on the other side of that window, to suggest some ways to reach those destinations, and to highlight some relevant considerations in choosing what path to take. The baggage of history is always heavy and, like the traveler in my story, you might wish that you had started from a different point. Nevertheless, through consultations and discussions such as those organized by the Constitutional Committee, you can make a collective decision about what route to take in light of where you've been, where you are, and where you want to go.

I. Status Options Under International Law

It is clear as a matter of international law that all peoples have the right of self-determination. The question is: who can exercise this right, and how? It seems to me beyond dispute at this point that the Faroese are a people with the right to determine their own political destiny, however radical this idea might once have seemed. The more complicated question, which I will attempt to address, is what this right means in concrete terms, and how to go about exercising it.

United Nations General Assembly Resolution 1541 sets out three conditions under which a „Non-Self-Governing Territory can be said to have reached a full measure of self-government":

[2] G.A.Res. 1541 (XV), Principle VI, U.N. GAOR, 15th Sess., Supp. 16, at 29, U.N.Doc.A/4684 (1960).

(a) Emergence as a sovereign independent State;
(b) Free association with an independent State; or
(c) Integration with an independent State.[2]

The idea of a non-self-governing territory is a term of art; the General Assembly created, and continues to maintain, a list of such territories. The original list was composed largely of U.N. trust territories, including territories that had been placed under League of Nations mandates after World War I, territories that had been detached from „enemy states" after World War II, and territories that were voluntarily placed on the list by administering states.[3] Greenland was on the original list of non-self-governing territories, but was removed in 1954.[4] The Faroe Islands have never been on the list.[5]

The right of self-determination has not been restricted to the territories on the General Assembly's list. These territories do, however, receive special international attention, including the requirement that the administering power regularly transmit information to the United Nations on the status of each territory under Article 73(e) of the U.N. Charter. Any people's status as less than fully self-governing is a matter of inclusive international concern, whether or not formal reporting requirements are in place with respect to that people.[6]

The three indicators of full self-government set out in Resolution 1541 can also be viewed as a list of status options for peoples who have not yet exercised their right to self-determination.[7] I will examine each of these options briefly and then explore the free association option in greater detail.

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[3] UN CHARTER, art. 77.

[4] *See Trust and Non-Self-Governing Territories, 1945-1999, at* http://www.un.org/Depts/dpi/decolonization/trust2.htm. For a critique of the process that led to Greenland's removal from the list, see Gudmundur Alfredsson, *Greenland and the Law of Political Decolonization*, 25 GERMAN YEARBOOK OF INTERNATIONAL LAW 290 (1982).

[5] *See Non-Self-Governing Territories Listed by General Assembly in 2002, at* http://www.un.org/Depts/ dpi/decolonization/trust3.htm.

[6] See generally C.I. Keitner & W.M. Reisman, *Free Association: The United States Experience*, 39 TEXAS INT'L L.J. (forthcoming). I am indebted to my work with Professor Reisman for many of the ideas in the current paper, but I take sole responsibility for all opinions expressed herein.

[7] The idea was that a non-self-governing territory would make a choice for independence, free association, or integration. An uncoerced and genuine choice for integration would be considered final. However, because the free association option involves a right of unilateral withdrawal by the associate (as explored below), this idea of a „one-shot" exercise of the right may be inappropriate in some contexts.

A. Independence

Independence is, perhaps, the most familiar and unequivocal form of external self-determination.[8] The Revolutionary Americans famously proclaimed in their Declaration of Independence of July 4, 1776:

> We, therefore, the Representatives of the United States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States, that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.

There are several remarkable aspects of the Declaration. First, it spoke the language of representative democracy (although of course only a small percentage of the population in each colony actually voted for delegates to the Continental Congress, given the restriction of the franchise to propertied white men). Like the subsequent French Revolution, the American Revolution forged a strong link between the ideas of representative democracy and self-determination. The American representatives were self-consciously acting „in the Name, and by Authority of the good People of these Colonies." Their source of authority was neither royal nor divine, but popular.

Second, the Declaration's authors asserted that „these Colonies are, and of Right ought to be Free and Independent States." Independence was a matter of right, not of privilege, nor even negotiation with the administering power. The only difference between this assertion of a right to independence and the idea of an inherent right to national self-determination is the care the Declaration takes to catalogue the injustices of the British Crown as a justification for and

[8] The term „external" self-determination generally refers to a people's choice of international status. The degree of „internal" self-determination depends on the extent to which a people's political institutions are democratic and participatory, as opposed to authoritarian.

source of this right. Non-self-governing territories and overseas colonies do not need to demonstrate abuse in order to claim independence. (The status of the right for non-„salt-water" territories is more ambiguous.[9])

Third, the Declaration dissolves all ties of allegiance and „political connection" between the newly independent states and Britain. It purports to establish a clean break between the Old World and the New.

Fourth, the Declaration specifically claims for the newly independent states the status of full and equal members of international society, with „full Power to levy War, conclude Peace contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." The Declaration's authors recognized that the essence of sovereign statehood lies not only in being, but in doing—in the ability to act, and to have those actions recognized by the international community as the actions of a sovereign state.

The Declaration of Independence did not end the American Revolutionary War. A declaration does not in itself create the reality it announces: at the risk of oversimplification, other states, and ultimately the administering power, must recognize this new status and treat the new state as „one of them." Nonetheless, in issuing the Declaration, the American colonists took a monumental step towards the creation of an independent United States.

Integration and free association, the other two forms of self-determination, do not involve a clean break. They accept that a degree of „political connection" to another people might be necessary and even desirable. They acknowledge the reality that, especially for a small polity, a people's material, strategic, and other objectives can often best be achieved in formal alliance with, rather than separately from, a larger state. Integration is the political opposite of independence; free association covers a range of options in-between.

B. Integration

Integration is the trickiest of the three options for self-determination because it is often difficult to determine when a purported choice for

[9] For a recent judicial analysis of this question, see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, *available at* http://www.lexum.umontreal.ca/csc-scc/en/pub/1998/vol2/html/1998scr2_0217.html.

integration is, in fact, a genuine expression of the popular will. Integration would occur if, for example, the people of Puerto Rico decided in a referendum to become a state of the United States.

Resolution 1541 provides:

> The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage.[10]

During the process of decolonization in Africa, certain non-self-governing territories merged with others to form larger independent states. For example, Tanganyika and Zanzibar joined to form what is now Tanzania; Togoland joined the Gold Coast to form Ghana; the Northern Cameroons joined with Nigeria; and the Southern Cameroons joined with Cameroon.[11] These unions were not uniformly unproblematic. For example, Netherlands New Guinea is listed by the United Nations as having joined with Indonesia in 1963; in fact, Indonesia was given a mandate to administer the territory in 1963 with an understanding that a referendum would follow in 1969. The territory's inhabitants call it West Papua, Indonesia persists in calling it Irian Jaya. Delegates from the territory voted unanimously in 1969 to remain administered by Indonesia in an „Act of Free Choice" that was, by some accounts, free only in name.[12] There has been, and continues to be, agitation for self-determination in the territory, even though the U.N. General Assembly approved the integration as the free expression of the population's wishes.

There is nothing intrinsically pathological about the option of integration. That said, it is unlikely to appear very attractive unless it involves significant economic or security benefits. Multicultural societies can and do flourish; but when a territorially distinct people with its own culture, history, and sense of distinct identity is faced with the choice of enshrining that identity in separate international status or merging that identity into that of an existing state, the human desire for recognition strongly suggests that the former option

[10] G.A. Resolution 1541, Principle IX(b).

[11] *See Trust and Non-Self-Governing Territories, 1945-1999, supra* note 3.

[12] *See West Papua, Member of the Unrepresented Nations and Peoples Organisation, at* http://www.unpo.org/member/wpapua/wpapua.html.

will appear preferable. While many forms of federation preserve a large degree of internal autonomy, particularly over cultural affairs, they rarely entail international status for the component units of the federation. As the American Declaration of Independence indicates, one of the things that a people often wants is to be able to do the „Things which Independent States" do. Unlike integration, free association enables a people to do some, if not all, of these things.

II. The Free Association Option

The term „free association" does not refer to a set model, but rather encompasses a range of intermediate arrangements between independence and integration. Professor Hurst Hannum touched briefly on this option in his report on „Possibilities for Increased Faroese Autonomy."[13] As Professor Hannum noted, not all free association arrangements actually use the term „free association" in their constituent documents. Nonetheless, we can identify certain common features of arrangements that fall within this category.

A free association is formed when two states of unequal power form voluntary and durable links.[14] The smaller state, the associate, delegates certain functions to the more powerful state, the principal, while maintaining its own international status. The features of associate statehood include: internal control, international status, and delegation of certain state functions to a principal, with the *power of unilateral revocation* residing in the associate.

First, an associated state will have complete control over its internal constitution. As Resolution 1541 states: „The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people." Of course, this does not preclude outside consultations. The key point is that an associated state retains, at a minimum, exclusive control over its internal affairs.

The definition of what is „external" and what is „internal" is not always self-evident, particularly as states find themselves increasingly intermeshed in regulatory regimes at both the regional and international levels. In general, however, one can expect associated states to have control over such things as education, taxation, and infra-

[13] *See* Hurst Hannum, *Possibilities for Increased Faroese Autonomy*, *at* http://www.fullveldi.fo/uploads/HurstHannum.doc.

[14] *See* Reisman & Keitner, *supra* note 5.

structure. They will generally have their own judicial systems with final authority over matters arising within the territory, but some may retain recourse to the highest judicial instance of the principal. Associated states generally have control over immigration and issue their own travel documents, although some will continue to share citizenship with the principal. Some will have their own currencies; others will share the principal's currency.

The most important feature of an association is not what competencies an associated state delegates or maintains, but the process by which the division of competencies is agreed upon, and the common understandings that underpin that division.

Resolution 1541 indicates that a free association arrangement „retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes."[15] In other words, an associated state (or „territory," in the language of the Resolution) retains the right to modify its status through an act of popular will. As a matter of international law, a principal cannot dictate the future political status of its associate: an associate always has the unilateral right to withdraw from the association. While economic, security, and other practical considerations might constrain an associate in deciding whether to exercise this option, the option is always there as a matter of right under international law.

This right of unilateral withdrawal distinguishes free association from other forms of power-sharing, such as federations. While a federation might include a right of secession as a matter of domestic constitutional law, a free association retains this right for the associate as a matter of international law. The associate delegates certain powers to the principal, but it can reclaim these powers as a matter of right if and when it so chooses. It is highly recommended that this basic principle be enshrined explicitly in a free association agreement to avoid future confusion. The right of unilateral withdrawal by the associate is a legal entitlement, not a matter of negotiation.

