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Singing revolutions?

Constitution building in the Baltics and the Faroe islands

Føroyskt úrtak: Syngjandi Kollveltingar?
Grundlógarsmíð í baltisku londunum og í Føroyum.
Síðst í 1980'unum var gamli siðurin at savna nógv fólk í stórum tjøldum at singja tjóðskaparsangir við at endurreisa tjóðskaparrørslurnar í Estlandi, Letlandi og Litava. Tað eydnaðist at løsa londini frá Sovjetsamveldinum og henda frælsistilgongdin fekk heitið "syngjandi kollveltingin". Tey trý fóru síðani undir at smíða nýggjar stjórnarlógir. Føroyingar hava – umframt sangmentanina – eisini tað til felags við baltisku londini at skula smíða eina stjórnarskipan til uppá seg smá viðurskifti. Í baltisku londunum vóru tað serliga undir lógkønir, sum saman við nøkrum tingmonnum skrivaðu nýggjur stjórnarskipaninar. Tey, ið smíðaðu hesar nýggju grundlógir gjørdust ofta sjálvi limir í teimum ovastu dómstólunum, sum skuldu døma eftir, rætta og tulka hesar nýggju lógir. Onnur avbjóðing var at taka støðu til, hvussu nýggju stjórnarlógirnar skuldu samtykkjast – á tingi ella á fólkaatkvøðu, við vanligum, avgjørdum ella serliga stórum meiriluta? Eisini var spurningurin frammi, um londini heldur skuldu venda aftur til tær gomlu grundlógirnar frá tíðini undan sovjetsamveldinum. Uppií hesum var spurningurin, um londini skuldu velja tað einstreingjaðu skipanina við tingræði (parlamentarismu) ella heldur leggja størri dent á valdsbýti við forsetaskipan. Felags fyri londini var, at tey funnu fram ymsar serliga politiskar stovnar við uppruna í egnu siðvenju teirra, eitt nú lógarkanslaran í Estlandi, og at hesar nýggju stjórarnarlógir gjørdust sera týðani tjóðskaparligar ímyndir

Introduction

In the late 1980s, the tradition to gather and sing in huge song festivals made up the starting point for a national awakening in Estonia, Latvia and Lithuania. Liberation from the Union of Soviet Socialist Republics (USSR) and restoration of statehood were the ultimate results from this political movement which has entered the history books as the "the singing revolution". Except the common feature with the Faroe Islands of a vital singing tradition, these three states are

comparatively small (1.35, 2.4 and 3.6 million inhabitants respectively) and thus provide questions of particular relevance to small states or polities. The aim of this article is to present some themes connected to the constitution building in Estonia, Latvia and Lithuania that may be of interest to the Faroe Islands.

The term "Baltic" is often used to put these three states into one group and to treat them almost as a unity. This is misleading as Estonia, Latvia and Lithuania differ very much from each other when it comes to language, religion and historical experiences. The occupation and annexation in 1940 and the experience of being incorporated into the USSR for about 50 years remain the common factor. However, the term "Baltic" is indeed correct with respect to geography as these states are located by the Baltic Sea. Using this argument, even Sweden is a Baltic state (comparatively small and with a singing tradition!) and therefore some examples will be picked from Swedish constitutional law.

I. Constitutional drafters and staffing resources in small states

The first theme connects to the discussion on the question of which groups of persons that are involved in writing the constitution – "We, the experts" and/or "We, the people". The dilemmas that are relevant in the context of the Estonia, Latvia and Lithuania concern the constitutional drafters as such and their later positions, and problems that relate to personal and professional ties.

The choice of constitutional drafters touches a difficulty that hits small countries in particular. The circle of people who are qualified and interested in constitutional law is limited. It can be expected that those who participate in the drafting process already hold – or later will hold – a position in the state where he or she will make active use of the Constitution (in political positions of various kinds, in positions within the judicial system, e.g., as a constitutional judge). In that sense there is a risk of rotation of the same people in certain positions. The smallness of a state (or polity) contributes to inevitable personal ties which in turn will give rise to situations where decisions or standpoints may be questioned because of the personal connections or positions favoured during the drafting process. Considering the choice of constitutional drafters and their later positions in Estonia, Latvia and Lithuania, there are several examples of the outlined situations.

