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Stjórnarskipan og Samanberingar

Tim Murphy	Reflections on the „Other Rights“ Provision in the Draft New Constitution of the Faroe Islands
Jonas Landstad Fjeldheim	A comparative review of the Faroese draft Constitution
Rúni Rasmussen	Konstitutionalisma og stjórnarskipanir
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Kári á Rógvi, ritstjóri

Áhugi fyri stjórnarskipan

Í lógarritinum hesuferð eru tríggjar greinir um uppskotið um stjórnarskipan Føroya umframt sera áhugaverda greining av verandi skipan.

Við hesum hava vit av álvara sett ferð á orðaskiftið um framtíðar føroysk stjórnarviðurskifti.

Uppskotið um stjórnarskipan Føroya er ætlað at betra stýrislagið, loysa ríkisrættarliga knútin, leggja hornastein undir føroyskan samleika og skipa fólkaræðisliga orðaskiftið.

Orðaskiftið um stjórnaskipan Føroya eigur tí at snúgva seg um hesar stóru spurningar. Greiningar av verandi skipan og tilmæli um framtíðar stjórn er av altórum týdningi.

Millum stóru stjórnarligu landnámini í uppskotinum eru mannarættindi orðað á føroyskum á fyrsta sinni, betraðar lóggávumannagondir við millum øðrum kravdum hoyringum og møguleika fyri fólkaatkvøðu og tjóðskaparlig semja um Føroyar sum land, føroyingar sum tjóð og mannagongd fyri framtíðar broyting í ríkisrættarligu støðuni.

Stjórnarskipan Føroya skipar tað fólkaræðiliga orðavalið, stovnar og mannagongdir. Stjórnarskipan Føroya kemur í staðin fyri løgtingslóg um stýrisskipan, og skapar harvið betri karmar um allar framtíðar lógir í Føroyum.

Tim Murphy, ið kennir lóg á háskúlanum á Akuroyri Norðlandinum, hevur tikið upp spurningin um onnur rættindi. Jonas Landstad Fjeldheim, lovandi norskur lógkønur, viðger javnrættindi, og Rúni Rasmussen, ágrýtni skrivari stjórnarskipanarnevndarinnar, greiðir frá um stjórnarstevnu í hesum høpi. At enda tekur formaður uttanlandsnevndar løgtingsins til orðanna um handilssáttmála Føroya við Ísland, hvussu hesin av røttum átti at verið hagreiddur á tingi.

Við hesum er verulig gongd komin á fakliga orðaskiftið um stjórnarskipan Føroya, og eru fleiri aðrar greinir við støði í uppskotinum um skipanina fráboðaðar ritinum.

Latið orðaskiftið halda fram!

Kári á Rógvi, editor-in-chief

An Interest in the Constitution

In the Law Review this time there are three articles on the draft Faroese Constitution in addition to a note on our current regime.

With this the debate on the future constitutional arrangement of the Faroe Islands is truly underway.

The draft Faroese Constitution is intended to improve the governing, solve the federal knot, lay a foundation stone under the Faroese identity, and structure the democratic debate.

The debate on the Faroese Constitution must therefore concern these questions. Analysis of the present system and recommendations on the future governing is imperative.

Among the constitutional conquests in the draft are the first time ever formulation of human rights in Faroese, improved legislative procedures including mandatory hearings and possible referenda, and a national accord on the Faroe Islands as a Land, the Faroese as a Nation, and procedures for future amendments of the federal relations.

The Faroese Constitution is providing the democratic vocabulary, institutions, and procedures. The Faroese Constitution will replace the current Statute on Governing, therefore, creates the framework for all the future legislation of the Faroe Islands.

Tim Murphy, who teaches law at the University of Akureyri in North Iceland, has raised the issue of other rights. Jonas Landstad Fjeldheim, a promising Norwegian lawyer, deals with equal rights, and Rúni Rasmussen, the persistent Secretary of the Constitutional Committee, portrays constitutionalism in this context. Finally, the Chairman of the Foreign Affairs Committee of the Law Thing speaks out on the Faroese trade treaty with Iceland, how that treaty should have been handled in the Law Thing.

Hereby, the scholarly constitutional debate is truly underway on the Faroese Constitution and several more articles based on the draft have been offered to this law review.

Let the debate continue!

At halda FLR

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Galdandi frá 9. juni 2005.

Aðalfundur var 8. juni 2006, har nýggj ritstjórn varð vald.

Í ritstjórnini sita:

A. Kári á Rógvi
B. Bárður Larsen
B. Birita Samuelsen
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B. Bogi Eliasen
B. Jóanna Djurhuus
B. Jóhanna Arge
B. Jógvan Elias Winther Poulsen
C. Rúni Rasmussen

Tim Murphy

Reflections on the „Other Rights“ Provision in the Draft New Constitution of the Faroe Islands

Føroyskt úrtak

Stjórnarskipanarnevndin hevur í uppskoti sínum í Fyrra Flaggdagsáliti til nýggja føroyska stjórnarskipan valt at skriva ta hugsanina beinleiðis inn í stjórnarskipanina, at tað kunnu vera onnur stjórnarrættindi, ið eiga verju, hóast tey ikki verða nevnd millum beinleiðis ásettu rættindini. Frammanfyri ítøkiliga rættindapartinum undir yvirskriftini „Almenn rættindi og skyldur“ er grein 8, ið ber heitið „Onnur rættindi“: „Umframt rættindi ásett í hesi skipan verjir hon onnur rættindi, sum eru sjálvsøgd, ómissandi ella neyðug.„ Verða teir at virka undir hesi skipan, fáa dómstólarnir í Føroyum við hesum beinleiðis heimild til at viðurkenna stjórnarrættindi, ið ikki eru at síggja í skrivaða skjalinum. Henda grein hugleiðir um ta aktivismu frá dómstólunum, ið ein stjórnarskipanargrein sum henda kann fara at hava við sær. Hesar hugleiðingar eru fyrst og fremst grundaðar á læruna um óskrivað rættindi, ið eru ment undir írsku stjórnarskipanini, Bunreacht na hÉireann, frá 1937. Víst verður á, at hóast virðismikið so er vanliga kjakið um dómstólaaktivismu í sambandi við rættindi uttan fyri tekstin grundað á stórar misskiljingar um, hvørji fyribrigdi hugtøkini lóg og rættindi sipa til. Greinin leggur út eitt ástøði um lóg, ið svarar til Aristotelsku-rómversku-thomistisku tradisjónina innan løgvísindi, og greinin roynir at grundgeva fyri, hví hetta er einasta farbara leið, um ein vil skilja og góðtaka andsøgnirnar, ið koma í innan rættindadiskurs.

English Summary

The Faroese Constitutional Committee have decided to incorporate explicitly in the text of the Draft New Constitution the idea that there may be constitutional rights that should be defended and protected that do not appear in the rights provisions of the Draft. Preceding the catalogue of rights in the constitutional text, under the heading „General Rights and Duties“, is Article 8, titled „Other Rights“: „In addition to the Rights enumerated in this Constitution, other rights shall be defended that are self-evident, inalienable or necessary.„ The judicial organ of the Faroese polity, therefore, if operating under this clause, would unambiguously be empowered to recognise constitutional rights not found in the text. This article reflects on the debate and discussion about judicial activism

that Article 8 would be likely to provoke. This reflection is based mainly on the doctrine of unenumerated rights that has developed under the 1937 Constitution of Ireland, Bunreacht na hÉireann. It is suggested that, while valuable, typical debates on judicial activism in the context of extra-textual constitutional rights are based on fundamental misconceptions regarding the nature of law and rights. The article outlines the theory of law in the Aristotelian-Roman-Thomist jurisprudential tradition and argues that this theory is the only viable option if one seeks to understand and accept the paradoxes involved in rights discourse.

1. Introduction

Jurisprudence – the philosophical pursuit of wisdom about law, legal systems and justice – has traditionally been regarded as an esoteric subject, even amongst lawyers. Yet according to Christopher Gray interest in philosophy of law „thrives today around the world"; new developments in law in both age-old and more recently established nations, he observes, call for a good deal of philosophical reflection, and new institutional and disciplinary contexts encourage that reflection and have further increased its range. The precise extent of contemporary interest in legal theory is difficult to discern; it seems fair to surmise, however, that much of the interest that does exist relates to the role of the judiciary in contemporary liberal democracies – rather than to, say, the nature of law in the abstract, or the internal structure of legal systems. It is often remarked that it is now impossible to recount, much less understand, the major political, social and economic developments in Western societies without attention to legal norms and legal processes as they are filtered by courts and judges: „Increasingly, scholars are coming to view courts as political actors and to argue that judges, their modes of arguing, the type of evidence they require, even their partisan policy preferences, influence lawmakers and administrative agencies.„

In the field of constitutional law, individual rights are a secure part of most existing constitutional democracies and judges have a key role in their interpretation. It is pretty much accepted that courts, in undertaking this interpretive role, decide important matters of principle and policy on a routine basis, and it is understandable therefore that concern is sometimes expressed about the emergence of a system of „government by judiciary". This concern tends to reach a peak when judges go beyond the interpretive task in relation to rights and begin to recognise or discover „new" constitutional rights for which there is often no explicit textual basis.

The idea of rights „beyond" a constitutional text – that is, implied rights not enumerated in a constitution or bill of rights – is a part of the constitutional jurisprudence of many jurisdictions. Some judges of the United States Supreme Court have searched for rights in the „penumbras" and „emanations" of the Bill

of Rights. The Australian Constitution, to take another example, provides few explicit guarantees of individual rights and, in general, the Australian High Court, in its interpretation of the Constitution, has taken a conservative view of the Constitution's protection of individual rights. In recent years, however, the Court has recognized that the Constitution contains not only express rights but also implied rights. Yet another prominent example of this form of judicial activism is the „implied bill of rights theory" in Canadian constitutional jurisprudence. Although this theory was invoked more often before the Canadian Charter of Rights and Freedoms was enacted (as part of the Constitution Act, 1982), the Canadian Supreme Court revisited the theory in Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, and the ideas outlined in the Provincial Judges Reference were developed further in the Reference re Secession of Quebec.

The Faroese Constitutional Committee have decided to incorporate explicitly in the text of the Draft New Constitution the idea that there may be constitutional rights that should be defended and protected that do not appear in the rights provisions of the Draft. The Second Part of the Draft Constitution guarantees a range of different types of rights: Equal Rights; Personal Rights; Rights of Faith; Political Rights; Economic Rights; Rights of Subsistence; Social Rights; Administrative Rights; and Process Rights. Preceding this catalogue of rights, under the heading „General Rights and Duties", is Article 8, titled „Other Rights":

> "In addition to the Rights enumerated in this Constitution, other rights shall be defended that are self-evident, inalienable or necessary.„

The judicial organ of the Faroese polity, therefore, if operating under this clause, would unambiguously be empowered to recognise constitutional rights not found in the constitutional text. Judges would be entrusted not only with interpreting the rights found in the constitutional document, but also with deciding ultimately whether other, unenumerated rights were „self-evident, inalienable or necessary".

This article reflects on the debate and discussion about judicial activism that Article 8 would be likely to provoke. This reflection is based mainly on the doctrine of unenumerated rights that has developed under the 1937 Constitution of Ireland, Bunreacht na hÉireann, which we will outline first. This doctrine is both similar and different in kind to the draft Article 8 – it is similar because there is some textual basis for a doctrine of „other rights" in the Irish Constitution, but it is different because it does not provide any textual basis for what the „other rights" might actually be. Secondly, the article shall discuss various Irish perspectives on the legitimacy of judicial activism that recognises extra-textual rights, perspectives that are similar to that found in all jurisdictions where this type of judicial activism exists. It shall be suggested that, while valuable, the debates on judicial activism in the context of extra-textual constitutional rights

are based on fundamental misconceptions regarding the nature of law and rights. Thirdly, we shall outline the theory of law in the Aristotelian-Roman-Thomist jurisprudential tradition and argue that this theory is the only viable option if one seeks to understand and accept the paradoxes involved in rights discourse.

2. The Doctrine of Unenumerated Rights in Irish Constitutional Law

The Irish Constitution of 1937 is primarily based – like the Draft New Faroese Constitution – on the political ideology of liberal democracy. Political liberalism is constitutionally and legally expressed by two key aspects of „liberal legalism“ – „constitutionalism“, or the fencing-in of public power mainly by the separation of powers doctrine and justiciable individual rights, and the „rule of law“, or rule through law rather than the arbitrary whim of persons and the requirement that law must be general, equal, clear and certain before it can be labeled „good“ law. The general liberal legalist position is mirrored accurately in the provisions of Bunreacht na hÉireann and the Draft Faroese Constitution. Both constitutions are founded on the idea of the rule of law and the bulk of the articles in both constitutions deal with the institutions of government and their inter-relation, that is, with the separation of powers; a lesser number of articles in both constitutions are devoted to individual rights. In the Irish Constitution, five articles – Articles 40 to 44 – are devoted to „Fundamental Rights". The main matters dealt with in these articles are: Article 40.1 – Equality before the law; 40.3 – „Personal rights“ generally, particularly the rights to life, person, good name, and property; 40.4 – Personal liberty; 40.5 – Inviolability of the dwelling; 40.6 – Expression, Assembly and Association; 41 – The Family; 42 – Education; 43 – Property; and 44 – Religion.

Although, as has been stated, the Irish Constitution is predominantly liberal democratic in nature, the traditionally strong influence of the Roman Catholic Church in Ireland is also evident. This influence has contributed to the development of a particularly complex (and, it must be said, often incoherent) constitutional jurisprudence. Among two of the more important instances of the Catholic influence in the 1937 Constitution are the Preamble and Article 6.1. The Preamble reads:

> In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Éire [Ireland], Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation, And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the

> individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations, Do hereby adopt, enact, and give to ourselves this Constitution.

Article 6.1 reads: „All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.„

These religious references, along with the natural rights language contained in certain of the rights provisions, have been invoked to argue that Irish constitutional jurisprudence is founded on the philosophy of Christian democracy as well as on the philosophy of liberal democracy. The rights provisions containing natural rights language concern the Family, Education, children, and private property: Article 41.1 recognises the Family as „the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law"; Article 42.1 acknowledges that „the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children"; Article 42.5 provides that, where there is a failure of parental duty towards children, the State shall endeavour „to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child"; and Article 43.1.1, which reads: „The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods."

The view that the Irish Constitution is influenced by Christian democracy as well as by liberal democracy has sometimes been converted into a far more radical argument, namely, that Irish constitutional jurisprudence is founded ultimately on a modern version of theocratic, Catholic, natural law. This perspective has not been reflected consistently in the case law but there are, however, many decisions that do support a natural law approach of some kind to the Irish Constitution. As we shall see presently, the most important feature of the adoption of a natural law approach in Irish constitutional jurisprudence has been its use in the development of the unenumerated personal rights doctrine, the constitutional cornerstone of which is Article 40.3.1-2. These provisions state:

1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.