As suggested above, free association encompasses a range of relationships between independence and integration. The more competencies that are delegated to the principal, the farther away the

[15] G.A. Resolution 1541, Principle VII(a).

associated state will be from the „independence" end of the spectrum, and vice versa. Professor W. Michael Reisman and I have reported on five free association arrangements involving the United States. Two of these associated polities, Puerto Rico and the Northern Mariana Islands, are not recognized internationally as independent states. The three others, the Federated States of Micronesia, the Republic of the Marshall Islands, and Palau, are U.N. members, but they retain closer links with the United States than are typical of most independent states in the international system. Labels, while important, are not determinative. What matters is the substance of the relationship, and whether the population of the associated state finds that the relationship is conducive to promoting its material and symbolic needs, including the need for dignity and self-respect.

The following tables indicate some possible divisions of competencies, based on the U.S. models. The main conclusion to be drawn from the variety of arrangements is that there is no set formula for free association: it is up to each people to find the configuration that best suits its needs and interests, within the realm of what is feasible given its historical and actual relationship with the principal.

A. The Commonwealth Model

COMMONWEALTH OF PUERTO RICO

Key Legal Documents

– U.S. Public Law 600 (1950): „*Be it enacted by the Senate and House of Representatives* … That, fully recognizing the principle of government by consent, this Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption."[16] Approved in Puerto Rico by referendum. – Constitution of the Commonwealth of Puerto Rico (1952): „The Commonwealth of Puerto Rico is hereby constituted. Its political power emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America." Approved in Puerto Rico by

[16] Act of July 3, 1950, 48 U.S.C. § 731b-731e (1950).

referendum, then submitted to U.S. Congress for approval. Approved by U.S. Congress with three minor changes,[17] then re-approved in Puerto Rico by referendum.

Features of the Association

Competencies Reserved to Puerto Rico

- Elects its own Governor and legislature
- Appoints all judges, all Cabinet officials and all lesser officials in its executive branch
- Sets its own educational policies
- Determines its own budget – Amends its own civil and criminal code
- Legislative assembly has full legislative authority over local matters
- Participates directly in certain international organizations, including Caricom (observer), FAO (associate), IOC, and WHO (associate)
- Not subject to U.S. federal income tax

Competencies Delegated to U.S.

- Inhabitants have U.S. citizenship but do not vote for U.S. President
- U.S. currency is the only legal tender
- Foreign affairs and security delegated to the United States
- Public officials take an oath to support the Constitution of the United States
- U.S. federal law applies where it is not locally inapplicable
- „Fundamental" provisions of the U.S. Constitution apply to Puerto Rico

Areas of Shared Competence / Other Features

- Duty-free customs union with the U.S.
- Non-voting Resident Commissioner from Puerto Rico sits in U.S. Congress
- Amendments to Constitution of Puerto Rico must be consistent with the U.S. Constitution, with the Puerto Rico Federal Relations Act (those legal provisions relating to U.S.-Puerto Rico relations that continued in effect after the passage of Public Law 600), and with Public Law 600

[17] H.R.J. Res. of July 3, 1952, ch. 567, 66 Stat. 327.

Ongoing Issues

– Repeated referenda on the status question which have so fair failed to yield a majority on any of the options presented[18] – Disputes over the activities of the U.S. navy on the island of Vieques – Lack of precision over exactly which provisions in U.S. laws and Constitution are applicable to Puerto Rico – Continued attention by the U.N. Special Committee of 24 to the situation of Puerto Rico

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Key Legal Documents

– Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States (1975), approved in the CNMI by referendum and enacted into law after approval by U.S. Congress.[19] States that the CNMI will be „a self-governing commonwealth … in political union with and under the sovereignty of the United States of America." – Constitution of the Commonwealth of the Northern Mariana Islands (effective 1978), approved by referendum in the CNMI and by U.S. President Carter – U.N. Security Council Resolution 683 (1990) terminating the Trusteeship Agreement and declaring that the CNMI had become fully self-governing

Features of the Association

Competencies Reserved to the NMI

– Locally elected governor, lieutenant governor, and legislature
– Own trial and appeals courts
– Limited involvement in international organizations such as the South Pacific Commission, but no formal state department at this time (unlike Puerto Rico, which does have a state department)

[18] See *infra* note 28 and accompanying text.

[19] Act of March 24, 1976, Pub. L. No. 94-241, 90 Stat. 263, codified at 48 U.S.C. § 1801 (formerly § 1681); the Trusteeship was terminated by Proclamation No. 5564, 51 Fed. Reg. 40,399 (Nov. 4, 1986).

Competencies Delegated to U.S.

- Permanent inhabitants have U.S. citizenship but do not vote for U.S. President
- U.S. currency is the only legal tender
- U.S. District Court with appeal to U.S. Supreme Court on federal law matters
- Complete responsibility and authority with respect to foreign affairs and defense

Areas of Shared Competence / Other Features

- Elected representative serves as non-voting member in U.S. Congress

Ongoing Issues

- 90% of the workforce consists of alien laborers; issues with regulation of working conditions given these demographics – Unclear to what extent the U.S. can enact legislation applicable to the CNMI

B. Compacts of Free Association

THE FREELY ASSOCIATED STATES

Key Legal Documents

Federated States of Micronesia

- Constitution of the FSM (1975)
- Compact of Free Association with the U.S. (1986)
- U.N. Security Council Resolution 703 (1991) terminating the Trusteeship Agreement and recommending that the General Assembly admit the FSM to U.N. membership

Republic of the Marshall Islands

- Constitution of the RMI (1979)
- Compact of Free Association with the U.S. (1986) – U.N. Security Council Resolution 704 (1991) terminating the Trusteeship Agreement and recommending that the General Assembly admit the RMI to U.N. membership

Republic of Palau

- Constitution of Palau (1981)
- Compact of Free Association with the U.S. (1994)
- U.N. Security Council Resolution 956 (1994) terminating

the Trusteeship Agreement, and Resolution 963 (1994) recommending that the General Assembly admit Palau to U.N. membership

Features of the Associations

Competencies Reserved to the FAS

– Responsible for conducting foreign affairs in their own name and right enshrined in the Compact of Free Association, with provisions for mutual consultations with the U.S. where foreign affairs have the potential to overlap with security matters (a major difference between the FAS and the CNMI)
– Exclusive authority over internal affairs; not juridically part of the U.S.
– Maintain own police forces and have the option of establishing a coast guard
– Issue own travel documents
– Participate actively in international organizations

Competencies Delegated to U.S.

– The currency is the U.S dollar
– Exclusive U.S. authority over security and defense matters (the major U.S. interest in the islands is strategic, namely, preventing any other state from establishing a military presence)
– Provision for extending consular assistance to FAS citizens for travel outside the FAS and the U.S.

Areas of Shared Competence / Other Features

– Each compact of free association provides for a fixed term (15 years for the FSM and RMI) of U.S. financial and technical assistance
– Either party can terminate the Compact of Free Association with six months' notice, as long as agreed-upon procedures are followed, but security and defense arrangements in the Compact will persist beyond its termination and can only be terminated by mutual consent (an exception to the idea of a right to unilateral termination by the associate)
– Representatives exchanged between the FAS and the U.S. are accorded ambassadorial rank – FAS citizens may

serve voluntarily in the U.S. armed forces but cannot be drafted

Ongoing Issues

– RMI disputes with U.S. over continued use of Kwajalein Atoll as a missile testing ground, and with reparations for U.S. nuclear testing at Bikini and Enewetak Atolls from 1946 to 1958

III. Application to the Faroes

The Faroes already exhibit many of the features that characterize associated states. In particular, the Faroes have internal self-government and a degree of international personality, reflected most recently in its admission as an associate member of the International Maritime Organization. The Faroes' ability to define its own relationship with the European Union is also noteworthy. In certain aspects of international relations and foreign affairs, the Faroese already speak with their own voice, rather than through Denmark.

That said, it is clear that not all Faroese are satisfied with the current situation. Frederik Harhoff's work has demonstrated that the Home Rule arrangements in Greenland and the Faroe Islands, despite their origins in Danish legislation, will not be, and in fact cannot be, revoked by the Danish Parliament. As he explains in his thesis, the fear that home rule powers could be withdrawn unilaterally by Denmark is based on an understanding of home rule as a delegation of powers „from Danish constitutional authorities to the structurally *inferior* (Greenlandic and Faroese) Home Rule institutions."[20] Two things have happened to make this understanding obsolete: first, the internal evolution of Home Rule structures and decision-making processes within the Danish Realm; and second, the external evolution of international legal concept of the entitlements of peoples to self-determination, particularly where these peoples are territorially and culturally distinct from the administering state.

I indicate several options for reconfiguring the status of the Faroe Islands within, or separate from, the Danish Realm below. The important point at this stage is to note the opposing conceptions of the delegation of powers at play with respect to the Faroese: one

[20] FREDERIK HARHOFF, RIGSFÆLLESSKABET (English Summary) at 502.

model, now obsolete, under which the Danish central authorities delegate certain powers to the Faroese legislature, and another model, not yet explicitly entrenched, whereby the Faroese legislature delegates certain powers to Denmark. The current situation is somewhere in-between: there is a division of powers, and it would be both illegitimate as a matter of Danish constitutional law and, I would submit, illegal as a matter of international law for the Danish authorities to modify this division significantly without the consent of the Faroese people. However, if and to the extent this arrangement becomes unsatisfactory to a majority of the Faroese people, the question arises: How can the Faroese people move towards, and ultimately entrench, an alternative relationship between the Faroes and Denmark? How can you re-imagine the Danish Realm?

A. Consultation

The 1991 Report of the Secretary-General on the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples emphasizes the importance of the free, uncoerced, and well-informed exercise of the right to self-determination, and in particular the right of peoples of Non-Self-Governing Territories to „decide their future political status with complete knowledge and awareness of the full range of political options available to them, including independence."[21] Similarly, Resolution 1541 indicates that the decision to opt for free association must be „the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes."[22] The practical question, of course, becomes: who gets to decide, and how?

Theoretical and practical arguments can be, and have been, made to support a variety of alternatives. At the risk of oversimplification, the general practice seems to be that those residing in a territory are entitled to vote on its political future. This solution, of course, is far from unassailable. Even if borders are uncontested, the phenomenon of population transfers in anticipation of an upcoming referendum is not unknown. The disenfranchisement of those residing outside of the territory can also be problematic. In the case of a potentially seceding territory, should the rest of the existing political unit be consulted? (The answer in the case of a non-self-governing territory

[21] G.A. Res. 46/181, Annex, U.N. GAOR, 46th Sess., U.N. Doc. A/46/634/Rev. 1 (1991).