The process of state building and constitution-making differs in *Lithuania* compared to the other countries because of their different approaches to independence. In March 1990, Lithuania declared independence and adopted a transitional constitution. This Provisional Basic Law did not provide for any substantial changes of the existing state institutions. The preparation for drafting a completely new constitution was initiated in the early summer of 1990. A small constitutional

commission consisting of some lawyers was established; the task was to prepare a sketch for a future constitution. The further preparation of the new constitution was to be undertaken by a working group consisting mainly of lawyers and deputies. However, the tense relation to Moscow in 1990-1991 overshadowed the further procedure, and a new constitutional commission was not set up until the end of 1991. This commission had 14 members (nine lawyers, two philosophers, one economist, mathematician and physician) and it was chaired by the associate professor Kestutis Lapinskas.[1]

In *Estonia*, the Declaration of Independence (August 20, 1991) prescribed the procedure on how to elaborate a new constitutional order. A Constituent Assembly was to be established, and it would draft a new constitution that was to be adopted by referendum. In September 1991, the Constituent Assembly was set up, consisting of thirty members of the Congress of Estonia and thirty members of the Supreme Council. This composition represented the two elected political assemblies elected in March 1990, together representing the ideas of independence, legal succession, actual power and formal legitimacy. The chairman of the Constituent Assembly was Tõnu Anton.[2]

In *Latvia*, the idea to draft a new constitution was suggested in 1989, but in the following discussions a re-instatement of the Constitution of 1922 was maintained. The Declaration of Independence (adopted on May 4, 1990; it did not imply a declaration of full independence, cf. Lithuania) stated that a commission would be set up and revise the Constitution of 1922 in order to make it "correspond with the present political, economic and social situation". The Constitution of 1922 was a liberal constitution inspired by the Weimar Constitution of 1919. A commission of 22 deputies of the Supreme Council was set up in July 1990 under the chairmanship of the lawyer Aivars Endzins.[3]

Today, in 2003, we can conclude that the former chairmen of the respective constitutional commission are members of the judicial body that exercises review of the constitutionality of legislation – the Constitutional Review Chamber of the Supreme Court of Estonia, the Constitutional Courts of Latvia and Lithuania

[1] A. Hollstein *Das staatsorganisatorische Modell der neuen litauischen Verfassung. Ein dritter Weg zwischen präsidialem und parlamentarischen System?* Verlag Wissenschaft und Politik, Köln 1999, pp. 71-77.

[2] R. Maruste and H. Schneider "Constitutional Review of Legislation in Estonia – its Principal Scheme, Practice and Evaluation" in *Constitution as a legal base for a system and functions of organs of the state* The 4th Baltic-Norwegian Conference on Constitutional issues, Estonian Academy of Sciences, Tallinn 1996, p. 91.

[3] Resolution "On the Organization of the Working Group for the Working Out the New Wording of the Republic of Latvia Constitution and Citizenship Conception Projects of the Republic of Latvia" (Act 116 of 1990, July 31, 1990).

respectively. In Estonia there is the said chairman of the Constituent Assembly, and in Latvia there are in all two constitutional drafters in the present composition of the Constitutional Court. Lithuania is the extreme example: In the present composition of the Constitutional Court (it changes in part every third year), not less than 7 of 9 justices participated at various stages and in various ways in the constitution-making process. Such a background of the justices, combined with the young age of the Constitution, moreover contributes to the fact that it is hardly possible to find out a "one and only" meaning of a certain article of the Constitution. The standings taken during the constitution-making process somehow continues in the deliberations of the Constitutional Court.[4]

Whereas the Estonian and Latvian constitutional drafters were members of parliament (MPs), also some of the Lithuanian constitutional drafters were MPs. In both Latvia and Lithuania, one of these MPs was later Minister of Justice for a while. Another interesting example of a career where a constitutional drafter later circulates in different positions is a Lithuanian justice who was a justice of the Constitutional Court 1993-1996, then a MP in 1996-1999 and who is anew justice of the Constitutional Court. The manifold experiences are explained by the unique period of state building; the lawyers involved in the political and constitutional transformation that started in the late 1980s were the architects of the legal reforms.