Between 1937, when the Constitution was adopted, and 1963, little attention was paid to these provisions other than with regard to the rights specified in Article 40.3.2. In 1963, however, in Ryan v. Attorney General, the broad clause in this Article 40.3.1 – „personal rights“ – was held, by virtue of the reference „in particular“ in Article 40.3.2, to refer to more than the „life, person, good name and property rights of every citizen“. The plaintiff claimed that legislation requiring the public water supply to contain a minimum level of fluoride breached her constitutional right to bodily integrity, a right that is not specifically mentioned in the Constitution. Kenny J. in the High Court, in a judgment that was upheld by the Supreme Court, accepted that the plaintiff had an unenumerated constitutional right to bodily integrity. Although he held that it was not violated by the fluoridation (because the fluoridation was in his view proven scientifically to be beneficial and that it was therefore an acceptable public health measure), the judge's reasoning was that the words „in particular“ in Article 40.3.2 implied the existence of other rights than the ones which were mentioned in that provision; that there was in fact a whole range of unenumerated rights which „follow from the Christian and democratic“ nature of the State; and that the 1963 papal encyclical, Pacem in Terris (“Peace on Earth“), which identified „bodily integrity“ as being amongst the natural rights of a person, supported the conclusion that one of these unenumerated constitutional rights was the right to bodily integrity.

The decision in Ryan was the first of a series of decisions that identify such unenumerated, „personal“ rights. In 1996 the Report of the Constitution Review Group listed seventeen rights in addition to the right to bodily integrity that have identified by the courts as being amongst the unenumerated rights constitutionally protected by Article 40.3.1: the right not to be tortured or ill-treated; the right not to have health endangered by the State; the right to earn a livelihood; the right to marital privacy; the right to individual privacy; the right to have access to the courts; the right to legal representation on criminal charges; the right to justice and fair procedures; the right to travel within the State; the right to travel outside the State; the right to marry; the right to procreate; the right to independent domicile; the right to maintenance; the rights of an unmarried mother in regard to her child; the rights of a child; and the right to communicate.

It is critical to note, however, that the basis for the identification of unenumerated rights has not been restricted to those arising from the „Christian and democratic“ nature of the State. As has already been mentioned, the most important feature of the adoption of a natural law approach in Irish constitutional jurisprudence has been its use in the development of the unenumerated personal rights doctrine. Natural law has been by far the most important source referred to by the courts in the process of identifying unenumerated personal rights. As the Constitution Review Group observed, this is unsurprising „since the drafters of the 1937

Constitution clearly held natural law principles, as is evident from [the natural rights language of some provisions … and the various religious references in the Constitution]". Other sources that have been invoked less frequently with reference to the identification of unenumerated rights are the rationalist „human personality test" formulated by Henchy J. in Norris v. Attorney General (whereby the identification of rights is based upon the essential characteristics of the individual); the Preamble; and the provisions of Article 45, the „Directive Principles of Social Policy".

3. Irish Perspectives on the Legitimacy of Identifying Unenumerated Rights

There has been much debate regarding the legitimacy of the judicial activism of Irish courts in using Article 40.3.1 as a source for rights not mentioned in the Constitution. Similar debate has taken place in the other jurisdictions where extra-textual constitutional rights have been recognized by courts of law and it would be inevitable, if the Draft New Constitution of the Faroe Islands was adopted, and if the judicial organ of the Faroese polity decided that any unenumerated right or rights were either „self-evident", „inalienable" or „necessary" (or some combination of these), that broadly similar debate would ensue in the Faroese context.

Two of the most prominent commentators on Irish constitutional jurisprudence, the late John Kelly and Gerard Hogan, have both argued that while the language of Article 40.3.1 and 40.3.2 would seem to compel the courts to arrive at the analysis approved in Ryan, there is no objective means of ascertaining the provenance of the personal rights referred to in the provision, and that this seriously undermines the important legal values of objectivity and certainty.

Hogan has addressed and criticised the three main possible sources for the unenumerated „personal rights" of Article 40.3.1 that have been relied on by the Irish courts. Firstly, on the approach taken by Kenny J in Ryan – that the rights stem from the „Christian and democratic" nature of the state – Hogan argues that the two „limbs" of this test are unpersuasive guides to ascertaining which rights are protected. There is only one recognised unenumerated right – the right to travel outside the State – that could be said to derive from the „democratic" nature of the State. As for the „Christian" nature of the state (leaving aside the fact that some of the text of the Constitution, for example Article 44.2, which prevents the state from endowing any religion or from imposing disabilities or making any discrimination „on the grounds of religious profession, belief or status", suggests that the State does not in fact have this character), Hogan points out that the „practical utility" of this standard in determining the rights of citizens is also highly questionable. Hogan refers to the use in Ryan of the 1963 papal encyclical, Pacem in Terris, where the reference therein to a right to bodily integrity was invoked by Kenny J, and points out that the use of this

encyclical to interpret the 1937 Constitution, given that it was only published during the course of argument in the Ryan case, „seems remarkable", and also that the later decision in McGee v. Attorney General directly contradicts the teaching on contraception contained in another papal encyclical, Humanae Vitae (“Human Life“; 1968).

Hogan also dismisses the argument that the natural law approach provides anything like an objective standard for the identification of unenumerated personal rights. He notes that there is „an express judicial acknowledgement that the nature or extent of natural law is a matter of considerable dispute, but that it falls to the judiciary to determine its extent and application.„ Walsh J. in McGee v. Attorney General referred to the problems that this poses for judges in selecting from different versions of natural law:

> In a pluralist society such as ours, the courts cannot as a matter of constitutional law be asked to choose between the differing views, where they exist, of experts on the interpretation by the different religious denominations of either the nature or extent of … natural rights as they are to be found in the natural law.

Finally, Hogan dismisses the „human personality test“ of Henchy J. in McGee as „a secular version of earlier natural law theories".

Hogan describes „the gist of [his] objection“ as being „that the rather loose language of Article 40.3.1 has resulted in a vast – and, it must be said, unprincipled – expansion of the power of judicial review“. In rejecting the „politicisation“ of constitutional adjudication, Hogan supports the suggestion of John Kelly, who wrote in the wake of the decision in Ryan that one solution would be:

> … to amend the Constitution by incorporating in Article 40 an expanded recital of specific personal rights, laying down in each case the standards upon which the [Parliament] may delimit such rights. We would then be back to the simple principle of testing black-and-white constitutional norms.

This view received further support when, in 1996, the Report of the Constitution Review Group recommended the amendment of Art.40.3.1 to provide a comprehensive list of fundamental rights along the lines of the Kelly-Hogan suggestion (Hogan was a leading member of the fifteen-person Review Group). The Report recommended that this list „might also include those set out in the European Convention on Human Rights and the International Covenant on Civil and Political Rights", and Sionaidh Douglas-Scott observed subsequently:

> This recommendation, building upon the outward-looking approach that characterises some of the more progressive aspects of modern Irish

> society and which seeks to locate itself within best practice internationally, surely provides the basis for the future development of [Bunreacht na hÉireann] towards the realisation of its early potential as a liberal rights based document.

But not everyone agrees with the idea of expressly enumerating all constitutional rights and thereby restricting judicial freedom to recognise „other rights". Richard Humphreys rejects the argument that natural law does not provide adequate guidelines for the task of ascertaining unenumerated rights and favours a constitutional jurisprudence that would draw on natural rights theory and „the international experience". Humphreys' approach is one that entrusts the judiciary with the task of rights protection, irrespective of the fact that there may be a high degree of uncertainty and subjectivity involved in that process. He argues that the natural rights language of the constitutional text cannot simply be overlooked, and his view of drawing on natural rights theory and international human rights law is as an aid in interpreting the Irish Constitution rather than as a means of assisting the task of exhaustive enumeration. Judges, he suggests, should be permitted

> … to determine the extent to which the international community has recognised the right sought to be protected, and the result of that enquiry goes directly to the question of whether the right concerned, or the aspect of it that is at issue, deserves protection as a natural right under the Constitution of Ireland.

In concluding this survey of the Irish doctrine it should be noted that the role of natural law in the context of Bunreacht na hÉireann would appear to be greatly diminished by virtue of the Supreme Court decision in Re the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995. In that case the Supreme Court declared:

> From a consideration of all the cases which recognised the existence of a personal right which was not specifically enumerated in the Constitution, it is manifest that the Court in each such case had satisfied itself that such personal right was one which could be reasonably implied from and was guaranteed by the provisions of the Constitution, interpreted in accordance with its ideas of prudence, justice and charity. The Courts, as they were and are bound to, recognised the Constitution as the fundamental law of the State to which the organs of the State were subject and at no stage recognised the provisions of the natural law as superior to the Constitution.

While some have suggested that this heralds the „death" of natural law theory in Irish constitutional jurisprudence, others have – more correctly – emphasized

both the inaccuracy of the Supreme Court's claims and its flawed reasoning in this judgment. Indeed, natural law conceived as „higher law“ has been invoked on the Supreme Court subsequent to the Regulation of Information decision. Some may suggest that even if some form of natural law theory endures in Irish constitutional jurisprudence, the doctrine of unenumerated rights is in decline simply because the present crop of judges seem far less eager to invoke it. Significantly this reluctance has been evident specifically in relation to the protection of socio-economic rights. The crucial point in the present context, however, is that the doctrine remains in force and can be invoked by any litigant under Irish constitutional law.

What can we observe about Article 8 of the Draft New Constitution of the Faroe Islands in light of the issues raised regarding the Irish doctrine of unenumerated rights? It is first necessary to reiterate the prima facie difference between the two approaches to „other rights“. Whereas there are no criteria for other rights set out in the text of the Irish Constitution, we will recall that the Draft Faroese Constitution makes explicit provision for the „defence“ of unenumerated rights „that are self-evident, inalienable or necessary“. Let us examine each of these three criteria in turn. The first – „self-evidence“ – does not provide anything like an objective means of ascertaining the provenance of the „other rights“ referred to in the provision. It is, in short, question begging, because what will be self-evident to one person (or to one judge) will not be self-evident to another. A relatively sophisticated approach to „self-evidence“ featured in the preliminary stages of the natural rights theory developed by J.M. Finnis, but that theory has now been challenged and refuted on countless occasions.

If we turn to the second criterion – „inalienability“ – this perspective on rights originates from the concept of natural rights formulated by classical liberal theorists and is associated with modern natural law and natural rights theory. „Inalienable“ rights are said to be absolute, non-transferable rights that are not conferred by any human agency or power and that cannot be given away or repudiated. Again, as in the case of „self-evident“ rights, several different sets of inalienable rights have been suggested. So again the text of the Draft Faroese Constitution does not offer certainty or objectivity in relation to this criterion.

Finally, there is the category of „necessary“ rights. Necessary to whom, or to what? The sense of question begging that characterises the other two criteria remain.

In short, all three criteria for identifying „other“, unenumerated rights set out in Article 8 of the Draft New Faroese Constitution are vague and open to subjective interpretation. The next questions are these: Is this vagueness and openness to subjectivity a problem? And are there objective criteria for identifying other

rights that could or should have been included in the text of Article 8? The answers to these questions, like the questions themselves, are interrelated and can be discussed together. One can say that the vagueness of these criteria is not a problem, and that no more objective criteria could have been included in the text of Article 8, for the very simple reason that rights – whether conceived as „natural rights", „individual rights" or „human rights" – do not exist in the sense presupposed by many contemporary thinkers. Alisdair MacIntyre expressed the irrefutable argument to this effect in his work, After Virtue:

> The best reason for asserting so bluntly that there are no such rights is indeed of precisely the same type as the best reason which we possess for asserting that there are no witches and the best reason which we possess for asserting that there are no unicorns. Every attempt to give good reasons for believing that there are such rights has failed.

Despite the fact that it is commonplace to begin discussions of rights and rights theory on the assumption that rights do in fact exist in some real sense, it remains incontrovertible that no satisfactory normative justification for human rights has ever been proffered by anyone, irrespective of the extent to which they have been adopted in positive law. The most common type of attempt is to try to ground human rights in some form of political, moral or legal theory based on the rational nature of the human being, but even among these approaches there is persistent disagreement and this makes any reference to objective theories of rights implausible.

Given the prevalence and currency of „rights-talk" in contemporary culture, many will find this argument alarming. If there are no human rights, how are the values we associate with them to be protected? Are MacIntyre and his ilk suggesting that we dispense completely with the idea of human rights and allow those who hold political, economic or military power to ride roughshod, if they so wish, over any sense of human autonomy or dignity? To understand how misplaced these questions are, we must step back and examine the tradition out of which arguments like those of MacIntyre have emerged, namely, the Aristotelian-Roman-Thomist philosophical and jurisprudential tradition.

4. Rights in the Aristotelian-Roman-Thomist Jurisprudential Tradition

Originating in Aristotle and developed principally in the work of Cicero, the Roman jurists and St. Thomas Aquinas, the Aristotelian-Roman-Thomist tradition is concerned with fundamental questions about law's nature, sources, and consequences as a social phenomenon. The tradition has been maintained in recent times and in various forms by thinkers such as the twentieth century

French jurist, Michel Villey (1914-1988), Alisdair MacIntyre, and the contemporary Irish philosopher, Garrett Barden.

Villey noted that what characterises modern legal thinking is the tendency to regard law as a system of rules that are „a product of … the exclusively human spirit“. With regard to applying the law at the judicial stage, modern thinking – whether of the rationalist natural law or legal positivist variety – is that the legal outcome is derived deductively from the rule, and law is thus „the paradise of logic conceived as the art of deduction“. The notion of law normally expounded in classical and medieval theory, on the other hand, was quite different: the law – or „the just“ – is identified with the concrete solution that will be found in each case. The law is neither legislation nor the content of legislation, but the effort, in the light of previous discoveries, to discover what in the particular circumstances is just. There are, of course, rules, but these rules „are not the law, applicable as such to new cases, because to respond precisely to the conditions of each case, each solution must adapt itself to the 'nature of the matter at hand', to the nature of each case“.

The classical view of law is based on the Roman law idea that „the just“ (ius) is the rendering to each what is their due, that to which they are entitled: Justitia est constans et perpetua voluntas jus suum cuique tribuens. When law is applied at the judicial stage, the question that is asked by the court is always: „Who in these particular circumstances is entitled to what?“ The answer to the question – the law in any given instance – is discovered in the course of the judicial proceedings, which are in effect a „discussion“ or „controversy“. The traditional understanding of the judicial discussion or controversy

> had no other ambition than to arrive at the broadest possible agreement among the opinions: it aimed to convince, if not the losing litigant, at least the greatest possible number of the trial participants, of the wise men present in the audience and of the third parties who would agree the following day to help carry out the sentence. Yet this rational agreement was the sign of an approach to the truth.