[22] *See* GA Resolution 1541, *supra* note 14.

with an established right to self-determination is „no," but the answer in other cases is more ambiguous.) What of those who were born in or have some connection to the territory, but are not currently residing there? Answers to this question may vary. Absentee ballots are possible in a referendum, as they are in any election, as long as procedures for establishing who is qualified to vote and how ballots will be distributed, collected, and counted are confirmed ahead of time. Both under-inclusive and over-inclusive definitions of who can participate in a referendum can generate criticism and challenges to the legitimacy and authoritativeness of the result. General agreement on procedures ahead of time and U.N. supervision of the voting process can provide useful, though not infallible, safeguards.

The Faroe Islands are both a land and a people: territory and culture are intimately connected, and one without the other is difficult to conceive. While international law speaks of the right of „peoples" to self-determination, the labeling of non-self-governing „territories" indicates a practical reality of international politics: political institutions control not just people, but territory. Although different forms of multi-layer governance may coexist in one territory (for example, religious and secular authorities, or local and national governments), the reality is that sovereignty is generally exercised within geographical borders. At the end of the day, only one source of authority is generally recognized as having the last word in a given territory. In our contemporary international system, at least in theory, that 'last word" belongs to the government of the nation-state. The basic idea that individuals residing in a territory are bound by the laws of that territory, and owe their political allegiance to the source of those laws, remains predominant.

As I understand it, the desire for self-determination is the desire to be bound by, and loyal to, institutions that one feels one can truly identify with, and in which one can see oneself reflected. Faroese Home Rule allows this to a certain extent, since the final authority on many matters of central importance is Faroese. Of course, practically speaking, the „final authority" on many questions might depend on social, economic, military and other realities that are beyond the exclusive control of either Faroese or Danish political institutions. But the basic longing to be the author of one's own destiny insofar as possible is understandable, and widely shared.

Full independence is not necessarily the best way to become the

author of one's own destiny, especially in an increasingly interdependent world. Political negotiation is about being able to leverage one's resources; the more resources one has, the more one can use them as leverage. The free association option is one way that smaller polities can leverage the resources of larger entities as part of, rather than in opposition to, their own desire to be maximally self-determining. The balance may be a precarious one and, as Professor Reisman and I have suggested, merits ongoing international scrutiny to ensure that an association remains „free" in substance, and not in name only.[23]

If the Faroese Løgting decides to hold a referendum to determine the wishes of the Faroese people, understood broadly (subject to further specification) as those living within the Faroese territory, how ought it proceed? I know that much thought has already been devoted to this question, and that proponents of the „independence process" have clear ideas about what this should entail. I therefore limit myself to offering a few additional suggestions here.

First, it is important to determine the purpose of the referendum. Is it a general tool to gauge the level of satisfaction with the current political status of the Faroes? A more specific tool to identify which among several possible options the Faroese would prefer? A means of obtaining from the Faroese people a mandate to negotiate even more proactively with Denmark about modifying the current arrangement? All of these purposes are possible, and they are not mutually exclusive. Identifying and prioritizing purposes at the outset, to the extent possible, can facilitate the process of deciding what question to ask. It is also important to remember that there can be successive referenda, for example, a mandate to negotiate for a preferred option, followed by popular approval of the outcome.

Second, it is important to determine ahead of time what will constitute a definitive result. Is there a minimum voter turnout required? Will a simple majority in favor of an option suffice, or is a greater percentage required? There is no „correct" answer to these questions, but resolving them ahead of time will help avoid political disputes down the road about what the results of a particular referendum actually signify, and how binding or authoritative they should be considered.

Third, there is the difficult task of formulating a workable question.

[23] *See* Reisman & Keitner, *supra* note 5.

For each individual voter, making a choice among options might be difficult; but understanding what the options are, and expressing one's chosen preference, should not be difficult. This means that the Faroese authorities must formulate a question that is easily understood, and that is neither too narrow nor too all-encompassing. A balanced and well-planned information campaign ahead of the referendum can be an indispensable tool in creating a well-informed electorate and in facilitating widespread popular participation in the consultation process, strengthening the legitimacy and authoritativeness of the end result.

Below, I indicate a few examples of pitfalls that the Faroe Islands might want to keep in mind in planning its own referendum. The pitfalls include: an unclear question, a question that is too narrow, a question that has too many options despite a high level of public awareness, and a question with too many options and a poor level of public awareness.

Example 1: Unclear question

The province of Québec has had a series of referenda on the question of independence, with the most recent in 1995. Referenda have been held at the instigation of the „sovereigntist" party when it has occupied a majority of the seats in the Québec Parliament (called the „National Assembly"). In the lead-up to the 1995 referendum, there was a great deal of debate about what exactly a „yes" vote would entail, and in particular whether there could be some form of „sovereignty-association" between Québec and Canada, in which Québec would retain certain benefits such as use of the Canadian dollar and membership in the North American Free Trade Agreement. The following question was posed against the backdrop of this ambiguity about what exactly Québec voters were being asked to decide:

> MONTREAL (CNN) — The official translation of the question Quebec voters face on Monday in the separation referendum:
>
> „Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995? Yes/No."
>
> Some elements in the referendum need a little translating of their own:

> The „bill“ on the future of Quebec refers to Bill 1, which proposes a framework for achieving sovereignty and was introduced in the Quebec legislature in September.
>
> The June 12 agreement refers to a declaration by three Quebec parties that support sovereignty: the Parti Quebecois, the Bloc Quebecois and the Action Democratique du Quebec party.[24]

In the end, the vote was 50.5% „no“ and 49.5% „yes“ – the closest margin in any Québec referendum on sovereignty to date. The reactions included a reference to the Supreme Court of Canada to determine whether or not Québec was entitled to secede unilaterally from the Canadian federation (the answer is basically „no“),[25] and the passage by the Canadian Parliament of the so-called „Clarity Act,“[26] which attempts to establish parameters for any subsequent referendum so that its results can more plausibly be characterized as representing, in the words of the Act based on language from the Reference opinion, the „clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada.“

Example 2: Excessively narrow question

There can also be problems with questions that are too narrow, even if they are clear. For example, there has been criticism of the 1959 referendum that led to the admission of Hawaii as a state of the United States. „[A]lthough there were several forms of government available to a territory, the Hawai'i election proposed only one option. The question on the ballot was 'shall Hawai'i immediately be admitted into the Union as a State?'“[27] In this case, one could argue that the failure to indicate the existence of other options was, if not a fatal flaw, at least a serious shortcoming. If self-determination is to be meaningful, choices must be made with an awareness both of what the options are, and of what these options entail.

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[24] *What's the question?*, October 29, 1995 (from Reuters news service), *available at* http://www.cnn.com/WORLD/9510/canada/10-29/question.html.

[25] *See Reference re Secession of Quebec*, *supra* note 8.

[26] An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference (June 29, 2000), *available at* http://laws.justice.gc.ca/en/C-31.8/32600.html.

[27] Taryn Ranae Tomasa, *Ho'Olahui: The Rebirth of A Nation*, 5 ASIAN L.J. 247, 266 (1998), citing The Admission Act of March 18, 1959, Pub. L. 86-3, 73 Stat. 4 (1959).

Example 3: Too many options; inconclusive result despite high voter turnout

A question that presents too many options can also be problematic. The Puerto Rico political status plebiscite of December 13, 1998 included the following options. The English translation of the ballot is worth citing in full, as it is instructive in both form and content:[28]

> STATEHOOD
>
> „The admission of Puerto Rico into the Union of the United States of America as a sovereign state, with rights, responsibilities and benefits completely equal to those enjoyed by the rest of the states. Retaining, furthermore, the sovereignty of Puerto Rico in those matters which are not delegated by the Constitution of the United States to the Federal Government. The right to the presidential vote and equal representation in the Senate and proportional representation in the House of Representatives, without impairment to the representation of the rest of the states. Also maintaining the present Constitution of Puerto Rico and the same Commonwealth laws; and with permanent United States citizenship guaranteed by the Constitution of the United States of America. The provisions of the Federal law on the use of the English language in the agencies and courts of the Federal Government in the fifty states of the Union shall apply equally in the State of Puerto Rico, as at present."
>
> COMMONWEALTH
>
> „The application of the sovereignty of the Congress over Puerto Rico, which by virtue of Federal Act 600 of July 3, 1950, delegates upon the Island the establishment of a government limited to matters of a strict local order under its own Constitution. Said local government shall be subject to the authority of the Congress, the Constitution and the laws and treaties of the United States. By virtue of the Treaty of Paris and the Territorial Clause of the Federal Constitution, the Congress may treat Puerto Rico differently from the states, provided a rational basis exists for doing so. The United States citizenship of the Puerto Rican people shall be statutory. English shall

[28] For the source of this translation, see *Status Option Definitions*, *at* http://www.puertorico-herald.org/issues/vol2n14/statusopdefs.shtml.

continue to be the official language of the agencies and the courts of the Federal Government which operate in Puerto Rico."

FREE ASSOCIATION

„A Treaty which recognizes the full sovereignty of Puerto Rico to develop its relationship with the United States in a non-colonial, nonterritorial association. The United States shall relinquish all of its powers over Puerto Rico upon entering into the Treaty. Puerto Rico shall retain all powers not expressly delegated to the United States. Puerto Rico shall provide over the Puerto Rican citizenship. Current United States citizens in Puerto Rico shall retain their United States citizenship if they so desire, and may pass it on to their descendants, subject to the provisions of United States laws or the Treaty. It should be construed that, as of the effectiveness of the Treaty, the mere fact of having been born in Puerto Rico shall not constitute the right to United States citizenship. The Treaty to be negotiated shall provide for in matters concerning the market, defense, the use of the dollar, economic assistance, and the protection of personal vested rights. The Treaty shall also recognize the sovereign capacity of Puerto Rico to enter into agreements and other international treaties."