The most vivid example of a challenge to one of these courts because of former professional/personal ties to a political organ is a Latvian case where three justices of the Constitutional Court were challenged for not having the right to review a case. Two of them had participated in passing the disputed legislation, and one was married to the Chairman of the Saeima (the parliament). The *Constitutional Court Law* was later changed to state that no challenge of judges of the Constitutional Court could be expressed![5] Indeed, such a solution resolves the problem only on the surface. Professional and/or personal ties will always constitute a risk that may affect the credibility of an institution. However, if accepting a challenge of the kind in Latvia, one can also imagine that many decisions and necessary procedures could have been prolonged or even stopped in the 1990s because of challenges – whether justified or not – of this kind.

If there is any remedy to situations like this, it should be the emphasize of full openness in election and appointment procedures. In small states it will be even

[4] E. Kuris "Judges as Guardians of the Constitution: 'Strict' or 'Liberal' Interpretation?" in E. Smith (ed.) *The Constitution as Instrument of Change* SNS Förlag, Stockholm 2003.

[5] A. Endzins "Issues on interpretation of legal norms in the practice of the Constitutional Court of the Republic of Latvia" unpublished manuscript presented at a Venice Commission seminar in Kiev 1998, pp. 8-9.

more crucial than in bigger states. Strict integrity and professionalism when holding a position will also remain of utmost importance. Yet an additional option is an arrangement that prescribes foreign participation.[6] The dilemma of such a solution lies in a foreigner's less developed understanding of both the local language and of local traditions, while the advantages consist in his or her non-interest in potential local conflicts in addition to the professional competence.

The overall question boils down to when a polity is simply too small to host certain institutions. Considering the risks connected to professional and/or personal ties, when will the staffing resources be too limited? This will be decisive for when an organ/institution of the state or polity cannot enjoy a full credibility anymore. In case the determination to establish a certain organ/institution of the polity still remains strong, e.g., for symbolic reasons, it seems necessary to accept some kind of foreign participation. Seen from the outside, there will otherwise be a constant risk of challenges against the organ/institution and its staff, regardless of its professionalism and integrity.

II. Old or new constitutions: Constitutional choices?

The constitutional choices made in Estonia, Latvia and Lithuania has been determined by their previous constitutional experiences during the interwar time. These experiences were very mixed: As young democracies, these states failed and there were periods of authoritarian rule in each. The question of how to define the presidency was therefore topical in the constitution-making process in the early 1990s; former mistakes were not to be repeated. The electoral system has also required serious consideration, as the conditions for referenda (legislative and constitutional).

Despite the problems of the interwar time, that period was also the first time ever when Estonia and Latvia existed as independent states. The history of Lithuania differs. Considering the interwar time as a period of national pride, this contributed to controversies in the constitution-making, especially with regard to the question of how to define the presidency. An additional and complicating factor in that

[6] One example is the Constitutional Tribunal of Andorra where France's President of the Republic in his role as a one of the two co-princes of Andorra shall nominate one of four justices (Constitution of 1993, articles 43 and 96). This member of the Constitutional Tribunal seems to be selected from among French law professors. The situation in Bosnia and Herzegovina differs profoundly from most other states as its constitution results from an international treaty, the Dayton Agreement of 1995. However, it should be noted that this Constitution establishes a Constitutional Court where three of nine members shall be citizens of foreign states, albeit not of the neighbouring states; these members are selected by the President of the European Court of Human Rights after consultation with the Presidency of Bosnia and Herzegovina (Constitution of 1995, Article VI section 1).

respect was the activity and future political aspirations of the strong personalities who headed the independence movements.