Modern rationalism tends not to be satisfied with mere „agreement“ that „approaches“ the truth. How can justice be merely the giving to each what is their due when this means that the principles of justice are not specified in advance? The point is that justice, or what is due to whom, cannot be specified in advance because it cannot be known in advance: it must be discovered through the discursive judicial process. It represents the law because law demands a discovery based on the nature of each particular case with which it is confronted: a decision is required and the decision will relate to the particular facts of the case as well as to the legal rules in the abstract. The rationalist tendency is to suggest

that justice can be known, that a set of unassailable principles of justice can be formulated and particular conclusions of justice deduced therefrom. In effect this is a formalist mindset, in which justice becomes another „paradise of logic conceived as the art of deduction".

The judicial discovery of law – of the just – does not take place in a vacuum: it takes place in social context. The Roman jurists recognized that every society was governed partly by laws which were peculiarly their own (the ius civile of a particular society) and partly by laws which were common to all mankind. These latter laws they termed the law of nations, ius gentium:

> What natural reason establishes among all men and is followed equally by all people is called the law of nations (ius gentium) for all nations use it. It is common to all humankind for nations have established laws as occasions and the necessities of human life required.

The ius gentium is not invented as a common law; rather it is discovered to be common. It is common because humans are reasonable and social beings whose lives together are in very basic and important ways similar in different societies; so, for example, no human society can survive in which random and indiscriminate killing is approved or practiced; no human society can survive if whatever is in any way owned may be taken against the owner's will by another at his whim; no human society exists in which no agreements are made, or in which it is not accepted that agreements are to be honoured. That agreements should be kept – pacta sunt servanda – is not an arbitrary rule added to agreement; it is essential to agreement.

Thomas Glyn Watkin writes that the ius gentium „pre-exists the group's existence and the group's own legislative enactments must conform to this higher law in order to be valid.„ The phrase „higher law" may easily mislead by giving the impression that the ius gentium, already fully formed, is in some sense imposed from above. It is not. Its provisions are discovered to be common to different societies but, before they were discovered to be common, they were in fact common, and were similar responses to similar exigencies. The Roman law idea is that the ius gentium is a response to the very basic exigencies of human life that, as a matter of fact, are common to humankind.

The philosopher F.S.C. Northrop distinguished between the positive law of the community and the „living law", a concept similar to the ius gentium. The latter was a reference to how people in every community were brought up to do a whole host of things in particular ways that had nothing to do with the positive law, including, for example, established procedure, custom, habit, mutual expectation, assumption, and so on and so forth. The living law of a community does not come

into existence by any process of rational consideration or debate, is not for the most part explicitly formulated in language, can not be changed by any individual or institution, and if it changes at all it is only slowly. This is the background context or tradition against which dialectic or debate on positive law takes place; it constitutes the sense of justice of a given community or society, a sense that evolves as a consequence of people living together and dealing with the continual jural demands that ordinary living imposes upon them. This sense of justice not only provides the framework within which law is judicially interpreted; it also provides the basis of formulated law, that is, of constitutions and legislation. Society is lived; the law or formulated rules express an understanding of how society actually operates, how it is lived. Whatever is discovered as law in the social context – whether through interpretation or formulation – will not of course be infallible: what is discovered will often be the subject of intense debate and disagreement.

Garrett Barden has observed that this sense of communal justice that provides the context in which law is discovered may be recognised in a written constitution and, „to the extent that this recognition occurs, the written constitution acknowledges openly its own partial character“. He gives the example of the Dutch Civil Code, the Burgerlijk Wetbok, which refers to the „common opinions held about law by the Dutch people“ of which the written constitution and code are a partial expression. We find an allusion to this background or context in many constitutional preambles; in the Preamble to the Draft New Constitution of the Faroe Islands, it is stated: „We [the People of the Faroe Islands] built this Land in ancient times and governed ourselves with a Law Thing, Laws and Rights. We have held this Law Thing until this day and organised ourselves according to the needs of the People around the entire Land.„

What, then, of „rights“ in the tradition that we are discussing? We have seen that Alisdair MacIntyre has referred to belief in individual or human rights as akin to belief in witches or unicorns. This does not mean, however, that the Aristotelian-Roman-Thomist tradition rejects the vocabulary of „rights“ completely; but the term, when it is used, means something entirely different to – and much broader than – its more conventional meaning. St. Thomas Aquinas in his Summa Theolgiae, written in the thirteenth century, expressed this other sense of „right“ in particularly clear terms, but it is worth remarking first that the modern, conventional understanding of rights pre-dated St. Thomas.

The canon law of the twelfth and thirteenth centuries possessed both a fully developed concept of subjective rights and nascent theories of natural rights. Brian Tierney has shown that it was in the two centuries after Gratian's Decretum of 1140 that the phrase ius naturale, which traditionally meant cosmic harmony or objective justice or natural moral law, began to acquire also the sense of a subjective natural right. Although St. Thomas was influenced in some respects

by the canonists' teaching on various issues, he did not adopt their conceptions of a „right“ as either a power inhering in an individual or a zone of personal liberty. In the Summa Theologiae, St. Thomas offers the following version of the Roman law definition of justice: „the habit whereby a person with a lasting and constant will renders to each his due". The objective interest of justice, says St. Thomas, is called „the just thing, and this indeed is a right.„ Thus, in this conception of justice, a „right“ comes into existence in real terms when something is recognised as being due to someone. St. Thomas argues that „right“ is fittingly divided into natural right and positive right:

> [T]he right and just is a work that is commensurate with another person according to some sort of fairness. This can be measured in two ways. One, from the very nature of the case, as when somebody gives so much in order to receive as much in return: this is called natural right. The other, the commensurate to the other is settled by agreement or mutual consent, as when a person counts himself content to receive such or such in return. And this may come about in two ways. First, by private engagement, as when the parties bind themselves to a contract without the State entering in; and second, by public agreement, as when the whole civil community or State fixes what is adequate and commensurate or when this is so ordained by the sovereign authority who has charge over and personifies the people: this is called positive right.

In St. Thomas' thought, therefore, „natural right“ refers to entitlement in a situation of justice where no agreement or law exists, and „positive right“ refers entitlement in a situation of justice where an agreement as to entitlement has been arrived at either privately or publicly.

In the Aristotelian-Roman-Thomist tradition, therefore, rights-claims of any kind – including of course claims that an individual or human right exists in a given situation – represent claims to entitlement. All law – and all justice – is in this sense about „rights“: to ask who is entitled to what in a particular case is to ask who has a right in that particular case. Rights, therefore, like law and „the just“, are discovered. All law, moreover, is about potential or actual „conflicts“ of rights. What is always discovered in court is a resolution of a rights conflict.

5. Conclusion

If adopted, Article 8 of the Draft New Constitution of the Faroe Islands has the potential to give rise to substantial controversy. If invoked, there shall undoubtedly be occasional or frequent dissatisfaction with what the judiciary – or more specifically, what individual judges – consider to be „self-evident, inalienable or necessary“. But of course similar dissatisfaction may arise from judicial

interpretation of the rights that are enumerated in the constitutional text. This is the nature of interpretation. It is rarely, if ever, unanimously agreed upon. In the Irish debate on the enumerated rights doctrine those who favour the express and „exhaustive“ enumeration of rights have sometimes been forced to drop their guard when it comes to the question of interpretation. Gerard Hogan, for example, remains conscious of a problem with the proposal of a return to „black-and-white constitutional norms": there is still indeterminacy and significant room for interpretation, and therefore the possibility of subjective bias on the part of the judges. He acknowledges this, to some limited extent at least, when he refers to the express protection of rights in the European Convention of Human Rights: „This, of course, is not to pretend that the wording of the Convention is not very 'open-textured' and leaves much to individual judicial discretion."

Yet the quest for certainty and objectivity in constitutional jurisprudence – and indeed in law generally – is unlikely to end. The Aristotelian-Roman-Thomist tradition, which does not participate in this quest, represents an alternative and viable option in terms of understanding and accepting the paradoxes involved in rights discourse It is worth noting that for St. Thomas Aquinas, as indeed for Cicero, the ultimate authority of law is that it is a reasonable but not infallible solution, being only the best available opinion – in the main, and in a given institutional context (where some conclusion must be reached) – to a given problem.

This is not to suggest that the theory of law and rights that perceives them as being constantly discovered offers a complete jurisprudence. As with any tradition, there is always ongoing reflection and development. For example, a great deal of debate focuses on how judges should interpret constitutions and constitutional rights; what is noticeable about much of this debate is the absence of any reference to the personnel that actually do the interpreting, that is, the judiciary. We have seen that Aristotelian-Roman-Thomist jurisprudence gives prominence to the facts of each individual case but it does not engage sufficiently with twentieth century American realist jurisprudence, some of which gives even more prominence to the facts of cases and all of which turns the spotlight on judicial personnel. If one accepts the basic realist assumption as being „that judges – stimulated, primarily, by the facts before them rather than by the rules to which those facts might be fitted – work backwards, 'from a desirable conclusion to one or another of a stock of logical premises'", then the question of selecting the judiciary become highly significant (but a question that is not addressed much in the literature on constitutional adjudication). Brian Leiter has recently pointed out that the most influential realist view regarding what actually determines the responses of judge to particular fact has been that it is „common sociological facts about judges (e.g. their background, their professional socialization experiences, and the like)“ (rather than Jerome Frank's view that it is idiosyncratic facts about each judge's personality which counted). This view does find some expression

in an Appendix to the Irish Report of the Constitution Review Group entitled „The independence of the judiciary". The author, Kathleen Lynch, observed:

> While it may not have been the remit of the Constitution Review Group to engage in a class and gender analysis of the judiciary … they remain matters which impact directly on how the Constitution and the laws operating under it will be, and have been, interpreted. For it is a sociological fact that the perspectives of all persons are profoundly influenced by their own biographical experience, including their gender and social class-related socialisation. Judges (and other persons exercising judicial functions), being human, are subject to the same biases and prejudices as other persons…

Issues such as these would seem to be far more significant than the illusive search for „objectivity" in constitutional interpretation; moreover, they are issues that the Aristotelian-Roman-Thomist jurisprudential tradition has yet to accommodate theoretically.

FIN

C. B. Gray, „Introduction" in C. B. Gray (ed.), The Philosophy of Law: An Encyclopedia (New York, Garland, 1999), p.vii.

S. J. Kenney, W. M. Reisinger and J. C. Reitz, „Introduction: Constitutional Dialogues in Comparative Perspective" in S. J. Kenney, W. M. Reisinger an J. C. Reitz (eds.), Constitutional Dialogues in Comparative Perspective (New York, St Martin's Press, 1999), p.1.

Griswold v. Connecticut [1965] 381 U.S. 479. The Due Process Clause in the United States Constitution raises similar issues. For a recent discussion of whether a process can be „due" only if it accords with judicially ascertained principles of liberty and justice, see A. Hyman, „The Little Word 'Due'" (2005) 38 Akron Law Review 1.

Australia Capital Television v Commonwealth of Australia [1992] 177 C.L.R. 106. See A. Stone, „The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication" (1999) 23 Melbourne University Law Review 668. See also R. M. O'Neil, „Freedom of Expression and Public Affairs in Australia and the United States: Does a Written Bill of Rights Really Matter?" (1994) 22 Federal Law Review 1.

[1997] 3 S.C.R. 3.

[1998] 2 S.C.R. 217.

The original reads: „Onnur rættindi: Umframt rættindi ásett í hesi skipan verjir hon onnur rættindi, sum eru sjálvsøgd, ómissandi ella neyðug.„

For background to the Irish Constitution, see D. Keogh, „The Irish Constitutional Revolution: An Analysis of the Making of the Constitution“ in F. Litton (ed.), The Constitution of Ireland 1937-1987 (Dublin, Institute of Public Administration, 1988).

For an overview of this area of Irish constitutional law, see D. Gwynn Morgan, The Separation of Powers in Irish Constitutional Law (Dublin, Round Hall Sweet and Maxwell, 1997).

In the Irish Constitution, the right to vote – another classic liberal-democratic right – is guaranteed in a provision (Article 16.2) other than the provisions entitled „Fundamental Rights".

Other provisions where the religious influence is or was evident include Article 34.5.1 (providing the wording of judges' declaration upon appointment, which begins „In the presence of Almighty God I… do solemnly and sincerely promise and declare…") and the original text of Article 44.1.2 and 44.1.3 (providing that, while other religious denominations are recognised by the state, the „special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens“ be recognised in particular). Article 44.1.2 and 44.1.3 were deleted by referendum in 1972.

See, for example, G. Whyte, „Some Reflections on the Role of Religion in the Constitutional Order“ in T. Murphy and P. Twomey (eds.), Ireland’s Evolving Constitution (Oxford, Hart, 1998).

The right to own private property is guaranteed twice in the Irish Constitution: as a right under Article 43 and also under Article 40.3.

See, for example, R. J. O'Hanlon, „Natural Law and the Constitution“ (1993) 11 Irish Law Times 8 and „The Judiciary and the Moral Law“ (1993) 11 Irish Law Times 129. For responses to Judge O’Hanlon’s arguments, see T. Murphy, „Democracy, Natural Law and the Irish Constitution“ (1993) 11 Irish Law Times 81 and D. Clarke, „The Constitution and Natural Law: A Reply to Mr. Justice O'Hanlon“ (1993) 11 Irish Law Times 177.

[1965] I.R. 294. Although not reported until 1965, Ryan was decided in 1963. For a thorough discussion of this case, see G. Quinn, „Reflections on the Legitimacy of Judicial Activism in the Field of Constitutional Law“ (Winter 1991) Dlí 29.

Report of the Constitution Review Group (Dublin, Stationery Office, 1996), p.246. James Casey, in his Constitutional Law in Ireland, 3rd ed. (Dublin, Round Hall Sweet and Maxwell, 2000), lists only twelve unenumerated rights (p.395); this difference can be explained by a combination of different interpretations of cases and differing ideas as to what precisely constitutes a „right".

ibid., p.249.

[1984] I.R. 36, at 71. In Norris, Henchy J.'s minority judgment held that an unenumerated right to privacy existed and was breached by legislation that criminalized male homosexual behaviour. The legislation in question was subsequently repealed by the Criminal Law (Sexual Offences) Act, 1993 after Ireland was judged to be in breach of the European Convention on Human Rights in Norris v. Ireland [1988] E.C.H.R. 22.

See the judgment of Walsh J. in McGee v. Attorney General [1974] I.R. 284.

Article 45 states that it is „intended for the general guidance of the Oireachtas [Parliament]" and „shall not be cognisable by any Court under any of the provisions of this Constitution". However, the wording of Article 40.3.1 „enables matters which were supposedly beyond the scope of judicial enforcement to be rendered indirectly cognisable by the courts by virtue of being identified as a personal right". Report of the Constitution Review Group, p.253. See Murtagh Properties v. Cleary [1972] I.R. 330.