INDEPENDENCE

„The recognition of the fact that Puerto Rico is a sovereign republic with full authority over its territory and its international relationships, with a Constitution that shall be the Supreme Law that provides for a republican government system and the protection of human rights. The residents of Puerto Rico shall owe allegiance to, and shall have the citizenship and nationality of, the Republic of Puerto Rico. Having been born in Puerto Rico or having relatives with statutory United States citizenship by birth, shall no longer be grounds for United States citizenship; except for those persons who had the United States citizenship, who shall have the statutory right to keep that citizenship for the rest of their lives, by right or by choice, as provided by the laws of the Congress of the United States. The benefits of the individuals residing in Puerto

> Rico, acquired because of services or contributions made to the United States, shall be honored by the United States. Puerto Rico and the United States shall develop cooperation treaties, including economic and programmatic assistance for a reasonable period, free commerce and transit, and military force status."
>
> NONE OF THE ABOVE

The voter turnout rate in this referendum was 71.3%. The results were as follows:

> Commonwealth, 993 (0.1%)
> Free Association, 4,536 (0.3%)
> Statehood, 728,157 (46.5%)
> Independence, 39,838 (2.5%)
> None of the above, 787,900 (50.3%)[29]

In other words, the end result was a perpetuation of the status quo, even though virtually no one voted for the „Commonwealth" option, which is the English word currently used to characterize Puerto Rico. (The Spanish expression is „Estado Libre Associado," a difference that itself indicates the imprecision of these categories and the use of terminology surrounding them.)

Interestingly, in 1993, 73.5% of voters turned out and gave the following answers:

> Statehood, 788,296 (46.3%)
> Commonwealth, 826,326 (48.6%)
> Independence, 75,620 (4.4%)
> Blank and void ballots, 10,748 (0.7%)[30]

The end result of that referendum was also the continuation of the status quo (Commonwealth). However, the close split between the options of „Statehood" (becoming a state in the U.S. federal union) and „Commonwealth," the two options that dominate the Puerto

[29] *See 1998 Status Plebiscite Vote Summary at* http://eleccionespuertorico.org/1998/summary.html.

[30] *See 1993 Status Plebiscite Vote Summary at* http://eleccionespuertorico.org/1993/summary.html.

Rican political status debate, produced a more meaningful response than that produced when „None of the above" was included as a formal option. This suggests that a workable question ought to navigate among the ambiguity of the Québec question, the narrowness of the Hawaiian question, and the overbreadth of the Puerto Rican inclusion of „None of the Above."

Example 4: Too many options; inconclusive result because of low voter turnout

The last example I include also presented too many options; in this case, however, this problem was compounded by low voter turnout and a general inadequacy of efforts to educate the public about the choice they were being called on to make. I will dwell for a moment on this example as it involves a territory that once belonged to Denmark and is therefore, I understand, of some interest to the Faroese: the U.S. Virgin Islands, known to you as the West Indies.

Salient historical and demographic facts include the following:[31]

- Denmark chartered the Danish West Indian Company and began colonizing St. Thomas in 1671 and St. John in 1684. Denmark later purchased St. Croix from France in 1733. Except for a brief period of English occupation during the Napoleonic Wars, the Virgin Islands remained under Danish control until 1917.
- As early as 1865, for strategic military reasons, the United States made overtures to acquire the islands. During World War I, fear that Germany might occupy the islands provided the final impetus for the United States to purchase the islands from Denmark, for $25 million on March 31, 1917. The islands were under the jurisdiction of the Department of the Navy until February 27, 1931, when an Executive order placed them under the supervision of the Department of the Interior. In 1927, Virgin Islanders were granted U.S. citizenship.
- Under legislation passed in 1968, the Virgin Islands has had

[31] This historical summary is taken from The U.S. Department of the Interior, Office of Insular Affairs, *USVI Fact Sheet* (1998), *available at* http://www.gov.vi/fastfact.html, and from U.S. Census Bureau, *Brief History of the Island Areas* (2000), http://www.census.gov/population/www/proas/pr_ia_hist.html. *See also 1999 Report on the State of the Islands—U.S. Virgin Islands*, compiled from the OIA Report on the State of the Islands, *available at* http://www.viaccess.net/politics/1999vi.html.

a democratically elected form of government since 1970. Prior to 1970, the Governor of the Virgin Islands was appointed by the President of the United States and reported to the Secretary of the Interior under the territory's 1954 revised organic act.

- The Government of the Virgin Islands is headed by a popularly elected governor and lieutenant governor for four-year terms. The lawmaking body of the Virgin Islands is a 15-member unicameral legislature. Its members are called Senator and are elected by popular vote. The judicial power of the Virgin Islands resides with the Territorial Court and the U.S. District Court.
- Since 1973, the Virgin Islands have been represented in the U.S. House of Representatives by a nonvoting delegate. The Member of Congress from the U.S. Virgin Islands possesses the same powers and privileges as Representatives from the States, with the exception of voting on the House floor.
- The resident population of the Virgin Islands is approximately 106,800, with the majority living on St. Croix and St. Thomas. English is spoken throughout the territory.
- A referendum was held in 1993 with only 10,710 or 31.4 percent of the 39,038 eligible voters participating which was below the 50 percent plus one needed. As a result, the Commission was disbanded on December 31, 1993.

Carlyle Corbin reported on the situation of the U.S. Virgin Islands to the U.N. Special Committee on Decolonization in 2002. He stated that „the 1993 referendum held in the Territory had failed mainly because the population was presented with seven options."[32] Additionally, „the level of public awareness on the process of self-determination had been low even at that time, [and] it had declined further since then."[33] The seven options presented were, as enumerated by Mr. Corbin: „integration; an interim process leading to integration; the status quo; the status quo by another name; a Commonwealth relationship; independence; and a free associated State."[34]

[32] *Special Committee Approves Draft Texts on Tokelau, United States Virgin Islands, Guam*, U.N. Press Release GA/COL/3066, *available at* http://www.un.org/News/Press/docs/2002/gacol3066.doc.htm.

[33] *Id.*

The experience in the U.S. Virgin Islands shows the dual importance of ensuring a sufficient level of public awareness in advance of a referendum, and of avoiding an excessively long list of options, particularly when many of the options overlap. For example, in the USVI, an initial referendum could have presented a choice among the basic options of integration, free association, and independence, and a subsequent referendum could have included more specific choices about the means of implementation. A people should have a genuine choice among a range of options; an uninformed and confusing choice is, in the end, no choice at all.

B. Implementation

It seems inevitable that any change in the political status of the Faroe Islands will involve negotiations with Denmark. Practically speaking, the assertion of a right is only effective if relevant others acknowledge it and modify their behavior accordingly. Maintaining a cooperative relationship with other states, when possible, is always desirable. This is true whether the Faroes retain political ties with Denmark or opt for the more radical independence option.

Whether you choose to call your constitution a Stýrisskipanarlóg (as it is currently called) or a grundlóg (the name used for the Constitution of the Danish Realm), the fact remains that any articulation of a people's constitutive principles has tremendous normative force. Whether these principles operate in conjunction with or to the exclusion of other norms depends on the territory's political structure. For example, each State of the United States has its own constitution; this does not prevent States from deferring to the federal government on matters that fall within federal jurisdiction. Although the basic dividing line between state and federal powers is enshrined in the U.S. Constitution, the precise contours of this boundary are constantly re-negotiated through formal and informal channels. This process of evolution and adaptation is driven by both legislative and judicial action, and occurs in response to and alongside shifts in the priorities and understandings of a dynamic civil society. Political arrangements, no matter how deeply entrenched, are never wholly static.

Given this fluidity, it may be helpful to think of the choice among political status options as a choice among basic frameworks. A wide range of social, economic, and diplomatic considerations will enter

[34] *Id.*

into any political status decision, and will shape the ultimate form that a choice among the frameworks of integration, free association, and independence will take. Some of the possible outcomes include:

1. Revision of the Faroese Constitution to reflect a more assertive and vibrant sense of national identity. Maintenance of the current outlines of Home Rule, with a possibility for expansion of competencies, particularly in the legal and judicial fields. Movement towards formal recognition as an equal partner in the Danish Realm, rather than a subordinate member. (I would not present this as an exercise of the right of self-determination in favor of integration, but rather a decision to continue with the status quo, subject to periodic re-evaluation.)
2. Removal of the Faroe Islands from the Danish Realm as a matter of constitutional law; replacement of constitutional ties with ties based on some form of free association agreement. Allocation of functions and resources according to a mutually acceptable arrangement, with the understanding that the Faroes retain the right of unilateral withdrawal. Development of an autonomous Faroese judiciary. Increased assumption of responsibility for foreign affairs, including diplomatic missions in key countries. Maintenance of Danish currency, citizenship, and travel documents.
3. Declaration of Faroese independence as a matter of international law. Application for U.N. membership. Maintenance of cooperative ties with Denmark insofar as politically possible, particularly in the areas of security, defense, and consular assistance to Faroese nationals abroad.

Elements of these options can also be combined: if there is one lesson to be taken from the experience of other self-determining polities, it is that the main constraints on creativity are logistical (involving resources and infrastructure) rather than legal. There are also important emotional considerations that should not be underestimated in evaluating which framework to choose, and how to go about implementing it. A principal that feels rebuffed or rejected by its would-be associate is unlikely to be very accommodating; an associate that feels an immediate need to assert its self-sufficiency might be tempted to „go it alone“ more than is strategically wise or

economically feasible. As a general matter, and as long as a people's fundamental dignity is protected throughout, an incremental approach to autonomy is preferable to a radical rupture. This is a question of prudence and common sense. Laying the foundations for the ultimate exercise of political sovereignty requires building and strengthening a polity's institutional infrastructure and human resource base, in addition to designing an appropriate legal and political framework. The incentive structures of electoral politics often lead to decisions based on short-term cost-benefit calculations; to the extent possible, self-determination decisions should be made and implemented with a longer-term perspective.

With or without immediate change in the political arrangement between the Faroes and Denmark, a clear emphasis on Faroese self-government as a matter of Faroese right rather than Danish prerogative can go a long way towards altering the tenor of political interactions over time. This can set the stage for the periodic reassessment and, if desired, reconfiguration of the existing relationship in a context of mutual consideration and respect.

Conclusions

This analysis has suggested some options for self-determination that take account of the practical constraints on small polities in international relations. Its purpose is to assist you in choosing a form of self-government that enables you most effectively to achieve your social, cultural, economic, and diplomatic goals. For this reason, I would encourage you to begin by defining your collective priorities, and then to ascertain what division of authority and responsibility will best enable you to realize them, rather than treating a particular status option as an end in itself.

While some might dismiss free association as a polite term for modern colonialism, the fact remains that even larger states are finding benefits in forging durable political links, as illustrated by the deepening of ties within the European Union. In certain respects, an association is like a marriage: dividing up specific tasks is less important than determining what common understandings will underpin the relationship and govern its evolution over time. It would be anomalous, for example, for one of the parties to have exclusive authority, or to be able to dictate the terms of the arrangement irrespective of the other's wishes. That said, any relationship is

fundamentally a matter of compromise. Compromise is worthwhile when both parties benefit in the longer term and are better able to reach their individual and collective goals through a division of labor. It becomes pathological when one of the parties' goals systematically dominate or displace the other's. As Professor Reisman and I have indicated elsewhere, associations are not antithetical to self-determination; to the contrary, they can be an effective means of enjoying greater influence over outcomes as a result of aggregated resources and greater international presence.[35] However, because associations of the type described here involve parties of unequal size and power, they require ongoing international scrutiny to ensure that they remain a means, and not an obstacle, to the associate's social and political goals, and to the basic human dignity of its members.

