

Constitutions - purpose and design

With this issue of the Faroese Law Review (FLR) we continue to follow up on the Conference on constitution making and constitutional matters, held in March this year. The Conference led to the intended side effect that the FLR editorial board received a lot of interesting material, some of it well suited as law review articles. But at the same time this issue is also marked by the fact that the Faroese Constitutional Committee is about to resume its task of creating a new Faroese constitution. Therefore it is of immediate importance to discuss the whole purpose of making a constitution.

This time we publish articles by the three professors and doctors in law, Eivind Smith from Norway, Caroline Taube from Sweden, and Mark Tushnet from the United States. We are, of course, proud to embrace these authors' articles in this Law Review, as they surely are some of the highest regarded experts in the field of constitutional law ever to publish in the FLR. We are also pleased once again to include news from the public administration, and expect this to become a regular feature in the future.

Mark Tushnet is a leading figure in the United States within constitutional law and his name is not least well-known in the international context of comparative constitutional law. In his article (*New Constitutions in light of Globalisation*) Tushnet reflects on the impact from globalisation on new constitutions.

Tushnet points out that globalisation pulls domestic constitutionalism in two opposing directions. On the one hand, the local units (the states and state-like entities) are no longer able to regulate the different areas of society to the same extent as they used to. A certain amount of power seems to have been taken away from the local units and put in the hands of transnational actors. On the other hand, in Tushnet's view, there is this opposite effect of globalisation, which makes it even more important for the local units in their constitutions to counter the influence from the transnational actors who often don't possess a democratic legitimacy comparable to the local units. Furthermore Tushnet suggests that globalisation as a consequence may make it more important for national units through their constitutions to develop institutions that can help the people to define themselves as members of a distinctive nation.

Here Tushnet strikes on the crucial topic what the whole purpose is with the idea of a constitution. Constitutions actually do contribute to the creation and maintenance of common identity and common values in a society and do not only, as the current Faroese *stýrisskipanarlóg* (the internal Faroese constitution), function as a predominantly technical frame of government.

Caroline Taube deals with constitution making in the Baltic countries after their liberation in the wake of the cold war. Her article is interesting because it touches on the issue of the size (population) of these countries and size related problems - such as (in-) capacities and qualifications of the judges - and possible solutions. We, the Faroese, have a lot to learn from these experiences.

Eivind Smith contributes with the article "*Grundloven som lov og som symbol*" (The Constitution as Law and as Symbol). It mainly deals with basic questions concerning the purpose of constitutions, judicial review, and the constitution as a part of positive law.

Eivind Smith has been characterized as Skandinavia's most eager and competent proponent of the idea of constitutional democracy. At least no other Skandinavian has written so much and so well in the field. Ideologically Smith is not to be found among the considerable number of scholars and politicians who prefer constitutions to be hidden away in the drawer. On the contrary he supports the view that the courts ought to apply constitutional provisions in cases before the courts as it would in relation to any other "regular" provision in the legal system. These views of his has been elaborated in numerous publications on the subject - most often on judicial review and to what extent it is the province and duty of the judicial department to say what the constitution is. Constitutional review as a privilege for the judicial branch of government may well be said to be decisive for whether the constitution will be part of the "ordinary" legal system or - as generally in Europe until some time after World War 2. - mainly a kind of ideological framework, sending recommendative directives to the political system.

According to Eivind Smith, an effective constitution can be a useful instrument in governing a society. An effective constitution will contribute to a level of stability and continuity, which will be more difficult to achieve in a system where construction of the constitution mainly is reserved to the legislature.

Of the outmost relevance to the Faroese situation are Eivind Smith's reflections on the influence that *break* or *continuity* has on the position of a constitution as a (national) symbol. According to Smith, a constitution's position as symbol will tend to be weaker in states whose history is characterized by continuity. On the

other hand, the constitution's position as a national symbol is likely to be strong in states where the constitution functions as the milestone marking a point in time where old values were rejected and new ones acclaimed.

Now it is up to the Faroese to decide whether the new Faroese constitution that will succeed the old frame of government (*stýrisskipanarlógin*) is to be considered as a *break* or *continuity*.