See J. M. Kelly, Fundamental Rights in the Irish Law and Constitution, 2nd ed. (Dublin, Jurist Publishing, 1984) and G. Hogan, „Unenumerated Personal Rights: Ryan's Case Re-evaluated" (1990-1992) 25-27 Irish Jurist 95. See also G Hogan, „Constitutional Interpretation" in F. Litton (ed.), op. cit.

G. Hogan, „Unenumerated Personal Rights: Ryan's Case Re-evaluated", at 104-11

The State (M.) v Attorney General [1979] I.R. 73.

In McGee, the Supreme Court held that a married couple had an unenumerated right to marital privacy that was breached by the criminal law prohibiting the importation, sale or advertising of contraceptives.

G. Hogan, „Unenumerated Personal Rights: Ryan's Case Re-evaluated", at 110.

ibid., at 111.

ibid., at 114.

J. M. Kelly, op. cit., p.47.

Report of the Constitution Review Group, p.259.

S. Douglas-Scott, „'A disposition to preserve and an ability to improve': The Report of the Constitution Review Group in the Republic of Ireland“ (1997) Public Law 55, at 62.

R. Humphreys, „Interpreting Natural Rights“ (1993-95) 28-30 Irish Jurist 221, at 227. See also R. Humphreys, „Constitutional Interpretation“ (1993) 15 Dublin University Law Journal 59.

[1995] 2 I.L.R.M. 81, at 107.

A. F. Twomey, „The Death of Natural Law?“ (1995) 13 Irish Law Times 270.

G. Whyte, „Natural Law and the Constitution“ (1996) 14 Irish Law Times 8.

See for example the judgment of Murphy J. in D.P.P. v. Best [1998] 2 I.L.R.M. 549. For the argument that to conceive of natural law as necessarily „higher law“ is inaccurate, see T. Murphy, „St. Thomas Aquinas and the Natural Law Tradition“ in T. Murphy (ed.), Western Jurisprudence (Dublin, Thomson Round Hall, 2004).

See Sinnott v. Minister for Education [2001] 2 I.R. 545 and D. (T.) v. Minister for Education [2001] 4 I.R. 259. On the Irish debate regarding socio-economic rights, see T. Murphy, „Economic Inequality and the Constitution“ in T. Murphy and P. Twomey (eds.) op cit., and G. Whyte, Social Inclusion and the Legal System (Dublin, Institute of Public Administration, 2002).

See J. M. Finnis, Natural Law and Natural Rights (Oxford, Clarendon, 1980).

For an early critique, see N. MacCormick, „Natural Law Reconsidered“ (1981) 1 Oxford Journal of Legal Studies 99.
A. MacIntyre, After Virtue, 2nd ed. (Notre Dame, Ind., University of Notre Dame Press, 1984), p.69.

For a recent example, see G. W. Rainbolt, „Rights Theory“ (2006) 1 Philosophy Compass 11. See also C. Harvey, „Talking about Human Rights“ in T. Murphy (ed.), op. cit., p.299 (“[My] view is that moral rights exist beyond the context of their legal recognition.„)

For examples, see D. Richards, A Theory of Reasons for Actions (Oxford, Clarendon, 1971); R. Dworkin, A Matter of Principle (Cambridge, Harvard University Press, 1985); and A. Gewirth, The Community of Rights (Chicago, Chicago University Press, 1996).

For discussion of this issue, see R. O'Connell, „Do We Need Unicorns When We Have Law?" (2005) 18 Ratio Juris 484, at 484-492.

I would like to thank Professor Barden for his assistance regarding this part of the article. Responsibility for any flaws, gaps or errors remains mine alone.

See M. Villey, „Questions of Legal Logic in the History of the Philosophy of Law" in V. Gessner, A. Hoeland and C. Varga (eds.), European Legal Cultures (Aldershot, Dartmouth, 1996), p.111 (emphasis in original). This is a translation of „Questions de logique juridique dans l'histoire de la philosophie du droit" (1967) 37 Logique et Analyse 3-22.

M. Villey, „Questions of Legal Logic", p.113.

ibid., p.114 (emphasis in original).

The Institutes of Justinian, Book I, Title I ("Of Justice and the Just"). In English: The virtue of justice is the constant and enduring will (determination) to render to each what is due.

See G. Barden, „Of the Naturally and Conventionally Just" in T. Murphy (ed.), op.cit.

As Villey has suggested, to carry out the judge's task in each particular case, „there is a method – supple, prudent, approximative – inherited from the ancients: the method of discussion". M. Villey, Critique de la pensé juridique moderne (Paris, Dalloz, 1976), p.136 (trans. G. Barden: „Discovering a Constitution" in T. Murphy and P. Twomey (eds.), op. cit., p.5; emphasis in original).

M. Villey, „Questions of Legal Logic", p.115.

See, for example, P. Hillyard, „Invoking Indignation: Reflections on Future Directions in Socio-legal Studies" (2002) 29 Journal of Law and Society 645 at 655 ("[W]e need the absolute value, a utopian concept of justice, in order to challenge [inequalities].„)

Institutes of Justinian: Bk.I. Title II. #1, 2.

T. G. Watkin, An Historical Introduction to Modern Civil Law (Aldershot, Dartmouth, 1999), p.25.

For an account of Northrop's theory, see Bryan Magee: Confessions of a Philosopher (London, Phoenix, 1997), pp.166-167.

See G. Barden, „Discovering a Constitution“, pp.5-6.

ibid., p.4.

Burgerlijk Wetbok, Preliminary Title, s.7. The provisions of the code, Barden notes, „may be conceived less as deductions from abstract principles than as attempts to discern and express the developing sense of justice“. „Discovering a Constitution“, p.4.

Emphasis added. The original reads: „Vit bygdu hetta landið í fornari tíð og skipaðu okkum við tingi, lógum og rættindum. Vit hava hildið ting til henda dag og skipað okkum eftir fólksins tørvi um landið alt.„

See B. Tierney, The Idea of Natural Rights (Atlanta, Scholars, 1997). See also B. Tierney, „Origins of Natural Rights Language: Texts and Contexts, 1150-1250", History of Political Thought, Vol. X, No. 4, Winter 1989, 615.

Summa Theologiae, II-II, q.58, a.1c, Vol. 37 (1975), p.21 (emphasis in original), trans. Blackfriars (London, Eyre and Spottiswoode, 60 Volumes).

Summa Theologiae, II-II, q.57, a.1c, Vol. 37 (1975), p.5.

Summa Theologiae, II-II, q.57, a.2c, Vol. 37 (1975), p.9.

G. Hogan, „Unenumerated Personal Rights: Ryan's Case Re-evaluated“, at 116.

N. Duxbury, Patterns of American Jurisprudence (Oxford, Clarendon Press, 1995) p.123 (quoting Max Radin).

B. Leiter, „Is There An American Jurisprudence?“ (1997) 17 Oxford Journal of Legal Studies 367, at 375.

Report of the Constitution Review Group, Appendix 26, p.584. See also J. A. G. Griffith, The Politics of the Judiciary, 4th ed. (London, Fontana, 1991) and G. H. Gadbois, „Indian Supreme Court Judges: A Portrait“ (1968-69) 3 Law and Society Review 317.

Consider, for example, John Hart Ely's account of a judicial class bias: „Experience suggests that there will be a systematic bias in judicial choice of fundamental values, unsurprisingly in favor of the values of the upper-middle professional class from which most lawyers and judges, and for that matter, most moral philosophers, are drawn… [W]atch when most fundamental-rights theorists start edging towards the door when someone mentions jobs, food or housing: those are important, sure, but they aren't fundamental.„ J. H. Ely, Democracy and Distrust: A Theory of Judicial Review (Cambridge, Harvard University Press, 1980) pp.58-9.

Jonas Landstad Fjeldheim

A comparative review of the Faroese draft Constitution

– A comparative review of the role of the judiciary and equality provisions

Introduction
The Faroese draft constitution in general
A comparative look at the role of the Judiciary in the Faroese draft
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Úrtak

Heitið á greinini er Ein samanberandi greining av uppskotinum til føroyska stjórnarskipan. Høvundin ber saman ásetingar um dómstólar og ásetingar um javnrættindi í uppskotinum til føroyska stjórnaskipan við útvaldar aðrar skipanir, rættarvenju og faklig ástøði í øðrum løgdømum. Víst verður á, at føroysku ásetingarnar taka støði í felags norrønari og vesturlendskari siðvenju, men kortini í summum førum fara longur og lata upp fyri víðfevndari menning. Ásetingin um at dómtólar kunnu gera lóg, har ongin er, eins og orðingar um at „øll" eiga rættindi merkja, at víðar ræsur eru fyri at mýkja tulking og venju í framtíðini.

Summary

The author undertakes a comparative analysis of aspects of the draft Faroese Constitution, comparing the Faroe Islands draft Constitution to selected constitutional provisions, court doctrine, and theory in other jurisdictions. The proposed constitutional text seems in many ways to draw on Norse and Western traditions but in some instances, it goes further and leaves open the prospect for wide-ranging developments. Provisions giving the Judiciary the power to declare law where none exists and phrases giving „All" a certain right offer extensive room for development and interpretation in the future.

Introduction

The object of this article is to look at the role of the judiciary and provisions on equality in a comparative way. The Faroe Islands draft Constitution will be the basis for the discussions and I will compare this draft with other constitutions, theory and court cases that can aim the spotlight on different aspects of the subject matter. I have chosen to use Western-European and North American constitutions to compare the Faroese draft Constitution with, amongst others because of the cultural, judicial, and political similarities. The final draft of the Constitution will be handed to the Prime Minister of the Faroe Islands on 31 December 2006 at the latest. I will start with a short introduction to the draft Constitution before I will deal with the role of the judiciary and provisions on equality in the draft Constitution separately. I will end the article with some thoughts on the future and conclusions.

The Faroese draft constitution in general

The Faroe Islands are part (or province) of the Kingdom of Denmark, but have been self-governing since 1948. In 1946 there was held a public election where the people were asked if they wanted to be free from Danish rule and become independent. The parliament was not bound by the people's decision. The outcome of the election was a small majority that favoured secession, but due to that the parliament fell and a new parliament election a few months later established a coalition of parties favouring staying with the Danish Kingdom the case did not move forward and the Faroe Islands did not become an independent state. As a compromise Folketinget, the Danish parliament, passed The Home-Rule Act that came into effect in 1948. This Act defined „særanliggender" (matters of separate concern) and „fællesanliggender" (matters of common concern). This Act gave the Law Thing or Faroese Representative Council legislative power in certain areas. This meant that the Faroe Islands achieved a right to govern themselves in some aspects. An example on „fællesanliggender" and an issue that the Faroese did not have jurisdiction over are the defence policy and foreign policy. Health, culture, education, and living marine resources (fish and marine mammals) are amongst the areas where the Faroese govern themselves. These areas of responsibility have been developed later as well. The draft Constitution has been written in order for the Faroese nation to have its own proper constitution, which reflects the Faroe Islands history and culture. Today the Faroe Islands use the Danish Constitution from 5 June 1953. The new Constitution, if it will be passed, recognizes a federation with another state, for example Denmark, see article 1 (2) and article 1 (3).

Text and translation

The Faroe draft Constitution has been translated into English in order for non-Faroese speaking people to read and understand it. The translation is focusing on capturing the tone and style of the original document. Further more, the language is easy to read and understand and it is also authoritative – it has been an ideal in itself to keep the articles short and with an extensive use of verbs. The reason for this solution, both in the translation and the original document, has been to draw from ancient Norse law.

The language of the draft Constitution is very „spoken" or political – not very legalistic. In the comment to the draft Constitution, this is said to be because it is perfectly understandable to non-lawyers. This can also strengthen the documents importance and bond to its people. If the language in the constitutional text had been too legal, like the Norwegian Constitution from 1814 has become, non-legal trained persons would not understand it and they would not feel attached to it. A constitution can be either a more passive document, like the Norwegian Constitution, or a more active document, like the Constitution of the United States of America. Many Americans refer to their Constitution and the rights in it and feel attached to it. The Constitution of the United States consists of the constitutional text and 27 amendments, including the first ten amendments that are known as the Bill of Rights. One example of an article that is invoked from time to time is the Second Amendment that gives the people the right to keep and bear arms. The text in the Second Amendment is clear and easy to understand. However, this might create difficulties. The Second Amendment, as I interpret it by looking at the ordinary meaning of the words, was made to secure the safety of a free state and not a right to carry weapons in a supermarket. This evolutionary aspect must be born in mind when writing all sorts of legal texts that are meant to have a long life. This is something that can result in a more legalistic wording. However, if the language in a constitution is too legalistic and technical the constitution would only facilitate for the political system et cetera to be written down and the constitution would not become a living and dynamic document. The Faroese draft has been written with a language to arrange for the document to be active and a part of the Faroese people's daily life. While the Faroese draft is modern, it brings in the states cultural heritage as well – this might help the document to be used and referred to.

A comparative look at the role of the Judiciary in the Faroese draft

The role of the Judiciary in general

When I refer to the role of the judiciary, I point to the system of courts that administer „http://en.wikipedia.org/wiki/Dispute_resolution"resolution of disputes. In other words, the police or other sorts of law enforcement are not a part of the judiciary because it is sorted under the executive branch.

Separation of Powers

In most European states and North America, separation of powers is the norm. This system, articulated by Montesquieu, is based on a structure where an executive, a legislative and a judiciary controls each other. This means that the judiciary has separate and independent powers and areas of responsibility. This area and these powers change, to some extent, from jurisdiction to jurisdiction. The Faroese draft is built on separation of powers something that both the preamble and article 2 (1) affirms. In article 3, the three constitutional institutions; Løgtingið, Landsstyrið and Landsrætturin are mentioned. Landsrætturin being the Court of the Land, the Supreme Court, whose judgements are final, see article 65 and article 77. Løgtingið and Landsstyrið are respectively the legislative and executive branches. The system of separation of powers implies that the judiciary with its courts shall use the law and not make law. However, this can be challenged through the courts work when they interpret the laws and precedence develops. The courts independent position as a non-political institution might then be challenged. This issue will be further discussed under the heading „… make law where no law is.„ below.

The Peoples Ombudsman

The Faroese draft also contains a Peoples Ombudsman, see article 93. The European Union and Sweden are both examples that also have this type of institution. Today, many states have some sort of Ombudsman and Sweden has had their Ombudsman since 1809. The term Ombudsman stems from Old Norse; umboðsmaðr. This institution can for example be controlling the legislative branch or the rights of the children of the land. The institution is often made to look after the people's rights in relation to the executive branch, but can also comment on acts by the judiciary. According to the draft constitution, this institution or person can inter alia look at the courts' judgements but she or he cannot overturn their decisions. However, the Peoples Ombudsman can be an important institution to represent the people of the land and publish statements on behalf of the people, which the judiciary can choose to take into consideration.