The internal evolution of Home Rule structures and the shift in international legal understandings of the right to self-determination have made the old conceptual underpinnings of the Faroese-Danish relationship obsolete. The question is how to re-imagine them. Virtually every politically organized society has an understandable desire to be able to do the „Things which Independent States may of right do." However, being able to do these things is not solely a matter of right. Effectively performing the functions of governance requires establishing and maintaining a sustainable political and economic infrastructure. Designing and fortifying this infrastructure is not a legal pre-requisite for increased political independence, but it may be a practical one.

At its core, the right of self-determination is the right to determine one's own political destiny, not a prescription for what form that destiny should take. There is no magic formula or „right" way to do things, but rather a range of possibilities limited primarily by the practical and human considerations alluded to above. Free association encompasses a range of relationships along the spectrum from integration to independence. You now have at your disposal a list of some of the typical „ingredients" of a free association arrangement, but it is up to you to piece together your own recipe in accordance with the needs and desires of your own unique appetite. Even an expert chef can do no more than suggest options: the choice, and the consequences, belong to you.

[35] *See* Reisman & Keitner, *supra* note 5.

Karsten Loiborg[1]

Grundlovssikrede borgerrettigheder over for forvaltningen?

Indledning

I et moderne velfærdssamfund er den offentligretlige regulering af borgernes erhvervsmæssige og private aktiviteter ganske intensiv, og hyppigt bestemmes borgernes retsstilling ikke direkte af loven, men af generelle administrative forskrifter og – ganske ofte – af afgørelser truffet af forvaltningen, særligt i form af tilladelser, dispensationer, påbud og forbud samt afgørelser om opkrævning af skatter og afgifter.

I de traditionelle vestlige forfatninger findes typisk et katalog af friheds- eller menneskerettigheder som både begrænser lovgivningsmagtens, domstolenes og forvaltningens muligheder for at regulere (begrænse eller gøre indgreb i) borgernes retsposition.

I forbindelse med et arbejde med en ny forfatning kan man overveje om – og i bekræftende fald på hvilken måde – der som supplement hertil bør indføres grundlovsbestemmelser som specifikt sikrer visse alment gældende rettigheder for borgerne over for forvaltningen.

Der kan næppe umiddelbart gives noget enkelt og éntydigt svar på

[1] Denne artikel er tidligere præsenteret som et debatoplæg til den færøske grundlovskonference i Torshavn den 11. – 13. marts 2003 og er udelukkende udtryk for forfatterens egen, personlige opfattelse. Karsten Loiborg blev cand. jur. fra Københavns Universitet i januar 1979 og har været ansat i den danske centraladministration, på Rigsombudet på Færøerne og – siden 1985 – som juridisk medarbejder hos Folketingets Ombudsmand. Ved siden heraf har han undervist i offentlig ret på Københavns Universitet og været medforfatter til forskellige bøger om offentligretlige emner, senest Forvaltningsret (2. udgave 2002), ligesom han siden 2002 har været censor i juridiske fag ved Århus og Københavns universiteter.

det rejste spørgsmål. I det følgende opridses nogle – men givetvis ikke alle – synspunkter som efter min opfattelse bør indgå i overvejelserne. Der er tale om et forsøg på at opstille en ramme for de videre og operationelle overvejelser, og der udpeges ikke mere præcise borgerrettigheder over for forvaltningen som bør skrives ind i en grundlov. Debatoplægget afsluttes dog med en – forsigtig – angivelse af nogle mere overordnede emner som efter min opfattelse i udgangspunktet kunne fortjene nærmere overvejelser i forbindelse med et udkast til en færøsk grundlov.

Hvilke borgerrettigheder over for forvaltningen bør findes på grundlovsplan og hvilke bør findes på lovgivningsplan?

Man kunne naturligvis have det udgangspunkt at principielt alle borgerrettigheder over for forvaltningen eller dog så mange af disse som overhovedet muligt bør findes i en grundlov. Dette udgangspunkt er dog næppe hverken realistisk eller ønskeligt – i alt fald ikke i et samfund som har lang tradition for demokrati og menneskerettigheder, og hvor forvaltningskulturen ud over disse værdier også hviler på legalitetsprincippet, dvs. princippet om at forvaltningens afgørelser og virksomhed i øvrigt skal kunne henføres til en af parlamentet vedtaget lov eller en anden retskilde på niveau hermed.

Hvor et diktatur som har tilsidesat grundlæggende menneskerettigheder afløses af et demokratisk styre som skal respektere en række borgerrettigheder kan der være grund til at insistere på det nævnte udgangspunkt. Men det er jo langt fra det færøske udgangspunkt, og her må man kunne tillade sig en mere nuanceret overvejelse og løsning af spørgsmålet.

Sat på spidsen er det strengt taget kun nødvendigt at indføje borgerrettigheder over for forvaltningen i en i øvrigt fuldt demokratisk forfatning som værn mod lovgivningsmagten. Har lovgivningsmagten således allerede vedtaget de relevante og ønskelige borgerrettigheder over for forvaltningen i lovsform, kan tilsvarende borgerrettigheder i forfatningen siges kun at være nødvendige for at forhindre lovgivningsmagten i at forringe eller afskaffe disse rettigheder. Hermed ikke være sagt at det ikke (f.eks. af lovgivningspolitiske grunde for at gøre disse rettigheder særligt synlige) kan være ønskeligt at have visse – grundlæggende – borgerrettigheder over for forvaltningen optaget i en grundlov, men man må gøre sig klart at

borgerrettigheder skal respekteres af forvaltningen ligegyldigt om de fremgår af grundloven eller en almindelig lov.

En detaljeret regulering i grundloven af samtlige borgernes rettigheder over for forvaltningen vil uvægerligt medføre at mange af de meget talrige forvaltningssager bliver grundlovssager. Man bør nøje overveje om konsekvenserne heraf er hensigtsmæssige og ønskelige. Her kan flere synsmåder anlægges, idet man *dels* kunne spørge om ikke det ville være at skyde over målet at tale om grundlovsbrud ved tilsidesættelse af enhver borgerrettighed over for forvaltningen (f.eks. hvis en forvaltningsafgørelse ikke ganske lever op til et formelt krav om begrundelse), *dels* på den anden side kunne spørge om respekten for grundlovsbestemmelsers væsentlighed vil kunne opretholdes hvis sager hvori der (med nogen rette) påstås grundlovsbrud bliver en daglig foreteelse. Eller sagt på en anden måde: risikerer man – hvis borgernes rettigheder over for forvaltningen i stort og småt fastlægges i grundloven – samtidig både en uproportional infamering af forvaltningen og en forfladigelse af forfatningen og dens bestemmelser?

En detaljeret og prætenderet udtømmende regulering i grundloven af borgernes rettigheder over for forvaltningen vil let kunne føre til en fastfrysning af udviklingen og friste til modsætningsslutninger. I de nordiske lande har man på forvaltningsrettens område gode erfaringer med en dynamisk retsudvikling, til dels på ulovbestemt grundlag, samt en udvikling af forvaltningens adfærd over for borgerne på grundlag af mere "bløde" normer end egentlige retsregler (først og fremmest god forvaltningsskik). I denne udvikling har de nordiske ombudsmænd været de fremmeste fødselshjælpere. Det forekommer vanskeligt at se hvorledes man med en grundlovsregulering som den beskrevne vil kunne opretholde en dynamik som i den traditionelle nordiske model.

Endnu et forhold bør medtænkes ved vurderingen af hvorledes borgernes rettigheder overfor forvaltningen bør reguleres i grundloven, nemlig: hvor vanskeligt er det at ændre grundloven; kan den ændres af parlamentet, og – i bekræftende fald – efter hvilken procedure, eller kræver en grundlovsændring en folkeafstemning, og – i bekræftende fald – hvilke krav er der til vælgerdeltagelse i afstemningen (stemmeprocent) og hvilket flertal kræves til en vedtagelse af en grundlovsændring? Spørgsmålet går for så vidt begge veje: både

på hvor let det vil være at forringe eller afskaffe forfatningsmæssige borgerrettigheder over for forvaltningen og omvendt på hvor vanskeligt det vil være at forbedre sådanne rettigheder. Første led af spørgsmålet er – som også tidligere påpeget – relevant i den udstrækning man ikke mener at parlamentet udgør en tilstrækkelig garant for opretholdelsen af borgernes rettigheder over for forvaltningen, medens andet led af spørgsmålet er af betydning ved vurderingen af risikoen for en fastfrysning af borgerrettighederne over for forvaltningen.

Forskellige reguleringsmetoder i en grundlov for så vidt angår borgerrettigheder i forhold til forvaltningen

De borgerrettigheder i forhold til forvaltningen som man mener bør optages i grundloven, kan heri reguleres efter forskellige metoder. Denne differentiering i reguleringsmetode betyder formentlig samtidig at et forholdsvis bredt udsnit af borgerrettigheder i forhold til forvaltningen vil kunne tænkes reguleret i grundloven uden at de ovenfor skitserede betænkeligheder herved bliver for tungtvejende.

En udtømmende og ubetinget fastlæggelse af en borgerrettighed i forhold til forvaltningen i selve grundloven bør forbeholdes de rettigheder som anses for almengyldige – både med hensyn til gyldighedsområde (de gælder i forhold til enhver del af forvaltningen) og tid (de vil skulle gælde til enhver tid og under alle forhold). Et godt eksempel på en sådan borgerrettighed over for forvaltningen (som dog samtidig er et demokratisk princip og en rettighed for parlamentet) er legalitetsprincippet.

I andre tilfælde kan man overskue at et princip i almindelighed skal være gældende, men erkender samtidig at princippet ikke bør være undtagelsesfrit. I sådanne tilfælde vil hovedreglen kunne fremgå af grundloven, medens undtagelserne til hovedreglen ifølge grundloven skal fastsættes ved lov. Et eksempel herpå kunne være en grundlovsregel om at der gælder et princip om almindelig dokumentoffentlighed i forvaltningen, og at undtagelser til offentlighedsprincippet fasttættes ved lov.