Yet another aspect on influence on the constitutional choices is the manner of adopting the constitution, by referendum or by a decision of parliament. If a referendum shall be held and if a successful result shall be reached (i.e. sufficient support for the new constitution), this demands even further compromises with the people, the constituent power. This way of settling the constitution may go beyond arguments of the experts and the constitution-making process may become somewhat contradictory if there are clashes between the "good constitutional solutions" presented by the drafters and the preferences of the electorate.

This background explains the main arguments in the constitution-making procedure that determined the compromises eventually achieved in Estonia and Lithuania. As will be seen, the constitutional choices had another character in Latvia.

Estonia and Lithuania: The new constitutions of 1992

In *Estonia,* the work started by choosing a working draft as a point of departure; several drafts and also the constitutions of 1920 and 1938 were considered. Two drafts were rejected because of their poor quality, and among the remaining drafts, two favoured a strong presidency while one draft enhanced a parliamentary system. Out of the two models of presidency, one draft was rejected since it granted too much power to the President. The second alternative was the proposal to re-instate the Constitution of 1938, a suggestion that was rejected for the same reason. It was considered as unsuitable for modern democracy.

The Constituent Assembly finally decided to use the only constitutional draft that featured a parliamentary democracy. It had been prepared by some members of the dominant group of the Congress of Estonia, the National Independence Party. Thus, the drafting process continued and the final draft provided for a strong, unicameral parliament. Rights and responsibilities of non-citizens were included in the Bill of rights and freedoms.[7]

Despite a campaign for the re-instatement of the Constitution of 1938 launched by a right-wing group short time before the planned referendum, the final draft of the Constituent Assembly was adopted by referendum on June 28, 1992. It was approved by 90% of the voters (interwar citizens and their descendants, approximately two-thirds of all the residents in Estonia), along with the *Constitution of the Republic of Estonia Implementation Act*. This Act prescribed that the first President of the Republic should be elected directly by the people, and that there

[7] R. Kionka "Estonia" in *RFE/RL Research Report Vol. 1 no. 27, July 3, 1992*, pp. 58-61.

would be a right of popular initiative for amendments to the Constitution. Both conditions were crucial for passing the Constitution. Mr Eerik-Juhan Truuväli, the Legal Chancellor, once pointed out that "*It is a public secret that two articles of the Implementation Act, namely the direct election of the first President and the right to initiate amendments to the Constitution by way of public initiative, were, I would say, political promises to insure the passage of the Constitution by the referendum*."[8] More than 10 years after these constitutional debates, the question of direct election of the President repeatedly turns up as a matter of discussion.

In *Lithuania*, the constitutional commission established in 1991 presented two constitutional drafts at the end of April 1992. The first draft, supported by the majority of the commission, advocated a parliamentary democracy. The second draft called for a presidential democracy; it was supported by three members of the commission. The first draft was presented as the proposal of the commission.

However, soon afterwards a new constitutional draft based on the draft of the commission's minority was presented by a political coalition ("For a democratic Lithuania") formed by Sajudis.[9] Moreover, Sajudis suggested that a referendum was organised on the matter of a strong presidency. This referendum was held in May 1992 (69.48% were in favour of a strong presidency whereas 25.58% voted against); it was invalid because of a low participation.[10] It may be noted that a constitutional draft advocating a strong presidency, inspired by the Constitution of 1938, was presented already in February 1992 by the Liberal Union (supported by Sajudis).

In the late spring of 1992, there were thus two alternative constitutional drafts, advocating a parliamentary and a presidential system respectively. A compromise between these drafts was finally worked out. Except the presidency, the main controversies concerned constitutional referendum and the term of office of the Seimas (the parliament). The final draft for the new constitution was published about a fortnight before the referendum which took place the same day as the parliamentary elections, on October 25, 1992. The new Constitution was approved by 75.4% of the voters, and in all 57% of the electorate.[11]

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[8] Legal Chancellor: Annual report 1994 in *VII Riigikogu Stenogrammid, vol. V, 1994*, pp. 553-565.