Adversarial system

Further on the Faroese judiciary is built on an adversarial system and not an inquisitorial one, see chapter 11, in particular article 34 (1) and article 37 of the draft Constitution. This implies that the parties are represented by advocates rather than a neutral person trying to determine the truth of the case. In modern inquisitorial jurisdictions the defendant is also represented by counsel, the European Convention on Human Rights and Fundamental Freedoms requires this in article 6 in relation to states who are parties to the treaty. Defendants in the United States state courts got the right to legal counsel in 1963, see the U.S. Supreme Court Gideon v. Wainwright. Many countries in Western Europe and Latin America are based on the inquisitorial system. An example is France

where they have a so-called juge d'instruction who conducts the investigation in certain cases as a neutral member of the court. The Faroese draft authors have here chosen the same system as applied in Norway and other Nordic countries, which is built more on Germanic custom than the Roman or Napoleonic Code. Modern criticism against the adversarial system is often focused on the hypothesis that the result of the case depends more on the skills of the lawyer than on the actual facts of the case, whereas the inquisitorial system has a person who does not represent one of the parties but tries to sort out the truth.

The duty of regular courts to uphold the Constitution v. Constitutional councils or courts

The Faroe courts shall ensure that the Constitution is upheld, see article 78 (3), article 78 (5) and article 89. This implies that the Faroese draft is built on a different system than the French, with their Conseil Constitutionnel, but more in line with the Norwegian system here as well. This means that there is no special court or other institution to handle constitutional issues, but that this task is left to the ordinary courts. Germany, with its Basic Law, has chosen a different solution and has a Federal Constitutional Court. Here it is the responsibility of the Constitutional court to interpret the Constitution, while it is all the courts in the Faroe Islands responsibility. When an issue has been interpreted and solved by the Faroe Supreme Court, the inferior courts are likely to follow the superior courts interpretation (precedence). Therefore, even if the task of interpreting the Constitution is handed over to more than one court, this will presumably not lead to more uncertainty. However, this system can create more work and difficult cases to handle for the inferior courts – something that might result in less predictability and other problems. When one looks to Norway that uses this system today, the mentioned system has only brought forward minor difficulties. In comparison, the incorporation of the European Convention on Human Rights and Fundamental Freedoms created and still creates much larger challenges for the lower courts. When judges in the lower courts are to deal with constitutional issues this might also be seen as more democratic, than having a specialized group of judges to deal with the cases. The respect for judges in general in the society, from a Norwegian point of view, will probably in itself create the needed approval from the people.

"… make law where no law is.„

The separation of powers or balance of powers implies that the parliament shall make law; it is not the judiciary's duty to do this. However when a court interprets a law, something that is clearly within its definition of tasks, it can decide on the interpretation of a provision. When other courts accept and use this interpretation the courts have thereby developed precedence, which in practice will have the effect of a law. In the Faroese draft, this has actually been mentioned in article 78 (2). This provision can however not be used to judge

someone for a wrongful act that is not criminalized by law, see article 35 (2) regarding punishment and the principle of legality. The Norwegian Constitution contains a similar provision, which restrains the judiciary from judging someone for something that is not criminalized, see article 96. Since the Faroese draft refers to the principle of Rule of Law and the principle of Balance of Powers, and seems to be build on these theories in general the provision, article 78 (2), must most likely be interpreted as a reference to the courts freedom to judge within certain thresholds. This is a very modern and honest provision that might educate its readers about the courts' work and be viewed as constructive in that respect. Nevertheless, this may perhaps be seen as if the judiciary is breaking into the turf of the legislative branch.

Emergency

During a case of emergency the Court of the Land, the Supreme Court, acquires a special role, see article 98 (3). If a state of emergency is declared inter alia, the laws may be set aside under special conditions. It would then be the responsibility of the Court of the Land to assess the legality of that conduct. The Norwegian Constitution has not regulated the courts duties in a state of emergency. In the German Basic Law article, 115g regulates the constitutional courts position and role during a state of emergency; they would then have to continue to fulfil their purpose and in other words assess the legality of the emergency laws that is passed. The Faroe Supreme Court has in other words a more unique position, especially because it would have to assess the „conduct" as is, and not only passed laws. This will widen the courts tasks and make it more dynamic, something that might be necessary in a case of emergency. Seen from a different angle, the Court of the Land will have to assess political decisions and thereby become more political, something that can be said to be negative for a court of law and something that should be avoided. When a court is controlling whether a law is within the boundaries that the Constitution draws up, it would also have to assure that the procedural rules have been followed. The authors of the draft Constitution must in other words have meant that the Court should be given more power than what follows from normal control with the laws. There might be good reasons behind granting the courts wider authority in an emergency, but it may also create a problem in relation to the boundaries of that power, which will be interpreted and decided on by the courts themselves. The lack of predictability is another relevant argument against expanding the courts authority in a case of emergency.

Independent judges

The system of Separation of Powers entails that the judiciary is independent from the other branches. The issue about the courts funding, the courts budget, is dealt with through article 82 (4) of the draft. The independence must furthermore also cover the judges. To ensure that the judiciary refrains from

becoming too engaged in political issues the judges could be totally self-governing. A system where the politicians or the people elect the judges may harm the judiciary's impartial role. On the more positive side, one can say that the system of electing judges is a more democratic solution than leaving this to the judges themselves or an administrative entity. An example is the United States of America where the judges are elected and where the political motivation of the judges becomes important. An issue, amongst many others, that for a long time has been important for the American people is abortion and this theme have been discussed extensively and many judges let their views on abortion be known before an election and thereby taking a side in a conflict. Which political party the judges support has also become an issue. The Faroese draft have chosen a system where the judges, to be appointed to the Court of the Land, are chosen by the people through an election, see article 18 (1). The leadership of the Court of the Land can either be chosen directly under the supervision of the Law Thing or by the Law Thing, see article 39 (1). The Law Thing obtains a great deal of influence through this system.

The remuneration for the members of the Law Thing and the Government of the Land is dealt with in article 50 (2). The intention of this article is to hinder the salaries of the members of the two institutions becoming a way of pressuring the members. The Court of the Land is not mentioned here, and seen together with article 82 (4) this points to that it is the courts themselves who decides on the remuneration for the members of the courts. This will make the courts more independent than if they had been economically under total authority of the Law Thing.

An introduction to equality

A developing principle

Equality or equal status is the ideological idea, which states that everyone shall have the same status in a society. Equality as a right has grown slowly and is still covering new ground. All men in Norway were allowed to vote from 1898 and women from 1913. It is in other words less than one hundred years ago since women acquired the right to vote in Norway. In Switzerland, which is looked upon as a modern European nation women obtained the right to vote in federal elections in 1971 and in the last canton (region), Appenzell Innerrhoden, in 1990 when the canton was forced by the Federal Supreme Court of Switzerland to recognize women's right to vote (suffrage). Present, many well established democracies see equal rights (especially with regard to gender) as a natural right, an inherent right – but no matter how inherent – this is a right we will have to struggle for in a long time to come on different arenas and in different areas. It is therefore beneficial that the Faroese draft is dealing with the issue.

In addition to gender or sex equality, one can mention the right of equality in connection with political standing, race, skin colour, nationality (national origin), religion, property, birth, sexual orientation, disabled people et cetera and of course law.

Constitutions have dealt with equality for a long time. A reason behind this is that equality is seen as a basic right, an inherent right as stated above. Nevertheless, a right has to contain something substantial. Even if the United States Declaration of Independence states that „all men are equal", this expression originally excluded women, slaves and other groups, but over time universal egalitarianism has won wide adherence and is a core component of modern American civil rights policies – even if practice may display a different reality.

A comparative look at provisions on equality in the Faroese draft

In the second part, chapter 3 of the draft Constitution, there are three articles under the heading „equal rights.„ These are articles 10, 11 and 12. Under the heading „Restrictions" one can also find the Principle of equality, see article 44. There are rights or restrictions related to equal rights to be found in other parts of the draft as well, like article 5 (2) that sets out rules on the right to vote. In this article, I will only focus on the three mentioned articles and article 44.

"All are valued equally"

Article 10 (1) states, „All are valued equally.„ In the second paragraph, it is written that „arbitrary, unjust, or offensive" differences cannot be granted. This implies that positive differentiations or discrimination can be made. This can also be called affirmative action. As long as the differentiation does not fall under one of the exceptions in the provision, the lawmaker can differentiate. There are many cases where one should differentiate in order to obtain equality, for example in relation with disabled people or in some respects gender, which will be shown below.

One measure to obtain equality between men and women, which article 11 on equal standing in the Faroese draft calls for, is positive discrimination. There can be said to exist at least two kinds of positive discrimination, Moderate and Radical positive discrimination. Moderate imply that when two equally qualified persons are applying for the same job one should choose the less represented candidate. Radical imply that one should choose the underrepresented gender even if that person is less qualified. Positive discrimination is amongst others justified because the greater represented gender has a bigger chance of being chosen because of institutional reproduction.

Radical positive discrimination can be seen as „unjust„ confer art. 10 (2), if the candidate is less qualified. If one interprets this word in that way, a Faroese

court of law, see article 78 (3), can rule a law providing for radical positive discrimination unconstitutional based on the draft Constitution. This means that the wording in article 10 can restrain the lawmaker from giving overly discriminatory provisions.

The Swedish Constitution spells out the rule on positive discrimination in relations to gender quite clearly. Article 16 in the second chapter says that laws or other provisions that imply unfavourable treatment of a citizen on the grounds of gender may not be unconstitutional if they while discriminating one group are promoting equality. The Swedish lawmaker has here chosen a point of view, instead of letting the courts deal with this. The court will of course have to interpret the provision, but if compared to the Faroese draft the Swedish provision is more detailed. The Faroe draft article 10 (2) is more general and will in addition to gender equality also deal with all other sorts of equality related issues.

In a French constitutional case, the court said that a positive discrimination law, in regards to gender and quota, was unconstitutional. The law provided for a minimum of 25% of each sex. While the French Constitution provided for suffrage to be equal, the French Declaration provided for everyone to be eligible to offices without other distinction than talent. In the minds of the French constitutional judges, this meant that a 25% quota was both not based on talent and lead to unequal treatment. Moreover, since positive discrimination still is discrimination, even if it is positive – the court said that this was an unconstitutional law. Their reasoning is legally and logically perfect, but it might not lead to the best result. In other words, the court could maybe have interpreted the constitutional provision differently and achieved a result that reflected the parliaments (lawmakers) desires. While the French Declaration states that „talent" should be the only measurement, the Faroese draft lays down thresholds for positive discrimination. This implies that the Faroese court would have to interpret what „arbitrary, unjust, or offensive" means and more power is given to the courts. Seen together with the French wording the Faroese provision is more dynamic and it can therefore be harder to predict the outcome of a dispute – something that may be seen as negative. On the other hand, this will probably lead to better judgements in most cases because it might lead to fair and reasonable solutions.

Privileges

Article 12 of the draft is written in the same way as article 10; in the first paragraph, the right or rule is stated and then, in the second paragraph, the exceptions are stated. The article concerns privileges – and states that none can be provided or practiced. Privileges would only be allowed to correct a previous unequal treatment and then with time limits. I interpret the word „privileges" as a special right or advantage for a particular person or group. This is also the „ordinary" meaning of the term.

The historical aspect of this provision can be seen if one compares it with the provision on privileges from the Norwegian Constitution, see articles 23, 95 and 108. Article 23 is directly dealing with privileges, article 95 deals inter alia with dispensations from the law and article 108 states that no counties, baronies etc. is allowed. These articles were meant to deal with rich families where the family members inherited important roles in the society. The purpose of the provision was to hinder an inheritable rich-man's class in the Norwegian society.

In a legal context, privileges are understood as something more than granting special rights to disabled people or alike because these rights are meant to rectify unequal treatment. A clear example on a privilege in a legal context is a person who is given the right not to adhere to the criminal laws or taxation laws. As I understand the draft Constitution it would have to imply something more than only granting normal support or more welfare, but where the line must be drawn are up to the courts to decide. Special rights afforded to indigenous peoples can maybe be seen as privileges, but there would also in this situation be a discussion if the special rights may be seen as unjust and so forth, see article 10 (2). Article 12 is presumably meant to deal with all the specific areas dealt with in the three provisions from the Norwegian Constitution and the provision, article 12, is therefore important in a society that wants to avoid a rich and powerful class or an oligarchic system.

Article 44 of the Faroe Islands draft Constitution deals with equality before the law. This principle builds on a legal egalitarian thought and maintains that all citizens are equal before the law. This principle can be found in many constitutions, like the Icelandic Constitution, the Constitution of the United States and the German Constitution. The wording concerning equality before the law in different constitutions is often very similar, it is normally something like, „Everyone shall be equal before the law.„ The Constitution of the United States is though a bit different. This provision states „…states (can not) deny to any person … equal protection of the laws.„ This implies that the clause does not apply to the federal level. There have however been several decisions that have held that the Fifth Amendment due process clause forbids „unjustifiable“ discrimination and that this amendment implies the same as equal protection rule under article 14. This would mean that the principle also extends to the federal level.

The second paragraph of the Faroese draft provision concerns legal assessments. This article states that when a legal assessment is made, persons that are alike shall be treated in the same manner, while different persons shall be treated differently. Normally this principle would be part of or included in the principle of equality before the law. This extra guidance for the judiciary might have historical reasons, as it is not to my knowledge used in other western-European or North American constitutions. I cannot see that it is a necessary provision, but it might make the text easier to understand for non-lawyers.

The equal rights provisions dealt with in this chapter are very political and legal at the same time, but in line with other European countries statutes on equal rights in their respective Constitutions. The provisions are also worded in a way that makes them understandable and dynamic, something that can lead to court cases regarding the limits and interpretation of the different provisions.

Conclusions

More than principles

The draft has been written in a way, concerning the provisions dealt with in this text, which lays the ground for it to be used. It differs from amongst others the Norwegian Constitution when it deals with equality in such a thorough way. In addition, as shown above, one can find actual rights in the Faroe Islands draft Constitution. The makers of the draft could have chosen a different path and made a constitution of more general principles, albeit there are general principles to be found in the draft as well, that were all to be specified in regular laws later. This latter approach would perhaps have made the document easier to agree on and adopt by the people and their representatives. However, it would not be as strong and since there would be fewer actual rights in it, the people would not have an incentive to care about it.