I atter andre tilfælde ønsker man at sikre borgerne en rettighed af en bestemt type over for forvaltningen, uden at rettigheden kan beskrives som en hovedregel hvortil der ved lov kan gøres undtagelse. I sådanne tilfælde kunne løsningen være en grundlovsbestemmelse om at en bestemt borgerrettighed reguleres nærmere ved

lov. Et eksempel herpå kunne være en bestemmelse om at partens ret til at blive hørt i en forvaltningssag nærmere fastsættes ved lov. Det valgte eksempel illustrerer dog samtidig at man bør tænke sig grundigt om: en grundlovsbestemmelse som den skitserede kræver ikke blot at der findes almindeligt gældende partshøringsregler i en af parlamentet vedtaget lov (således som der allerede findes i lagtingsforvaltningsloven), men *kunne* samtidig fortolkes som en ophævelse af partshøringsregler som hviler på retsgrundsætninger på lovsplan, f.eks. den ulovbestemte regel om udvidet partshøring i forbindelse med bl.a. påtænkt afskedigelse af offentligt ansatte på grund af samarbejdsvanskeligheder eller uegnethed.

Konventioner – særligt Den Europæiske Menneskerettighedskonvention (EMRK) – indeholder en del bestemmelser som i praksis fungerer som borgerrettigheder over for forvaltningen. Konventioner kan inkorporeres i national ret på forskellig måde. EMRK er inkorporeret i dansk ret ved lov om Den Europæiske Menneskerettighedskonvention (jf. lovbekendtgørelse nr. 750 af 19. oktober 1998), men kunne også inkorporeres i national ret ved en grundlovsbestemmelse. I EMRK findes bestemmelser som naturligt supplerer frihedsrettighederne i en grundlov, og det kunne derfor være naturligt at overveje fordele og ulemper ved en inkorporering ved en grundlovsbestemmelse.

Ved en stillingtagen til hvilken reguleringsmetode der i relation til konkrete borgerrettigheder i forhold til forvaltningen bør foretrækkes må man gøre sig klart om det er nødvendigt og hensigtsmæssigt at reglen indeholder et direktiv (også) direkte til forvaltningen, eller om det er tilstrækkeligt til opfyldelse af formålet med den enkelte grundlovsbestemmelse at den indeholder et direktiv til lovgivningsmagten.

Emner som bør undergives nærmere overvejelser i forbindelse med et grundlovsudkast

Ud over spørgsmålet om inkorporering af menneskerettighedskonventioner – særligt EMRK – bør det formentlig nærmere overvejes at formulere en grundlovsbestemmelse om legalitetsprincippet. I denne forbindelse kunne man også overveje at formulere en grundlovsbestemmelse om at (væsentlige) indgreb over for borgerne kun kan ske med hjemmel i formel lov. Problemet med en sådan bestemmelse er imidlertid tilstrækkeligt præcist at afgrænse gyldighedsom-

rådet. Endvidere forekommer det ret oplagt at overveje – på differentieret vis – at regulere borgernes centrale procesrettigheder over for forvaltningen i en grundlov.

Afsluttende bemærkninger

Som det turde fremgå findes der ingen på forhånd givet løsning på spørgsmålet om hvilke borgerrettigheder over for forvaltningen som bør optages i en grundlov og hvilken metodik der bør anvendes i relation til de enkelte rettigheder. Uanset hvilken indholdsmæssig løsning man måtte foretrække bør den retstekniske bestræbelse dog gå i retning af at undgå fortolkningstvivl og – også som et delvist produkt heraf – at undgå et større antal sager mellem forvaltning og borger med (påstået) grundlovsbrud. I denne forbindelse bør man have for øje om ikke det vil være tilstrækkeligt til opfyldelse af formålet med den enkelte grundlovsbestemmelse at den indeholder et direktiv til lovgivningsmagten.

Johnhard Klettheyggj[1]

Grundlógin og fyrisitingarrættur[2]

Ætlanin við hesum reglum er at skapa eitt grundarlag fyri einum kjaki, um:

- hvørt tað er neyðugt,
- hvørt tað er rætt ella ynskiligt, og
- í hvønn mun tað er møguligt

at fella partar av fyrisitingarrættinum niður í eina møguliga komandi grundlóg.

Undirritaði hevur ikki nakra avgjørda meining um, hvørt tað er rætt at grundlógarfesta hesar reglurnar ella ikki, men er ætlanin heldur at lýsa nakrar fyrimunir og vansar hesum viðvíkjandi. Tað er tó ikki gjørligt at geva nakra einkla ella avgjørda mynd av hesum evni.

Fyrisitingarrættindini

Tey fyrisitingarligu rættindini, sum skulu tryggja borgaranum eina rættvísa viðgerð, tá hesin gerst partur í málum, sum eru til viðgerðar í fyrisitingini, eru í dag lutvíst at finna í Fyrisitingarlógini. Harumframt finnast eisini aðrar ikki-lógarfestar fyrisitingarligur reglur, sum m.a. eru staðfestar í og mentar av rættarskipanini. Sum dømi um hesar kunnu nevnast líkareglan (líkheitsprinsippið) og markreglan (proportionalitetsprinsippið). Nakrar av hesum reglunum eru enntá at finna beinleiðis ella óbeinleiðis í nógvum ymsum serlógum.

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[1] Cand. jur. frá Københavns Universitet í mars 1999; starvast sum løgfrøðiligur ráðgevi hjá Løgtingsins umboðsmanni og hevur (saman við Petur Elias Nielsen) hildið eina rød av skeiðum í fyrisitingarrætti.

[2] Henda grein var fyrst løgd fram sum eitt upplegg til kjak á Grundlógarráðstevnuni 11. – 13. mars 2003.

Fyrimunir

Tað kunnu vera ávísir fyrimunir av at grundlógartryggja fyrisitingarrættindini ella nøkur teirra. Sum dømi um hetta kann nevnast, at tey borgararættindini, sum eru at finna í grundlógini, óivað eru meira kend millum manna enn tey rættindini, sum ikki eru at finna har. At grundlógarfesta partar av fyrisitingarrættinum kann tí virka við til at gera borgaran meira vitandi um rættarstøðu sína, og harvið eisini gera hann betur føran fyri at røkja áhugamál síni, tá hann stendur andlit til andlit við ein fyrisitingarmyndugleika. Ein grundlógarfesting av fyrisitingarreglunum kann tí virka við til at lyfta fyrisitingarrættin ella partar av honum upp á eitt hægri tilvitunarstøði.

Afturat hesum kemur, at tey rættindini, sum eru feld inn í eina grundlóg, nokk hava lyndi til at hava eitt heldur størri virði og kanska eisini at viga heldur tyngri, enn tey rættindini, sum ikki eru at finna í grundlógini. Hetta kemur til dømis til sjóndar, tá ein myndugleiki skal viga ymisk kriteriir upp í móti hvørjum øðrum. Havast skal tó í huga, at tað er tann munurin á fyrisitingarrættindunum og teimum borgararættindum, sum nevnd eru í Grundlógini, at tey fyrr nevndu eru av prosessuellum slagi, meðan tey seinnu í stóran mun eru av materiellum slagi.

Vansar

Tað eru tó eisini nakrir vansar knýttir at hesum at grundlógarfesta fyrisitingarrættin. Fyrst av øllum kemur, at tað valla er møguligt og kanska heldur ikki ynskiligt at grundlógarfesta allan fyrisitingarrættin. Skulu mestsum øll fyrisitingarrættindini grundlógarfestast í detaljeraðum ásetingum, eins og vit kenna tað frá Fyrisitingarlógini, so gerst grundlógin sera víðtøkin.

Í hesum sambandi eigur eisini at vera havt í huga, at tá danska fyrisitingarlógin varð gjørd, var talan um at lógarfesta (kodifisera) tær fyrisitingarreglurnar, sum longu vóru galdandi og sum annars vóru egnaðar til at seta inn í ein lógartekst. Tað er nevniliga soleiðis, at tey ymsu málini, sum fyrisitingin hevur til viðgerðar eru sera ymisk. Av somu orsøk kemur nýtslan av í hvussu er nøkrum av fyrisitingarreglunum at vera ymisk, alt eftir, hvat mál talan er um. Sum dømi kann nevnast, at líkareglan hevur stóran týdning í málum, har bert ein partur er í málinum, t.d. tá borgarin vendir sær til fyrisitingina um eitthvørt. Hinvegin hevur líkareglan lítlan ella ongan týdning, tá talan er um fleiri partar í einum máli, t.d. setan av einum

starvi í fyrisitingini. Eitt annað dømi er kravið um partshoyring, sum í mun til onnur mál er hert í málum um uppsøgn av starvsfólkum.

Afturat hesum kemur, at um tað verður mett neyðugt at grundlógarfesta fyrisitingarrættin í detaljeraðum líki, so er tað óivað eins neyðugt at grundlógarfesta stórar partar av rættargangslógini, serliga tann partin, sum snýr seg um revsimál.

Tað er tó lítið hugsandi, at ein komandi grundlóg fer at fevna um alt hetta. Talan gerst tí heldur um at grundlógarfesta nakrar fáar grundleggjandi meginreglur í fyrisitingarrættinum.

Grundlógin

Ein grundlóg er á okkara leiðum sermerkt á tann hátt, at hon skal tryggja borgarunum nøkur grundrættindi. Um alt ov nógvar reglur verða settar í eina slíka grundlóg, haldi eg ein ávísan vanda vera fyri, at grundlógin verður útvatnað, og at hesi rættindini harvið missa dámin av at vera nøkur serlig grundrættindi. Hetta vil hava við sær, at ein slík grundlóg, umframt at gerast sera umfatandi, fer at minna ov nógv um eina vanliga lóg, og at grundlógin harvið missir ein part av teirri serligu virðingini, sum eg haldi, at ein grundlóg eigur at hava.

Røddir hava verið frammi í Danmark um at grundlógarfesta partar av fyrisitingarrættinum, herímillum reglurnar um kontradiktión (partsinnlit og -ávirkan), almenni, sakliga viðgerð og líkaregluna. Hetta er m.a. umrøtt í greinini: Grundlovsfæstelse af forvaltningsidealer, sum Pernille Boye Koch og Michael Gøtze hava skrivað í ársfrágreiðingini fyri 1998 frá Københavns Universitet, Retsvidenskabelig Institut B: Grundlovens nutid og fremtid. Hesir tankar eru áhugaverdir, men her er talan um at velja nakrar av fyrisitingarreglunum burturúr. Tað gerst tí samstundis ein spurningur, hvørjar reglur skulu takast við í eina grundlóg, og harvið kanska takast framum aðrar fyrisitingarreglur, t.d. reglurnar um grundgeving.