[9] *Sajudis* was the name of a mass movement founded in 1988 the political aim of which was political and economical reorganization, later independence from the USSR. Its leader was Vytautas Landsbergis.

[10] S. Girnius "Lithuania" in *RFE/RL Research report Vol. 1 No. 27, July 3, 1992* pp. 67-69, and Hollstein (1999) pp. 78-82. See also C. Taube *Constitutionalism in Estonia. Latvia and Lithuania. A Study in Comparative Constitutional Law* Iustus Förlag, Uppsala 2001, pp. 51-52 with references.

[11] Hollstein op. cit. pp. 83-85.

Latvia: Re-instatement of the Constitution of 1922 (in 1993)

Latvia has taken the somewhat original step to re-instate the constitution from the interwar time, the Constitution of 1922. The idea to turn back to this document was outlined in the Declaration of Independence of 1990: Four articles of the Constitution were re-instated in order to provide constitutional continuity with the year 1940 when the constitutional order was suspended. The decision to re-instate the Constitution in its entirety was to be taken by the Saeima (the parliament) elected in June 1993, the first free elections after regaining independence. This order of events was realised.

The work of the constitutional commission established in 1990 did not give rise to any changes of the document; it was good enough. The Constitution of 1922 is inspired by the Westminster model of parliamentarism with a Saeima (the parliament) and an executive body (the Cabinet of Ministers) responsible to it. The Head of state, the State President, is elected by the Saeima and has a ceremonial role. There are several means of direct democracy through popular initiative, legislative and constitutional referenda. The Constitution was not amended during the authoritarian rule in the 1930s; it was suspended and therefore kept its democratic character. This explains why it could be made use of again, establishing an institutional-political set up that remained workable even in the present time.

Considering the needs for modernisation and adaptation to modern standards of Western democracy, the Constitution of 1922 has presented advantages due to its open and incomplete character. It can be amended rather easily (quorum of 2/3 of the total number of 100 MPs, and 2/3 vote, in all a majority of 46 MPs).[12] However, the fact that a constitution may be amended without greater difficulty can imply disadvantages. It can pave the way for doubtful short-sight changes only to satisfy the electorate before elections (like the amendments in 2002 on state language), or even for swift changes of the political system as such, even if this danger seems far-fetched at the moment in Latvia. The Constitution of 1922 has been adjusted step by step. The most important constitutional amendments include the prolongation of the term of Saeima from three to four years, the establishment of a constitutional court and the adoption of a bill of rights. The question of direct election of the State President has been raised – by the current State President – but no further steps have been taken to amend the Constitution.

The choice to reinstate the Constitution of 1922 may be analysed from various angles. First, it should be questioned whether it was favourable to re-instate a constitutional order the deficiencies of which made it possible to pave the way for

[12] Satversme (Constitution) (February 15, 1922) art. 76.

authoritarian rule in the 1930s (insufficient of control mechanisms, issuance of Cabinet regulations with the force of law according to Article 81, legislation on parliamentary elections that lacked a small-party threshold and caused a serious fragmentation of the Saeima).[13]

It also seems natural to consider the adoption of a new constitution as an opportunity to create a new and comprehensive institutional framework that will start the operation of all political organs and institutions at the same time and on equal terms. Institutions added later may otherwise face difficulties for reasons of prestige or competition with existing institution, i.e. a lack of acceptance. Thereby the new institution may have problems to function in full; an example from the Latvian context is the Constitutional Court which faced difficulties of this kind.

Despite these arguments, it must not be neglected that Latvia saw a period of severe political and ethnic instability in the (early) 1990s; this may have contributed to the eventual "choice" of constitution. A constitution-making process requires a true ability and determination to work out political compromises; in a politically shattered country this process will be very hard to accomplish. Considering the outcome in Latvia and comparing with the main arguments and proceedings in the respective drafting process in Estonia and Lithuania, the Constitution of 1922 still provided a fully acceptable model of democratic government for the further political development. And the "constitution-making process" did not pave the way for political figures with presidential aspirations, contrary to the situation in Estonia and Lithuania.