The draft as it is published must also be said to imply certain values. In relation to the widely used, „All are equal before the law" – clause the Faroese draft talks about that all are valued equally. This can be seen as something more than just a granted right. In addition to the legal rights afforded by this provision, the provision also contains a value-aspect, which says something about the type of society the Faroese wants and what fundament the land is built on. Article 12, on privileges, follows up on this thought and confirms that the „all are and shall be equal" – principle is a cornerstone in the Faroese society, when prohibiting privileges subject to certain conditions.

Ending notes on equality and the role of the judiciary in the draft

The draft seems further more to be built on much of the same principles as other western-European law, and especially Nordic and Old Norse law, instead of based on for example Roman law. Partly because of this, the draft Constitution better represents the Faroese people than the Danish Constitution does. The most important aspect is of course that this Constitution is made by and for the Faroe Islands.

Regarding the role of the judiciary the „… make law where no law is.„ provision is special. Even if many courts always or at least for a very long time have „made" law by constructing precedence's, this is not very often seen written

down in constitutions. This clarifies the role of the judiciary to non-legal trained persons but can also create problems concerning the boundaries of the courts right to „make“ law.

One possible future
Some scholars are defining equality wider than what is presently normal and including certain or all animals in the scope of equal rights. HYPERLINK „http://en.wikipedia.org/wiki/Peter_Singer"Peter Singer, an Australian philosopher, includes animals and maintains that the pleasures and pains of every animal should count equally in moral deliberation. Singer has frequently defended what he calls the principle of equal consideration of interests. This point of view is, to my knowledge, not international customary law or national customary law in any jurisdiction, but it might represent a future development of the interpretation of the principle of equality. As stated above, the principle of equality has grown and is now covering more ground than it historically has done and including animals into the definition could be a natural development. Article 10 paragraph 1 of the Faroese draft states in the translated version that, „All are valued equally.„ As can be seen here, the word „All“ would have to be interpreted. To include animals in this wording would maybe be „far fetched“ today, as were women's suffrage in most states a few generations back, but it might also be one possible future.

All internet references are as at 31st of July 2006.
The historical background has been found on the Internet:

Wikipedia contributors, „Faroe Islands„ Wikipedia, The Free Encyclopedia, http://en.wikipedia.org/w/index.php?title=Faroe_Islands&oldid=44943326.

Løgmansskrivstovan, The Prime Minister's Office of the Faroe Islands www.tinganes.fo.

Løgtingið (in English) http://www.logting.fo/L%F8gting%20UK%202004.pdf.

Some pro-union voices are claiming that the election was a referendum and binding on the parliament. Reference: Conversation with Kári á Rógvi, LL.M. Deputy Chair of the Faroese Constitutional Committee, during the spring of 2006 in Reykjavik, Iceland.

Act no. 11 of 31st March 1948 on the Home Government of the Faroese.

Act on the Power of Matters and Fields of Responsibility.

CIA Factbook: https://www.cia.gov/cia/publications/factbook/geos/fo.html.

This chapter is based on Kári á Rógvi's „A Note on the Text and Translation of the Draft Constitution.„

The translation is prepared by Kári á Rógvi, LL.M. Deputy Chair of the Faroese Constitutional Committee.

See comment by Professor Francis Sejersted in Aftenposten (Norwegian Newspaper) http://www.aftenposten.no/meninger/kronikker/article1173092.ece.

There have been amendments to the Norwegian Constitution, so that it better can represent today's society but there is not for example a reference to parliamentarianism or the air force (the Navy and the Infantry are mentioned, see article 25 of the Norwegian Constitution).

See U.S. Supreme Court: Gideon v. Wainwright, 372 US 335 (1963).

Established by the Constitution of the Fifth Republic 4 October 1958.
See the Basic Law for the Federal Republic of Germany (Grundgesetz, GG) Article 93.

Positive discrimination is the Great Britain term, while the term affirmative action often is used in United States law.

18 November 1982 – Décision n° 82-146 DC, Journal officiel du 19 novembre 1982, p. 3475.

French Constitution of October 4. 1958 article 3 (3) second period.

Definition from Oxford English Dictionary, Oxford University Press 2001, 2002.

Article 31 (1) Vienna Convention on the Law of Treaties (1969). This convention is only applicable between states, but the General Rule of Interpretation in article 31 (1) represents a widely used principle of interpretation and will therefore be applied.

Article 65 of the Constitution of the Republic of Iceland.

XIV Amendment of the United States Constitution.

Article 3 of the Basic Law for the Federal Republic of Germany (Grundgesetz, GG).

William B. Lockhart, Yale Kamisar, Jesse H. Choper, Steven H. Shiffrin and Richard H. Fallon, Jr. Constitutional Rights and Liberties – Cases – Comments – Questions Eight Edition (1996) West Publishing Co. p. 1054.

Rúni Rasmussen

Konstitutionalisma og stjórnarskipanir

Samandráttur
Í greinini verður greitt frá teirri fólkaræðisligu gongdini seinastu árini. Tey skyldu hugøkini konstitutionalisma og stjórnarskipan verða lýst og allýst. Víst verður á ymiskar allýsingar av hesum hugtøkum. Valdsbýti ella valdsavmarking, løgræði, mannarætindi og hugsanin um umboðandi ella fólkaræðisligt stýri eru partar av skipan, sum er grundað á konstitutionalismu. Staðfest verður, at í frælsum og fólkaræðisligum skipanum verður mett, at høvuðsendamálið við eini stjórnarskipan er at avmarka stjórnarvaldið við tí fyri eyga at verja rættindini hjá einstaklingum og at tryggja politiskan stabilitet. Arbeiðið at smíða eina nýggja føroyska stjórnarskipan verður lýst í stuttum, og víst verður á, at Stjórnarskipanarnevndin hevur ein søguligan møguliga at smíða eina grundleggjandi lóg fyri Føroyar við støði í felags samleika.

Fólkaræðisvøkstur

Støðan hjá nógvum londum er grundleggjandi broytt seinastu 50 árini. Fleiri lond vunnu sjálvstýri og gjørdust fullveldisríki. Fólkaræðishugsjónin hevur í stóran mun broytt tilveruna bæði hjá samfeløgum og einstaklingum. Hugtøkini fólkaræði og frælsi hava verið natúrligur partur av almenna og politiska orðaskiftinum kring heimin. Serliga aftan á, at kommunisman fall í Sovjetsamveldinum og Eysturevropu í tíðarskeiðinum 1989-1991, hava hesi bæði hugtøkini verið nógv nýtt. Einaveldi fullu, og royndir at smíða frælsar, fólkaræðisligar skipanir vóru framdar í fyrrverandi kommunistisku londunum.

At smíða og evna til eina politiska skipan, sum skal staðfesta og seta á stovn fólkaræði, er ein hin størsta avbjóðingin, ið eitt fólk møtir. Hetta er serliga galdandi fyri tey lond, sum ikki hava havt nakra fólkaræðisliga siðvenju ella mentan. Hagtøl vísa tó, at til ber at smíða nýggja politiska skipan, sum tekur av gamlar, og ofta kúgandi, skipanir og skapa nýggja skipan, sum hevur sum endamál at tryggja frælsi hjá borgarum landsins. Hesar skipanir, sum hava frælsi sum endamál, eru aloftast grundaðar á verju av grundleggjandi rættindum, fólkaræði, valdsbýti (valdsavmarking) og løgræði. Slíkar stjórnarskipanir (grundlógir) hava veruliga vunnið frama kring heimin seinastu 50 árini.

Sambært kenda granskingarstovninum Freedom House, er politiska frælsið økt

munandi seinastu 30 árini. Stovnurin býtir upp heimin í tríggjar partar: frælsa heimin, lutvís frælsa heimin og ófrælsa heimin. Í 1974 vóru 42 lond mett at vera fræls, 48 lond vóru mett at vera lutvís fræls og 63 lond vóru mett at vera ófræls. Tølini fyri 2004 vísa, at munandi fleiri lond eru vorðin fræls. Í 2004 vóru 89 lond mett at vera fræls. Í 2004 var heimsins fólkatal 6,4 mia. Av hesum búðu 2,8 mia. fólk (44 %) í frælsa heiminum, 1,9 mia. fólk (18,59 %) búðu í lutvíst frælsa heiminum og 2,4 mia. fólk (37,33 %) búðu í ófrælsa heiminum. Í 2004 búðu 2,8 mia. fólk (44 %) í frælsa heiminum í mun til 1,4 mia. fólk (24,83 %) í 1992. Hesi tøl eru áhugaverd og viðkomandi fyri ein og hvønn, sum hevur áhuga fyri politisku støðuni í heiminum og fyri alheims fólkaræðisligu gongdini. Øll hesi lond, sum hava sett á stovn fólkaræði og eru vorðin bólkað sum fræls, hava verið ígjøgnum eina tilgongd, sum hevur kravt dirvi, vilja og semjusøkjandi mannagongdir. Fólkaræði verður ikki sett á stovn eftir einari nátt. Tilgongdin tekur tíð. Eingi lond eru eins, og eingin endalig og fullkomin frælsisuppskrift er tøk, men tó eru nøkur felagseyðkenni fyri fræls og fólkaræðislig lond.

Í eini fólkaræðisligari skipan fær fólkið rødd og ávirkan á avgerðir, og til tess at tryggja frælsið hjá borgarunum ímóti ágangi frá myndugleikunum, verður roynt at avmarka valdið hjá myndugleikunum og skapa eina valdsjavnvág millum ymisku vøldini. Løgræði er eisini partur av fólkaræðisligari skipan. Løgræði tryggjar, at borgarar og almennir myndugleikar skulu geva seg undir lógirnar í landinum; eingin er hevjaður oman fyri lógirnar.

Allýsing av konstitutionalismu

Týdningarmikið er í politiskari gransking at hava greiði á teimum nýttu hugtøkunum. Mál og hugtøk eru amboð, sum verða nýtt fyri at kunna samskifta og fremja gransking, gera niðurstøður og geva øðrum innlit í egið granskingararbeiði og niðurstøður. Innan samfelagsvísindalig fak, t.d. stjórnmálafrøði, er endamálið ikki at menna endaligar allýsingar. Hetta er sera trupult og helst ómøguligt. Allýsingar eru ætlaður at vera fyritreyt fyri at kunna siga nakað skilagott um samfelagið og samfelagsviðurskifti, so at fatanin av samfelagsligum fyribrigdum kann mennast og vísindaligar niðurstøður kunnu gerast. Ofta er neyðugt at endurskoða áður viðurkendar allýsingar, tí samfelagið ella viðurskifti í samfelagnum eru grundleggjandi broytt.

Orðið hugtak er týdningarmikið at skilja. Ofta verða orð brúkt uttan at hugsað verður um innihald og týdning. Fyri at vita, hvat ein hundur er, er neyðugt at kenna hugtakið hundur. Á sama hátt mugu vit kenna hugtakið fólkaræði fyri at kunnu skilja og vita, hvat fólkaræði er. Hugtøk eru sjálvandi ymisk, tí fólk hava ikki somu fatan av hugtøkum. Men neyðugt er at royna at menna hugtøk, sum semja er um, tí uttan nýtilig hugtøk er vónleyst at samskifta, argumentera, greina og gera niðurstøður. Innan stjórnmálafrøði ella politisk ástøði eru grundleggjandi

hugtøk, sum ein eigur at hava kunnleika um og brúka. Uttan hesi hugtøk gerst politisk gransking fløkjaslig og vónleys.

Tað er eingin røtt ella skeiv allýsing av konstitutionalismu, men talan kann vera um góðar og minni góðar allýsingar. Konstitutionalisma er eitt hugtak, ið ofta verður sett í samband við politisku ástøðini hjá John Locke og teir amerikonsku stjórnarskipanarsmiðirnar (founding fathers) og teirra hugsan um lógarásetta avmarking av valdinum hjá almennu myndugleikunum. Teir amerikonsku stjórnarskipanarsmiðirnir hugleiddu dúgliga um, hvussu ein góð og frælsistryggjandi stjórnarskipan skuldi skipast. Í greinasavninum The Federalist Papers verður roynt at lýsa avbjóðingar og loysnir í samband við amerikonsku stjórnarskipanina, sum varð skrivað í 1787 og fekk gildi í 1789. James Madison verður roknaður at vera faðir at teirri amerikonsku stjórnarskipanini, og tí er tað í sambandi við allýsing av konstitutionalismu áhugavert og viðkomandi at lata Madison koma til orðanna:

"But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external or internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place obligate it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

Brotið oman fyri lýsir sera væl kjarnina í konstitutionalismu, nevniliga at skapa eina stjórn, sum skal fyrisita menniskjum og verða fyrisitin av menniskjum og gera stjórnina føra fyri at hava umsjón við teimum stjórnaðu og síðani plikta stjórnina at hava tamarhald á sær sjálvari. Konstitutionalisma snýr seg tískil í stóran mun um avmarking av valdinum hjá politiska myndugleikanum fyri at tryggja frælsið hjá borgarunum. Aloftast verða eisini grundleggjandi rættindi og valdsavmarkingar, ofta valdsbýti, staðfest í týdningarmiklasta politiska skjalinum, nevniliga landsins stjórnarskipan (grundlóg).

Jan-Erik Lane allýsir konstitutionalismu á henda hátt í bók sín Constitutions and Political Theory: „Constitutionalism is the political doctrine that claims that political authority should be bound by institutions that restrict the exercise of power.„ Eins og í endurgivna brotinum hjá James Madison leggur Jan-Erik Lane dent á, at konstitutionalisma snýr seg um avmarking av valdinum hjá politiska myndugleikanum. Lane vísir eisini á, at valdsbýti og mannarættindi og skyldur, sum eru ásettar í millumtjóða sáttmálum, eru partar av konstitutionalismu.

M. J. C. Vile lýsir væl hugtakið konstitutionalismu í bókini Constitutionalism

and the Separation of Powers. Allýsingin er henda: „Constitutionalism is not a matter of seizing a short-term advantage; it is a belief in the need to establish and support those values in the political system which provide for stability and maintain the procedures which protect the liberty of the individual in a democratic society.„ Her verður staðfest, at konstitutionalisma eisini inniber eina politiska skipan, sum skal borga fyri stabiliteti og varðveiting av frælsinum hjá tí einstaka í samfelagnum. Sostatt snýr konstitutionalisma seg, sambært Vile, um annað enn at avmarka stjórnarvald. Tey virði, sum skapa stabilitet og frælsi er kjarnin í konstitutionalismu.