Spurningurin er eisini, í hvønn mun tað ber til at grundlógarfesta eitt nú líkaregluna, serliga sæð í ljósinum av, at hendan ikki eru løtt at lýsa neyvt í ein generellum lógarteksti, sum skal kunna nýtast í nógvum ymiskum málssløgum. Hetta er óivað ein av orsøkunum til, at hendan og aðrar fyrisitingarreglur ikki eru at finna í donsku og harvið eisini føroysku Fyrisitingarlógini. Hesar reglur hava sum nevnt ikki altíð sama virði í teimum ymisku sløgunum av málum.

Annað er, at um fyrisitingarrætturin ella partar av honum vera grundlógarfestir, gerst talan ikki um lógarbrot, men um grundlógar-

brot, um ein myndugleiki í einum ávísum máli ikki til fulnar hevur fylgt einari formellari reglu, t.d. regluni um partshoyring. Brot á regluna um partshoyring kann í ringasta føri hava við sær, at avgerðin í einum máli verður ógildað, og at málið má viðgerast av nýggjum. Løgfrøðiliga ger tað kanska ikki tann stóra munin, hvørt talan er um grundlógarbrot ella lógarbrot, tí avleiðingin verður tann sama, men um vit koma í ta støðu, at vit ov ofta skulu tosa um grundlógarbrot, haldi eg, at hetta vil virka við til eina inflasjón í einari komandi grundlóg. Hendan støðan tykir mær løgin og neyvan ynskilig.

Eg eri eitt sindur bangin fyri, at um tær fyrisitingarreglurnar skulu grundlógarfestast, sum ikki eru lógarfestar í dag, so gerst talan um so leysar orðingar, at tær innihaldsliga ikki kunnu nýtast til nakað ítøkiligt, tí at annars gerst vavið á grundlógini alt ov stórt. Um tað hinvegin ber til at lógarfesta hesar reglurnar so neyvt, at tær fáa eitt nýtiligt innihald, haldi eg, at tær eins væl kundu verið feldar inn í Fyrisitingarlógina, tí fyrisitingin skal fylgja hesari eins væl og einari grundlóg. Rættarstøðan hjá borgaranum skuldi ikki blivið verri av hesari orsøk.

Eitt annað sermerki við hesum fyrisitingarligu reglunum er, at tær eru vorðnar til í løgfrøðiliga litteraturinum, og at tær síðani eru staðfestar og stigvíst mentar av m.a. danska umboðsmanninum og dómstólunum. Hetta hevur ført við sær, at rættindini hjá borgaranum stigvíst eru bøtt við tíðini. Tað er sostatt farin ein menning fram í rættarsamfelagnum hesum viðvíkjandi.

Um hesar reglurnar skulu grundlógarfestast í einum innihaldsliga konkretum formi, so gerast tær avgjørt meira statiskar, og vera tí ikki eins lættar at menna ella broyta framyvir. Hetta er bæði galdandi fyri dómstólarnar, sum stigvíst hava ment reglurnar, men kanska einamest fyri lóggávuvaldið, tí at tað er ikki á hvørjum degi, at grundlógir vera broyttar. Tað kundi t.d. hugsast, at lóggávuvaldið kemur til ta niðurstøðu, at fyri eitt ávíst slag av málum ella ein ávísan almennan myndugleika, skulu fyrisitingarrættindini ella partar av teimum ikki vera galdandi. Sum dømi um hetta kann nevnast § 35 í løgtingslóg nr. 118 frá 18. juni 1997 um Húsalánsgrunn o.a., har ásett er, at Fyrisitingarlógin og Innlitslógin ikki eru galdandi fyri Húsalánsgrunnin og Íbúðargrunnin, hóast eingin ivi kann vera um, at hesir grunnar sambært Fyrisitingarlógini og Innlitslógini annars eru at rokna við til almennu fyrisitingina undir heimastýrinum. Høvdu fyrisitingarrættindini uttan undantøk verið grundlógarfest, hevði slík lóggáva ikki

verið gjørlig. Hetta kann sjálvandi vera bæði ein vansi og ein fyrimunur.

Tað kunnu vera nógvar ymiskar meiningar um, hvørt tað er rætt ella neyðugt at grundlógarfesta fyrisitingarreglurnar ella partar av teimum. Tað er tó greitt, at eitt uppskot hesum viðvíkjandi eigur at fáa eina sera gjølla viðgerð.

Eg kundi í hesum sambandi hugsa mær, at reist spurningin um, hvørt tað er neyðugt at grundlógarfesta partar av fyrisitingarrættinum, eitt nú reglurnar um kontradiktión (partsinnlit og -ávirkan), almenni, sakliga viðgerð og líkaregluna, ella um tað fyri eitt nú kontradiktión og almenni ikki er nøktandi, at hesi eins og nú eru lógarfest í Fyrisitingarlógini og Innlitslógini ?

Eg dugi illa at ímynda mær, at tað í okkara rættarsamfelag skal vera nakar avgjørdur tørvur á at grundlógarfesta fyrisitingarrættindini. Tað er fyri mær óhugsandi, at Løgtingið skuldi farið at strika tey rættindini, sum borgarin hevur í Fyrisitingarlógini.

Um vit t.d. hugsa um kravið um, at øll mál skulu hava eina sakliga viðgerð, so haldi eg tað vera óneyðugt at grundlógarfesta hetta kravið, tí at hetta kravið liggur í sjálvum valdsbýtinum. Fyrisitingin skal útinna vald sítt sambært lóggávuni, og hetta verður bert gjørt á fullgóðan hátt, um hetta fer fram á einum sakligum grundarlagi.

Eg haldi, at áðrenn farið verður undir at grundlógarfesta partar av fyrisitingarrættinum, eigur spurningurin um, hvørt hetta er neyðugt og ynskiligt, at vera viðgjørdur út í æsir. Tað finst valla nakað løgfrøðiligt svar uppá hendan spurning, sum heldur er av politiskum ella rættarpolitiskum slagi.

Eg vil at enda skoyta uppí, at tað er mín fatan, at um vit skulu grundlógarfesta partar av fyrisitingarrættinum, so má hetta gerast á ein generellan yvirornaðan hátt. Sum eitt dømi um hetta kann nevnast svenska skipanin, har ásett er, at valdið kemur frá fólkinum, og at valdið skal útinnast undir lógini og við virðing fyri menniskjanum og tess frælsi. Í einari slíkari áseting liggja fleiri av teimum ikki-lógarfestu fyrisitingarrættindunum innbygd, t.d. kravið um sakliga viðgerð, líkareglan og markreglan.

Finnbogi Ísakson[1]

Føroyar og danska grundlógin

Eftir at tað nýggja Landsstýrið, sum varð skipað eftir valið í 1998, hevði sett sær fyri at gera Føroyar til ein suverenan stat, var tað ein riðil av donskum serfrøðingum, sum skrivaðu ella søgdu, at hetta bar ikki til. Í minsta lagi ikki, um ikki danska grundlógin varð broytt. Og tað kann bert gerast við fólkaatkvøðu, har reglurnar fyri at fáa eitt uppskot um broytingar samtykt eru rættiliga strangar.

Tað undraði meg tá, at tað ikki kvøtti úr føroyskum frøðingum, serliga løgfrøðingum. Málið um føroyskan suverenitet átti at havt minst líka stóran áhuga hjá føroyskum sum donskum frøðingum.

Eg loyvdi mær tí at skriva nakrar reglur í einum blað um, hvussu eg sum leikmaður lesi nakrar greinar í donsku grundlógini um henda spurning, hóast eg annars haldi, at skal sama grundlóg broytast í sambandi við føroyskan suverenitet, so er tað ein danskur og ikki ein føroyskur trupulleiki.

Henda greinin er tann sama, tó eru nakrar broytingar gjørdar.

Føroyar úr ríkinum

Fyrsta grein í donsku grundlógini er soljóðandi:

„Denne grundlov gælder for alle dele af Danmarks Rige."

Hetta verður útlagt soleiðis, at grundlógin er galdandi fyri Danmark, Føroyar og Grønland, so leingi hesi trý londini mynda Danmarkar Ríki.

Í § 19, stk. 1, 2. punktum í grundlógini stendur:

„Uden folketingets samtykke kan han (kongur) *dog ikke foretage nogen handling, der forøger eller indskrænker rigets område."*

[1] Finnbogi Ísakson, f. 1943, fjølmiðlamaður og politikkari, valdur á ting á fyrsta sinni í 1966, landsstyrismaður 1975-79, jan.-juni 1989 og 1993-94 og tingformaður 1998-2002.

Hetta lesi eg soleiðis, at *við* Fólkatingsins samtykki kann kongur *„indskrænke rigets område“*, tvs. at kongur (í praksis stjórnin) kann, um Fólkatingið tekur undir við tí, minka um danska ríkið við at góðkenna Føroyar sum ein suverenan stat.

Tá hetta er gjørt, er danska grundlógin ikki galdandi í Føroyum longur, tí Føroyar eru ikki partur av tí ríki, sum grundlógin er galdandi fyri.

Fólkatingsmenninir

Tað verður eisini sagt, at føroyingar skula sambært grundlógini velja tvey umboð í Fólkatingið, og tí verður neyðugt at broyta grundlógina, um Føroyar gerast suverenar.

Í § 28 í grundlógini stendur, at í Fólkatinginum kunna vera *„højst 179 medlemmer, hvoraf 2 medlemmer vælges på Færøerne og 2 i Grønland.“*

Hetta skilji eg so, at talið á fólkatingsmonnum kann vera lægri enn 179. Tí stendur orðið *“højst“* í tekstinum sum mark uppeftir, meðan einki mark er niðureftir. Tað tykist tó greitt, at er talið 179, so skula føroyingar velja teir tveir. Men um Føroyar fara úr ríkinum, kann talið bara lækkast til 177.

Kongsfelagsskapur

Í samgonguskjalinum stóð eisini, at hóast Føroyar verða suverenar, skuldu føroyingar (fyribils í hvussu er) hava kongsfelagsskap við Danmark. Ber tað til?

Í § 5 í grundlógini stendur:

„Kongen kan ikke uden folketingets samtykke være regent i andre lande“.

Hetta skilji eg soleiðis, at *við* Fólkatingsins samtykki kann drotningin vera regentur í teimum suverenu statunum Danmark og Føroyum.

Mær tykir ikki, at tað er neyðugt at broyta grundlógina, sjálvt um Føroyar gerast suverenar. Tvørturímóti haldi eg, at fedrarnir at grundlógini júst hava lagt uppfyri tí møguleika, at eitt nú Føroyar kundu fara úr ríkinum. Føroyingar høvdu jú á einari fólkaatkvøðu sjey ár, áðrenn grundlógin varð broytt, samtykt at loysa frá Damark.