III. Symbolic issues

Under this heading I will discuss various matters that connect to the previous theme of new/old constitutions and institutions that may serve as symbols for a country, its history and continuity.

The choice of Latvia to re-instate the Constitution of 1922 underlines the continuity with the interwar state, the "first republic".[14] It may be discussed whether this

[13] The *Law on Saeima Elections* (1922) was re-instated in 1992 although in a revised version that included a small party threshold. On the impact of the Election law in the 1930s, see further the discussion in the Constitutional Court: Case No. 2002-08-01 on Electoral systems (September 23, 2002) at http://www.satv.tiesa.gov.lv/Eng/spriedumi/08-01(02).htm. See also J.J. Linz and A. Stepan *Problems of Democratic Transition and Consolidation* The Johns Hopkins University Press, Baltimore and London 1996, p. 83 and C. Taube op. cit. pp. 54-55.

[14] The position in all three states is that there is state continuity with the interwar states – they never ceased to exist. Because the USSR's aggression and threats of force, occupation, and subsequent annexation in 1940 of the interwar states were contrary to international law, the incorporation into the USSR was invalid. State continuity can be distinguished from state succession; it would have implied secession from the USSR through the procedure set forth in the USSR Constitution (see C. Taube op. cit pp. 33-44 with references).

constitution also has the status of a state founding act, similar to the constitution of the USA or of Norway. It is too early to give an answer. However, the Peace Treaty of Riga (1920) between Latvia and Russia is probably much more important in that respect. This is certainly the case of the Peace Treaty of Tartu (1920) between Estonia and Russia which was even labelled the "certificate of baptism" of Estonia by former President Lennart Meri. These peace treaties would assure peace and independence for eternal time and they also defined the territory of the interwar states, boundaries that have been claimed most actively in Estonia in the 1990s. The symbolic role of the Peace Treaty of Tartu is confirmed in the Constitution of 1992, stating that "The land boundary of Estonia is determined by the Peace Treaty of Tartu of 2 February 1920 and by other international boundary agreements" (Article 122).

The new constitutions in Estonia and Lithuania, on the other hand, also have an important symbolic role as the basis for the modern democratic state. Similar to the situation in other countries of Central and Eastern Europe and South Africa, the new constitutions have the function of introducing new political and legal programmes as well as a new institutional set-up. The need for a revision of the form of government as provided by the authoritarian constitutions of 1938 was nothing but a necessity in present times. Choosing a new constitution has entailed an opportunity to improve former constitutional models in order to provide a functioning and permanent form of democracy suited for the present day, similarly to the case of Spain and Portugal in the late 1970s upon the end of the authoritarian regimes. A possibility of the former Soviet satellites was that of keeping and adjusting the communist constitution. Hungary was the only country that followed such a path; the radically adjusted Constitution of 1949 now appears in a new shape. This exception may be explained by an earlier and smoother start of the legal transition and by the influence of the Constitutional Court. All other states in Eastern and Central Europe have adopted new constitutions.[15]

A short comparison with Sweden on the symbolic role of a constitution: The written constitution has not been significant for the creation of the Swedish state as such, and there is hardly any popular awareness of the Instrument of Government (1974). This is because Sweden has existed for a very long time as an independent state and because Sweden has never experienced occupation or subordination to the rule of another country. With regard to certain legal institutions, however, the situation is different. There is a strong tradition of protecting the freedom of the press, freedom of information and freedom of expression. The

[15] Albania (1998), Belarus (1994, essentially amended 1996), Bosnia and Herzegovina (1995), Bulgaria (1991), Croatia (1990), the Czech Republic (1993), Macedonia (1992), Poland (1997), Romania (1991), Russia (1993), Serbia and Montenegro (2003), Slovakia (1992), Slovenia (1991), Ukraine (1996).

symbolic role of these rights and freedoms is considerable, a fact that is reflected by their being regulated in separate constitutional acts.