F.A. Hayek hevur skrivað verkið The Constitution of Liberty. Verkið er ein lýsing og viðgerð av hugtakinum frælsi. Hayek vísir á, hvat frælsi er, og hvussu tað hevur ávirkað lond og eigur at ávirka øll samfelagsøki. Í hesum verki hevur hann áhugaverda allýsing av konstitutionalismu:

"Constitutionalism means that all power rests on the understanding that it will be exercised according to commonly accepted principles, that the persons on whom power is conferred are selected because it is thought that they are most likely to do what is right, not in order that whatever they do should be right. It rests, in the last resort, on the understanding that power is ultimately not a physical fact but a state of opinion which makes people obey.„

Brotið gevur veruligt innlit í politisk ástøði, tí sagt verður, at tey ráðandi eiga at endurspegla almenna viljan og grunda sítt vald á góðtiknar meginreglur. Vald er sostatt gundað á fólkaviljan, tí tað er fólkið, sum velur tey ráðandi við tí útgangsstøði, at tey valdu fara at grunda sítt stjórnarvald á tað, sum er rætt sambært fólkaviljanum. Konstitutionlisma merkir, sambært Hayek, at tey ráðandi grunda sítt stýri á alment góðtiknar meginreglur, og henda fatan ber við sær, at hesar góðtiknu meginreglur allýsa og avmarka stjórnarvaldið. Orðini alment góðtiknar meginreglur hjá Hayek tykjast at liggja nær vanligari fatan av løgræði.

Michel Rosenfeld lýsir konstitutionalismu í grein síni Modern Constitutionalism as Interplay Between Identity and Diversity, sum er partur av greinasavninum Constitutionalism, Identity, Difference, and Legitimacy. Hansara allýsing er soljóðandi: „There appears to be no accepted definition of constitutionalism but, in the broadest terms, modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights.„ Rosenfeld staðfestir ta sannroynd, at tað tykist ikki at vera nøkur góðtikin allýsing av hugtakinum konstitutionalismu. Hann gevur síðani sítt boð uppá, hvat konstitutionalisma, í breiðari merking, inniheldur. Avmarking av stjórnarvaldi er partur at hugtakinum. At geva seg undir løgræði (Rule of Law) er eisini partur av hugtakinum, og verja av grundleggjandi rættindum er somuleiðis partur av konstitutionalismu. Avmarking av stjórnarvaldi merkir, at

almenni myndugleikin ikki kann gera sum honum lystir. Eisini myndugleikin skal halda seg til greiðar spælireglur. Endamálið við valdsavmarking er at forða fyri stríði og ágangi ímóti frælsinum hjá tí einstaka. Løgræði er ein konstitutionell meginregla, sum serliga er viðurkend í frælsum fólkaræðisligum londum. Løgræði merkir, at land verður stýrt við lógum, og lógir landsins tryggja borgarunum verju ímóti ágangi frá statinum. Løgræði tryggjar við einari klassiskari orðing „government of laws and not of man.„ Lógin ræður sostatt bæði yvir borgarunum og statinum. Triðja innihaldið í konstitutionalismu, sambært Rosenfeld, er verja av grundleggjandi rættindum. Rættindi skulu verja borgaran fyri ágangi frá øðrum borgarum og almenna myndugleikanum.

Í greinini The Confines of Modern Constitutionalism vísir David T. ButleRitchie á tvær vanligar merkingar av konstitutionalismu. Fyrsta merkingin snýr seg um, hvussu samfelagið er skipað. Tá ið ein spyr: „Hvussu er eitt samfelag konstituerað?“ verður sipað til hesa merking ella allýsing. Hugtakið umfatar tað mentanarliga, búskaparliga, løgfrøðiliga, politiska og sosiala – tað er tað, ið ein samfelagsskipan er sett saman av. Tá ið tosað verður um konstitutiónina í einum samfelagi, verður hinvegin sipað til formelt skrivað skjal, har statsinstitutiónirnar v.m. eru ásettar. Henda seinna merkingin er tann formella fatanin av konstitutionalismu. ButleRitchie vísir á, at hesar báðar merkingarnar samsvara væl við skilnaðin ímillum fornu og modernaðu fatanina av konstitutionalismu. Forn konstitutionalisma snýr seg í størstan mun um samfelagsskipanina. Í modernaðari konstitutionalismu verður høvuðsdenturin hinvegin lagdur á formligar statsinstitutiónir; borgarans rættindi mótvegis myndugleikum v.m. T.d. kunnu Aristoteles og Cisero setast í samband við forna konstitutionalismu, og John Locke og James Madison kunnu setast í samband við modernaða konstitutionalismu. Serliga áhugaverd er lýsingin hjá ButleRitchie av modernaða hugtakinum konstitutionalismu. Um hugtakið sigur hann:

“Modern constitutionalism, as I use the term throughout the rest of this project, refers to a set of formal legal and political concepts that were developed in Western Europe during the enlightenment. These concepts, which serve as cornerstones of liberal political theory (and evolved to support that theory), are the division and limitation of governmental power, the recognition and protection of certain individual rights, the protection of private property, and the notion of representative or democratic government.”

Hornasteinar í modernaðari konstitutionalismu eru sostatt hesir sambært ButleRitchie: býti og avmarking av stjórnarvaldi, verja av borgararættindum, verja av ognarrættinum og hugsanin um umboðandi ella fólkaræðisligt stýri.

Stjórnarskipanir og endamál teirra

Ein stjórnarskipan (ella grundlóg) kann sigast at vera tað fyribrigdið, ið hugtakið konstitutionalisma fyrst og fremst sipar til. Her skal tí verða roynt at fáa greiði á møguligum týdningum av orðinum stjórnarskipan og teimum orðum, sum hava sama týdning ella eru nær skyld.

Úti í heimi verða stjórnarskipanir nevndar alt frá grundlógum (grundgesetz, grundlag, grundlov) til konstitutiónir (constitution), forfatningar (verfassung, forfatning) og stýrisskipanarlógir ella stjórnarskráir. Orð og heiti hava tó ikki annan týdning, enn vit leggja í tey. Grundlógir, forfatningar, konstitutiónir og stjórnarskráir ella stjórnarskipanir merkja í modernaðari tíð á leið tað sama; tær eru grundviðtøkur fyri samfeløg og binda ofta saman fortíð, nútíð og framtíð, har tjóðin ella samfelagið verður (endur)stovnað og grundleggjandi viðurskifti sum eitt nú rættarskipan og stýrisslag ásett.

Orðið stjórnarskipan ella konstitutión kann sum longu nevnt oman fyri allýsast við breiðari og smalari merking. Sambært breiðu allýsingini merkir stjórnarskipan øll tann stjórnarligu skipanina; t.e. lógir, ymiskar reglur (skrivaðar ella óskrivaðar), konventiónir, siðvenja og praksis. Tann smala allýsingin vísir vanliga til løgfrøðiligt skjal, t.e. stjórnarskipanarlóg. Henda merking líkist rómversk-germansku siðvenjuni, har stjórnarskipan verður kallað grundlóg (basic law, Grundgesetz), sum inniheldur hesa kjarnuhugsan: Grundlóg er truplari at broyta ella ógilda enn vanligar tinglógir. Grundlóg er hægsta lógin í einum lógarstigveldi (lógarhierarki); grundlógin er grundleggjandi lóg og kann eisini nevnast evstalóg, tí skipanin er grundað á meginregluna lex superior. Henda smala merking av hugtakinum stjórnarskipan er vanlig í Norðanlondum (á svenskum Grundlag, á norskum Grunnlov og á donskum Grundlov).

Løgfrøðingarnir Bárður Larsen og Kári á Rógvi hava skrivað áhugaverda grein um stjórnarskipan í Fyrra flaggdagsáliti. Greinin er ein góð lýsing av hugtakinum konstitutionalismu við atliti til føroysk viðurskifti. Um endamál við stjórnarskipan siga teir:"Mangir hættir eru at lýsa eina stjórnarskipan, og ongin einstøk lýsing kann vera einsamøll. Men flestu eru samd um, at eitt av høvuðsendamál við skrivaðari stjórnarskipan er at skapa støðugleika og framhald.„ Í greinini verður eisini víst á tveir vanligar hættir at lýsa munin ímillum vanliga lóg og stjórnarskipan (grundlóg). Annar er tann formligi munurin, sum snýr seg um, hvussu lógin verður samtykt og broytt, og hin munurin er tann innihaldsligi, ið heftir seg við, hvørji viðurskifti, ið stjórnarskipanin hevur ásetingar um.

Stjórnarskipanir eru ymiskar frá einum landi til annað. Tó eru nøkur alfevnd eyðkenni. Stjórnarskipanir regulera skipanina av stjórnini, áseta ofta slag av politiskari skipan (forsetaskipan, tingræðisskipan ella blandingsskipan), skipa starv og avmarkingar hjá lóggevandi, útinnandi og dømandi valdi og viðurskiftini

teirra millum, og hvussu valdið er býtt ímillum meginstjórn og statir/landspartar. Eisini er vanliga grundleggjandi rættindaverja (bill of rights) staðfest í eini stjórnarskipan.

Hóast eingin endalig ella alment góðtikin allýsing er tøk av hugtakinum stjórnarskipan, er tað mennandi og skilagott at royna at menna allýsing av hugtakinum, tí á tann hátt verður allýsingin, um hon er nøktandi, eitt gott amboð í viðgerðini av stjórnarskipanarligum viðurskiftum.
Á sama hátt sum ymiskir felagsskapir hava ymisk endamál, hevur ein statur nøkur grundleggjandi endamál. Ósemja man vera um hvørji endamálini eru ella eiga at vera hjá einum stati, tí hugsanir um endamálini eru í stóran mun avgjørdar av tí hugmyndafrøðiligu grund, ið ein stendur á. Tó man ávís semja vera um nøkur grundleggjandi endamál hjá statinum. Ein stjórnarskipan er miðil til at røkka ávís endamál. Í bókini Politics vísir Andrew Heywood á nøkur týdningarmikil endamál, sum ein stjórnarkipan hevur. Tey eru: at geva statum vald ella myndugleika, at staðfesta sameinandi virði og mál, at útvega stjórnarstabilitet (politiskan stabilitet), at verja frælsi og at legitimera stýrið.

Ein stjórnarskipan er eitt slag av spælireglum, sum skipa politisku institutiónirnar og royna at staðfesta greiðar og skilagóðar mannagongdir fyri at tryggja effektivitet og politiskan stabilitet. Hetta er aðaltátturin í konstitutionalismu. Tað øvuta av slíkum skipaðum stjórnarligum viðurskiftum er tilvildarligt og sjálvráðið stjórnarvald. Tær flestu stjórnarskipanirnar innihalda lógargreinar, sum hava sum endamál at forða fyri, at alt valdið verður miðsavnað, og at vandin fyri valdsmisnýtslu harvið verður øktur. Roynt verður at skipa greiðan skilnað millum útinnandi, lóggevandi og dømandi vald. Gott dømi um slíka lógargrein er at finna í pólsku stjórnarskipanini § 10, stk 1:"The system of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.„ Í hesi grein verður greitt staðfest, at valdið í pólsku politisku skipanini er tríbýtt og eitt av endamálunum við hesum býti er at tryggja stjórnarstabilitet.

Samanumtikið kann sigast, at í frælsum fólkaræðisligum skipanum verður mett, at høvuðsendamálið við eini stjórnarskipan er at avmarka stjórnarvaldið við tí fyri eyga at verja rættindini hjá einstaklingum.

Ein føroysk stjórnarskipan

Ofta verða nýggjar stjórnarskipanir smíðaðar í sambandi við kreppu ella kollvelting. Borgararnir royna í slíkum førum at staðfesta grundleggjandi rættindi og annars at leggja lunnar undir komandi samfelagið. Góð dømi um hetta eru amerikanska Frælsisyvirlýsingin frá 1776 og franska Mannarættindayvirlýsingin frá 1789. Men spurningurin er, um flestu borgarar í slíkum broytingartíðum eru

nóg „edrúiligir“ politiskt til at staðfesta og allýsa virði fyri framtíðar samfelagið. Løgfrøðingarnir Bárður Larsen og Kári á Rógvi hava skrivað áhugaverda grein í Fyrra flaggdagsáliti, sum teir nevna Skipanin. Um fyritreytirnar hjá føroyingum at smíða eina stjórnarskipan, siga teir t.d.: Møguleiki er tó fyri, at føroyingar í síni tilgongd eru hepnari enn flest onnur fólk. Long tíð er nú liðin síðan seinastu kreppu, og fólkið kann sigast aftur at vera nóg „edrúiligt“ til at leggja treytir fyri komandi samfelagið. Sambært hesi fatan er tíðin lagalig til at seta á stovn nýggja eina stjórnarskipan.

Tað verður av fleiri mett at vera týdningarmikið, at føroyska fólkið staðfestir og lýsir, á egnum máli, hvat fólkið er, og hvørja grund fólkið byggir samfelagið á. Arbeitt verður framvegis við at smíða eina nýggja føroyska stjórnarskipan. Grundarlagið fyri hesum arbeiði er frágreiðing frá gomlu Grundlógarnevndini og frágreiðing frá formanninum í Stjórnarskipanarnevndini (Fyrra flaggdagsálit frá 2004). Stjórnarskipanarnevndin er sett saman av politikarum og serfrøðingum. Nevndin skal lata landsstýrinum álit og uppskot til stjórnarskipan í seinasta lagi 31. desember í 2006.

Nevndin hevur ein søguligan møguleika at smíða eina grundleggjandi lóg fyri Føroyar. Stríð um ríkisrættarliga spurningin hevur í stóran mun eyðkent politiska kjakið í Føroyum. Arbeiðið í Stjórnarskipananevndini er eitt gylt høvi hjá øllum politiskum flokkum at prógva, at føroyingar kunnu semjast um at staðfesta elligomlu virðini, støðu landsins við onnur lond og tey rættindi, sum fólkið longu hevur og menna tey víðari.

Ein nýggj stjórnarskipan verður samtykt av fólkinum. Tað er fólkið, sum, við hesi skipan, staðfestir sín samleika, virði og rættindi. Upprunin til hesa nýggju grundleggjandi lóg er sostatt føroyska fólkið. Fólksins vilji er tann evsti myndugleikin, og tí skulu aðrar lógir smíðast við støði í andanum í teirri nýggju skipanini.

Í uppskoti til formæli stendur:”Vit, fólkið í Føroyum, samtykkja hesa stjórnarskipan okkara. Hon er grundarlag undir stýri okkara og tann fyriskipan, ið skal tryggja frælsi, trygd og trivnað okkara.„

Vónandi fer viljin at fáa í lag eina tjóðskaparliga semju at vinna á teimum ósemjum og trætum, sum forða fyri, at føroyingar smíða sína egnu grundleggjandi skipan við støði í felags samleika.

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Rúni Rasmussen hevur tikið B.S.Sc.-prógv í stjórnmálafrøði, B.A.-prógv í søgu og mentanarfrøði og M.S.Sc.-prógv í stjórnmálafrøði á Fróðskaparsetri Føroya. Hann er skrivari í Stjórnarskipanarnevndini.

Freedom House varð stovnað av Eleanor Roosevelt og øðrum í 1941. Stovnurin hevur sum endamál at virka fyri og verja fólkaræði og frælsi í øllum heiminum. Stovnurin gevur javnan út tilfar, sum vísir støðuna í heimsins londum (serliga fullveldisríkjum) í samband við fólkaræði og frælsi. Heimasíðan: www.freedomhouse.org.