Tað skal tó viðmerkjast, at eg havi ikki lisið ein stav í álitinum, sum danska Stýrisskipanarnevndin (Forfatningskommissionen) legði úr hondum, áðrenn danska grundlógin varð broytt í 1953.

Heldur ikki havi eg ráðført meg við nakran løgfrøðing ella annan frøðing, áðrenn eg skrivaði hetta.

Tað hevði verið áhugavert, um føroyskir frøðingar av ymiskum slag høvdu sagt sína meining um hesi viðurskifti.

At enda eigur at verða nevnt, at spurningurin um grundlógina var mær kunnugt ikki orsøkin til, at samráðingarnar um fullveldið gingu so illa.

Nýtt frá fyrisitingini

Stuttur samandráttur av nøkrum av lógarbroytingunum á skatta og avgjaldsøkinum, ið hava virknað frá 1. januar 2003.[1]

Toll- og Skattsfyrisitingarlógin: Ll. nr. 100 frá 20. desember 2002
Høvuðsbroytingarnar eru:

1. Samanlegging av Landsskattakærunevndini, Meirvirðisgjaldskærunevndini og Tollkærunevndini í eina kærunevnd (Skatta- og avgjaldskærunevndin)
2. Dagføring av fyrningarreglunum fyri metingar og skattaálíkningar

1. Samanlegging av trimum kærunevndum

Sambært lógarbroytingini skulu allar avgerðir, sum eru tiknar av Toll- og Skattstovu Føroya, Økisskrivsstovunum kærast til Skatta- og avgjaldskærunevndina. Við hesum verður kærugrundarlagið víðkað til at umfata allar avgerðir. Herundir eisini avgerðir, ið innkrevjingin tekur, tó ikki tær avgerðir, sum sambært áðrari lóggávu hava annan kærumynduleika (t.d. fútarætturin). Tvs. at frameftir verða nú kærur um skatt, ið verða kærdar víðari frá kommunalu skattakærunevndunum, og kærur um meirvirðisgjald og toll viðgjørdar av einari og somu kærunevnd.

Meirvirðisgjaldskærunevndin gjørdi í 2000 vart við, at ein avgerð frá Toll- og skattstovuni ikki var endalig, fyrrenn Stýrið hevði tikið avgerðina. Toll- og skattstova Føroya tók tulkanina hjá Meirvirðisgjaldskærunevndini til eftirtektar.

[1] Lógardeildin hjá Toll- og Skattstova Føroya, Styrinum

Stýrið metti tó, at verandi skipan, har Stýrið lutvíst var kærumyndugleiki, lutvíst – saman við Toll- og skattaráðnum – hevði eftirlit við skattaálíkningini og toll- og avgjaldsfyrisitingini og í hesum sambandi ansaði eftir, at hon á øllum økisskrivstovum fór fram á rættan og samlíkan hátt og í samsvari við galdandi lóggávu, ikki var løtt at fáa at sampakka.

Setti Stýrið uppgávuna sum eftirlits- og vegleiðingarmyndugleiki fremst, var torført, fyri ikki at siga ómøguligt, eftirfylgjandi at viðgera málini sum kærumyndugleiki uttan samtíðis at vera ógegnigur.

Stýrið mælti tí landsstýrismanninum til at umhugsa eina broyting í verandi skipan, sum innibar, at Stýrið frameftir ikki var kærumyndugleiki. Stýrið hevði harvið kunnað tikið sær av teimum uppgávum, sum nevndar eru í kapittul 1 og 4 í løgtingslóg um Toll- og skattafyrisiting.

Endamálið við lógarbroytingunum var at broyta skipanina samsvarandi áðurnevndu sjónarmiðum, og inniber hetta, at Stýrið frameftir ikki er kærumyndugleiki.

2. Dagføring av fyrningarreglunum fyri álíkningar og metingar vm.

Galdandi reglur um fyrning hava ikki verið nøktandi, og tí varð skotið upp, at reglurnar vórðu nútímansgjørdar.

Eftir galdandi lóg fyrnast metingar eftir 2 árum, meðan onnur krøv verða viðgjørd eftir 1908-lógini, sum ásetir eina 5 ára fyrningarfreist fyri skattakrøv. Galdandi reglur um fyrning av metingum eru rættiliga ógreiðar m.a. tí, at meting í skattligum høpi kann koma fyri í fleiri frábrigdum. Tað kann tí tykjast rættiliga ivasamt, hvørjar metingar ein hevur havt í huga, tá reglan kom inn í lógina av fyrstan tíð.

Við hesum broytingum verður lagt upp til, at lógin fær almennar fyrningarreglur, og tí verð mælt til, at galdandi fyrningarreglur um metingar eftir § 104 í skattalógini verð strikað.

Eisini verð skotið upp at seta eina felagsáseting um fyrning av skattaálíkningum í lógina ístaðin fyri galdandi ásetingar, ið finnast tríggja staðni í lógini.

Eftir broytingini verður meginreglan hereftir tann, at skattaálíkningar uttan mun til, um talan er um meting ella ikki, fyrnast eftir 3 árum.

Endamálið við regluni er lutvíst at samla ásetingarnar í galdandi lóg, t.v.s. § 3, stk. 8, § 7, stk. 2 og § 20, stk. 3, í eina reglu, lutvíst at broyta skipanina frá einari serligari til eina almenna fyrningarreglu fyri skattaálíkningar.

Eftir broytingaruppskotinum kunnu økisskrivstovurnar, Stýrið og Toll- og skattaráðið sum meginregla ikki gera, broyta ella taka upp aftur skattaálíkningar seinni enn tann 15. mars ávikavist tann 1. juni 4. árið eftir, at inntøkuárið er lokið. Er freistin longd, jbr. § 105 í skattalógni, verður freistin tó roknað frá tí degi, freistin er longd til. Ynskir skattgjaldarin, at skattaálíkningin verður broytt, skal hesin seinast 3 ár eftir, at inntøkuárið er lokið, leggja fram nýggjar upplýsingar, sum kunnu grundgeva broytingina.

Í § 25b eru nevnd undantøk til ásetingina í § 25a. Sum heild eru undantøkini miðsavnað um viðurskifti, har antin skattgjaldarin ósekur er blivin skattsettur ov høgt, ella har myndugleikarnir ósekir hava skattsett skattgjaldarin ov lágt.

Undantøkini hava týdning fyri bæði lækkingar og hækkingar, men ávirka ikki vanligu fyrningarreglurnar fyri skattakrøv í 1908-lógini, sum vanliga merkir 5 ár frá gjaldkomutíð.

Avgerð um, hvørt treytirnar fyri fráviki eftir § 25b eru til staðar, verður tikin sum liður í vanligu líkningini. Avgerðin kann tí kærast eftir vanligu reglunum.

MVG- og tolllógin: Ll. nr. 94 frá 5. desember 2002 og ll. nr. 92 frá 5. desember 2002

Broytingarnar í §§ 1 í toll- og mvg-lógin hava við sær, at avgjaldsøkið verður víðkað frá at verða 3 sjómíl til 12 sjómíl. Broytingin er orðað soleiðis, at toll- og mvg-lógin til eina og hvørja tíð fer at fylgja niðanfyrinevndari lóg.

Tann 1. juni 2002 varð lov nr. 200 af 7. april 1999 om afgrænsning af søterritoriet sett í gildi fyri Føroyar. Samtíðis varð bekendtgørelse nr. 306 af 16. maj 2002, sum greidliga setir upp tær grundlinjur, sum avmarka sjóumveldið, sett í gildi.

Lov nr. 200 frá 7. apríl 1999 hevur við sær, at sjóumveldið við Føroyar økist úr 3 upp í 12 sjómíl (t.v.s. úr umleið 1.720 upp í umleið 6.520 ferkilometrar) og merkir hetta samtíðis, at Føroyar fáa lógsókn yvir einum munandi størri øki enn áður.

Skattalógin: Ll. nr. 56 frá 22. apríl 2003

§ 63a í skattalógini (FAS) er broytt við tað, at treytin um, at veruliga leiðslan hjá reiðaravirkinum skal hava sæti í Føroyum, er tikin úr § 63a í skattalógini.

Treytin um, at veruliga leiðslan skal hava høvuðssæti í Føroyum,

varð upprunaliga sett inn fyri at tryggja, at skatturin fyri slíkt reiðaravirksemi kom til Føroyar. Men síðani henda áseting varð sett inn í Skattalógina, eru hendar stórar broytingar innan tvískattasáttmálar, ið Føroyar hava við onnur lond. Eftir teimum tvískattasáttmálum, sum Føroyar hava gjørt við onnur lond, eru fleiri ymiskar ásetanir um, hvat land skatturin endaliga skal falla til. Skattingin er ymisk, alt eftir hvat slag av inntøku talan er um. Tað eru serligar ásetingar galdandi fyri skipa- og loftferðslurakstur í altjóða ferðslu. Eisini eru serligar reglur, tá talan er um virksemi í samband við forkanning, rannsókn ella brúk av kolvetnisfyrikoming.

Kravið um, at veruliga leiðslan skal hava høvuðssæti í Føroyum, kann eisini í summum førum forða fyri, at feløg verða skrásett í Føroyum fyri slíkt reiðaravirksemi, tí tey kunnu ikki altíð frammanundan vita, um tað fer at verða góðtikið, at „veruliga leiðslan“ er í Føroyum. Tá ið metast skal um hetta, verður tað altíð í hvørjum einstøkum føri gjørd ein ítøkilig meting.

Eisini er orðingin broytt, og núverandi stk. 1 er býtt upp í 2 stykkir, soleiðis at greinin verður lættari at skilja.

Orðingin: „persónur búfastur í Føroyum ella eitt partafelag, íognarfelag, partsreiðarí, annar felagsskapur ella felag skrásett í Føroyum“ er broytt til „persónur ella felag, sum hevur fulla skattskyldu til Føroya“. Persónar búfastir í Føroyum hava fulla skattskyldu til Føroya, og feløg, sum eru skrásett í Føroyum, hava fulla skattskyldu til Føroya. Tí er eingin broyting í innihaldinum av ásetingini við hesi umorðing.

Eisini er orðið „boripallum“ broytt til „ boriútbúnaði“. Henda broyting verður gjørd fyri at náðgreina, at allur boriútbúnaður, eisini t.d. boriskip, skal viðgerast eins, og ikki kunnu koma undir ásetingina.