Among legal institution of particular interest in Estonia, Latvia and Lithuania, the Legal Chancellor of Estonia should be mentioned as the most important example. This organ was established in the Constitution of 1938 and implied a kind of advisory role to the President along with supervisory functions in relation to the administration. The Constitution of 1992 also establishes a Legal Chancellor, although its role differs from the 1938 version. It includes the control of legislation ex ante (in an advisory function), and the Legal Chancellor may also submit petitions ex post to the Constitutional Review Chamber for review of the constitutionality of legislation. In addition, the function as ombudsman was added in 1999. It may be argued that the Legal Chancellor has too many functions and may interfere into too many spheres, but the counterargument in Estonia has been that this is a practical and economical solution for such a small country. Even if the functions of the Legal Chancellor of the respective constitutions are different, it seems nevertheless important to keep and develop old institutions. It can be assumed that this is a more appropriate way to go in comparison to the introduction of new and completely unfamiliar institutions (legal transplants). The constitutional traditions of the state thus continue.

Other legal institutions or constitutional rights that are of particular interest to a certain state often concern the language and national identity or other more specific issues. This depends on the political history and living conditions of and in a given state. In Estonia, Latvia and Lithuania, the state language is seen as a symbol for survival of the respective nation, despite periods of subordination to Russian rule and to the Russian language. But the protection and promotion of the state language have consequences to the minorities living in these states, especially in Latvia and Estonia, thus constituting a source of major political controversies and individual frustration.

In the context of Sweden, it is relevant to mention the so-called "allemansrätt" in this context. "Allemansrätt" means the right of every person of access to nature (walking in the forest, picking flowers, berries and mushrooms, canoeing in lakes etc within certain limits) even if the piece of land (forest, beach plus water etc) belongs to someone else. The right of access to nature was not codified at the constitutional level until 1994 (IG 2:18 section 3) although it makes up a custom since a very long time.[16] In that sense it was a somewhat symbolic step to include the "allemansrätt" in the Instrument of Government. In the context of the Faroe

[16] Instrument of Government (1974, as amended) Chapter 2 Article 18 reads:
"The property of every citizen shall be so guaranteed that none may be compelled by expropriation or other such disposition to surrender property to the public institutions or

Islands, the right to fish for private consumption and the right to get a share of the whale catch seem to be parallel examples of rights that may be regulated in a future constitution.

Concluding remarks

Constitution building is challenging, especially in small states or polities. Some institutional arrangements will simply require a particular awareness of the potential risks of conflicting interests or personal ties between the persons in power. The role of the constitutional drafters and their later activities in the constitutional courts of Latvia and Lithuania respectively is one illustrative example. Whether this has constituted an actual problem in these states is, however, another question. It seems as if the smallness of a polity requires a somewhat broader participation, and that inherent limitations by necessity give rise to untraditional and innovative institutional solutions. One example is the Legal Chancellor of Estonia with its manifold functions, an arrangement that has developed under the legal and practical needs and preconditions of the Estonian society. With regard to the Faroe Islands, the smallness of the polity is problematic if an independent Faroese judiciary is to be created. What the untraditional solution may consist of in this case remains to be seen; participation from the outside is a possibility that is worth considering.

Considering the various symbolic issues, the constitution building is obviously not only about shaping the model of government and various institutions. The historical experiences and traditions of a state or a polity may have an important role in this process by providing inspiration for the future constitutional regulation. Hence a people may perceive the constitution as a national document that reflects the people's history and identity; the democratic legitimacy of the constitution may thereby become stronger.

to a private subject, or tolerate restriction by the public institutions of the use of land or buildings, other than where necessary to satisfy pressing public interests.

A person who is compelled to surrender property by expropriation or other such disposition shall be guaranteed compensation for his loss. Such compensation shall also be guaranteed to a person whose use of land or buildings is restricted by the public institutions in such a manner that ongoing land use in the affected part of the property is substantially impaired or injury results which is significant in relation to the value of that part of the property. Compensation shall be determined according to principles laid down in law.

All persons shall have access to nature in accordance with the right of public access, notwithstanding the above provisions."

(The English translation of the Instrument of Government is available at http://www.riksdagen.se/english/work/fundamental/government/index.htm.)