Http://www.freedomhouse.org/template.cfm?page=130&year=2005. Tikið av internetinum 8. mars 2006.

Tó nýtist hetta ikki vera so, tá ið tað ikki er nøkur forðing fyri, at eitt stýri við lítlum ella ongum fólkaræðisligum innihaldi kortini er so mikið at sær komið, at týðandi avgerðir í stóran mun fylgja reglum, ið eru staðfestar frammanundan. Men hetta er ástøði. Í veruleikanum er oftast so, at semja framman undan um spælireglurnar í einum samfelagi er treytað av líknandi virðing millum menniskju, ið illa fær verið uttan undir onkrum slagi av fólkaræði. Tí ber til við einum ávísum rætti at siga, at løgræði (Rule of Law) er tengt at fólkaræðisligari skipan.

Í bók síni Political Theory sigur Andrew Heywood t.d. hetta um mál og hugtøk: „Language is both a tool with which we think and means by which we communicate with others. If the language we use is confused or poorly understood, it is not only difficult to express our views and opinions with any degree of accuracy but it is also impossible to know the contents of our own minds.„ Sí Heywood, 2004, s. 1.

Http://plato.stanford.edu/entries/constitutionalism/ Tikið frá internetinum 8. mars 2005.

Alexander Hamilton lýsir væl avbjóðingina at skapa eina nýggja stjórnarskipan í The Federalist Papers no. 1: „It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the importan question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.„ Sí Madison, 1999, s. 1.

The Federalist Papers nr. 51. Sí Madison, 1999, s. 290.

Viðmerkjast skal tó, at til ber at hava eina konstitutionella stjórnarskipan uttan tó at hava eitt grundleggjandi politiskt skjal (stjórnarskipan). Ongland og Ísrael eru dømi um lond við einum slagi av konstitutionellari skipan, hóast tey ikki hava eina skrivaða stjórnarskipan. Men ivasamt er tó, um tað í slíkum føri ber til at siga, at landið hevur eina stjórnarskipan í modernaðari merking.

Lane, 1996, s. 19.
Ibid.
Vile, 1998, s. 408.
Hayek, 1999. s. 181.
Rosenfeld, 1994, s. 3.
Heywood, 2004, s. 154.

Dømi um grundleggjandi rættindi: talufrælsi, skrivifrælsi, trúarfrælsi og privatur ognarrættur. Í donsku ríkisstjórnarskipanini verður t.d. tali- og skrivifrælsi staðfest í § 77: „Enhver er berettiget til på tryk, i skrift og tale at offentliggøre sine tanker, dog under ansvar for domstolene. Censur og andre forebyggende forholdsregler kann ingensinde pány indføres.„ Allar stjórnarskipanir í fólkaræðisligum londum staðfesta og tryggja verju av grundleggjandi rættindum.

ButleRitchie, 2004, s. 3.
Ibid. s. 4.
Ibid. s. 6.

Annars er ButleRitchie ein av teimum atfinningarsomu høvundum, ið sær modernaða konstitutionalismu sum umboð fyri og avleiðing av upplýsingstíðarhugsan, ið hevur ov stórt álit á menniskjans evnum til at bólka og endaliga lýsa politiska og sosiala heimin; harvið eisini hugsanin, at til ber í einum einstøkum skjali at skriva og staðfesta grundviðtøkur fyri eitt heilt samfelag. Hetta er kortini heilt annað evni, ið ikki verður viðgjørt í hesi grein.

Formansskapurin í Stjórnarskipanarnevndini, 2004.
Husa, 2002, s. 15.
Ibid. s. 16.
Larsen, 2004, s. 38.
Ibid. s. 39.

Hóskandi er at gera vart við, at í norsku stjórnarskipanini er eingin áseting, sum staðfestir, at tingræðislig skipan er galdandi í Noregi. Lond kunnu sostatt óformliga lata stórar og grundleggjandi broytingar henda. Sí Fyrra flaggdagsálit, 2004, s. 38.

Bill of Rights kann umsetast til rættindaskjal. Eitt slíkt rættindaskjal er eitt løgfrøðiligt skjal, sum tryggjar og staðfestir frælsi og borgarlig rættindi. Tey fyrstu tíggju ískoytini til amerikonsku stjórnarskipanina er eitt dømi. Nevnast kann fyrsta ískoytið, sum er soljóðandi: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.„

Andrew Heywood allýsir í bókini Key Concepts in Politics eina stjórnarskipan á henda hátt:"A Constitution is, broadly, a set of rules that seek to establish the duties, powers and functions of the various institutions of government, regulate the relationship between them, and define the relationship between the state and

the individual. Constitutions thus lay down certain meta-rules for the political system; in effect, these are rules that govern the government.„ Sí Haywood, 2000, s. 196.

Heywood, 2002, s. 298.

Viðmerkjast skal, at munur er á valdsbýti millum útinnandi og lóggevandi vald í ávikavist tingræðisskipan og forsetaskipan. Tað er ikki talan um veruligt valdsbýti millum lóggevandi og útinnandi vald í skipan við tingræði, tí stjórnin (samgongan) hevur bæði tað lóggevandi og útinnandi valdið. Harafturímóti er hetta býti veruligt í forsetaskipan, tí bæði lóggevandi og útinnandi vældini eru vald hvør sær beinleiðis av fólkinum. Tað besta dømið um slíka skipan er tann amerikanska politiska skipanin. Fólkið velur umboð til Kongressina (Umboðsmannatingið og Senatið), sum er lóggávuvald, og forsetin (útinnandi vald) verður eisini valdur av fólkinum. Sí Rasmussen, 2005, s. 14-23.

Vanliga verður skilt ímillum tvey sløg av rættindum, nevniliga negativ og positiv rættindi. Í frælsari konstitutionalismu verður høvuðsdentur lagdur á tey sokallaðu klassisku ella siðbundnu borgararættindini. Endamálið við at seta eina stjórn á stovn er at verja slík rættindi. Hesi eru tey sokallaðu negativu rættindini. Alt fleiri lond hava ásetingar um búskaparlig, sosial og mentanarlig rættindi. Dømi um slík rættindi eru: rættur til sjúkrahjálp, útbúgvingarrættur og rættur til forsorgarhjálp. Hesi eru tey sokallaðu positivu rættindini. Hesi rættindi hava ofta elvt til kjak, tí hesi rættindi krevja víðkan av almenna myndugleikanum. Fyritreyt fyri úvegan av slíkum rættindum er jú ein statur við stórum búskaparligum og sosialum tilfeingi. Er tað nøkur orsøk til at orða trygging av slíkum rættindum í eini stjórnarskipan, um tað ikki er møguligt hjá statinum at veita tær tænastur, sum rættindini krevja? Greitt er, at hetta er ein hugmyndafrøðiligur spurningur. Í indisku stjórnarskipanini verður t.d. ásett, at rætturin til arbeiði verður tryggjaður „within the limits of economic capacity and development.„ Sí Heywood, 2002, s. 299.

Norski heimspekingurin Jon Elster hevur skrivað sera áhugaverda grein, sum nevnist Forces and Mechanism in the Constitution-Making Process. Greinin lýsir og viðger ymiskar mekanismur í sambandi við stjórnarskipanarsmíð. Elster vísir á, at stjórnarskipanir tykjast at koma fram í bylgjum. Hann sigur, at í minsta lagi sjey bylgjur kunnu staðfestast. Sí Elster, 1995, s. 368.

Larsen, 2004, s. 39.

Heimasíðan hjá nevndini er: http://www.ssn.fo.

Grundarlagið undir arbeiðinum hjá nevndini er løgtingslóg nr. 79 frá 8. mai 2003 um stjórnarskipanarnevnd, sum broytt við løgtingslóg nr. 72 frá 23. mai 2005.

Cass R. Sunstein vísir í bókini Designing Democracy á, at til ber at finna semjur hóast fólk eru ósamd um konstitutionell átøði. Hesar semjur nevnir hann uncompletely theorized agreements. Um hetta sigur Sunstein:"My basic suggestion is that people can often agree on constitutional practices, and even

on constitutional rights, when they cannot agree on constitutional theories. In other words, well-functioning constitutional orders try to solve problems, including problems of deliberative trouble, through reaching incompletely theorized agreements. Sometimes these agreements involve abstractions, accepted amid severe disagreement on particular cases.„ Sí Sunstein, 2001, s. 50. Tað er hóskandi at vísa á eitt dømi. Fólk kunnu hava ymiskar meiningar (ella ástøði) um hví ein stjórnarskipan eigur at staðfesta eitt valdsbýti. Onkur heldur, at valdsbýti er trygd ímóti harðræði. Onnur halda, at valdsbýti ger eina stjórn meira fólkaræðisliga; og onnur meta, at valdsbýti fremur størri effektivitet. Á sama hátt kunnu føroyingar semjast um, at tað er skilagott og neyðugt at seta á stovn eina nýggja føroyska stjórnarskipan, hóast ávísar ósemjur eru um grundarlagið (ástøðið) undir eini nýggjari skipan.

Restin av formælinum er soljóðandi:"Vit bygdu hetta landið í fornari tíð og skipaðu okkum við tingi, lógum og rættindum. Vit hava hildið ting til henda dag og skipað okkum eftir fólksins tørvi um landið alt. Føroyar hava í sáttmála viðurkent felagsskap við onnur lond. Ongin sáttmáli kann sløkkja sjálvræði landsins. Landsins egnu lógir og avgerðir eru bert tær, sum framdar eru á rættan hátt í landinum sjálvum eftir fólksins vilja. Føroyar verða skipaðar eftir nútíðar tørvi á siðaarv okkara við valdsbýti, løgræði og rættindum.„ Sí Fyrra flaggdagsálit, 2004, s. 18.

Johan Dahl, løgtingsmaður

Hoyvíkstilgongdin

Íslandssáttmálin – var talan um góðan sáttmála?
Hvar er so trupuleikin, kunnu tit spyrja?
Samráðingartilgongdin
Stýrisskipanarlógin – er nakar tulkingarivi?
Aðrir millumtjóðasáttmálar sum lóg
Hví verður so gjørt á hendan hátt?

Johan Dahl løgtingsmaður ger í hesi grein viðmerkingar til tilgongdina, tá sáttmáli um samhandil við Ísland varð samtyktur. Først verður fram, at sáttmálin í innihaldi kann gerast týðandi, men kortini er ófullfíggjaður og ov illa samskipaður við sáttmálan um fiskiveiðirættindi. Serliga verður tó funnist at handfaringini hjá løgmansskrivstovuni, ið frá byrjan vildi seta bæði løgtingsins ávirkan og stýriskipanarlógarinnar ásetingar til viks. Hetta førdi til stríðið um, hvørt lóg ella samtykt var rætti formurin til viðtøku av sáttmálanum. Løgmaður lat um seg ganga hesa framferð, ið sjálvsagt ger lívið lættari hjá fyrisitingini, men stríður ímóti bæði tingskipan, góðum lógarsmíði og fólkaræðisligari viðgerð og ávirkan.

Íslandssáttmálin – var talan um góðan sáttmála ?

Lat tað verða sligið fast, at allir flokkar á Løgtingi uttan undantak eru á einum máli um, at Íslandssáttmálin skal fremjast í verki, tí vit meta, at hóast tað í løtuni eru avísir ójavnar í sáttmálanum, so vil hesin kortini gagna føroyska samfelagnum og geva okkum ein nýggjan marknað at virka á frameftir.

Mín vón er sjálvandi, at hesin sáttmálin verður góður – eisini fyri Føroyar, tí nú er hann sera góður fyri Ísland – men skal hann gerast eins góður fyri Føroyar, skal misjavnin um, hvør kann virka og vinna í Íslandi, verða tillagaður, so at føroysk virki og vinnuligir persónar kunnu sleppa at virka fisk og eiga virki í Íslandi við somu treytum og sømdum, sum íslendingar sjálvir. Vinnulógávan er soleiðis, at teir kunnu eiga í okkara vinnutólum, undir 50% í skipum og 100% í øllum øðrum virkjum, men vit kunnu als ikki eiga í teirra skipum og bert minniluta í fiskivinnuvirkjum.

Eisini vantar ymiskt annað, til dømis at íslendsku uppsjóarskipini fáa loyvi at landa í Føroyum til matna, at føroysk skip kunnu fiska til matna í íslendskum sjógvi, t.d. lodnu og sild.

Fyrimunurin hjá íslendingum er tann, at teir hava nógv fjølbroyttari vinnu enn vit og fáa tí størri fyrimunir enn vit, tá ræður um útflutning…

Tá sáttmálin bleiv undirskrivaður, kundu íslendsk feskfiskaskip ikki landa í Føroyum uttan at verða áløgd plus 10% uppá landingarvektina, harvið minkaði kvotan, og tað bleiv ikki áhugavert hjá teimum at landa her. Hesin trupulleiki er loystur. Tá sáttmálin er ígildissettur, er lovað at tað eisini tá skal verða frítt hjá føroyskum og íslendskum feskfiskaskipum at landa ávikavíst í Íslandi og Føroyum á góðkendum landingarstøðum.

Einans tíðin vil vísa um sáttmálin er gagnligur fyri Føroyar, og tað er at vóna, at hann verður. Um ikki hann vísir seg at vera nøktandi, so er uppsagnarfreist í sáttmálanum.

Hvar er so trupuleikin, kunnu tit spyrja?
Trupuleikin er hátturin hesin sáttmálin verður framlagdur á Løgtingi – nevniliga sum uppskot um løgtingslóg ístaðin fyri uppskot til samtyktar við viðløgdum uppskotum um fylgilógir.

Neyðugt er tíverri at minna á, at Løgtingið hevur tað lóggevandi valdið her á landi. Landsstýrið og løgmaður kunnu einans leggja fram uppskot og staðfesta samtyktu uppskotini, men løgtingið ger av og hevur valdið.

Landsstýrið ger eftir grein 52 í stýrisskipanarlógini altjóða sáttmálar, men skal Løgtingið í flestu førum geva sítt samtykki. Vanliga managongdin hevur verið, at sáttmálar verða viðgjørdir í tinginum sum uppskot til samtyktar og hervið fingið samtykki tingsins. Landsstýrið ella løgmaður kunnu síðani staðfesta sáttmálan, ið tá gerst millumtjóða (fólkarættarliga) bindandi.

Hesar millumtjóða sáttmálar eru ikki bindandi fyri einstaka føroyingin. Landsstýrið má tí – fyri at ikki ósamsvar skal vera millum millumtjóða sáttmálan og landsins lóg –skjóta upp neyðugar lógarbroytingar.

Í hesum førinum varð roynt at gera alt í einum. Skotið varð upp at samtykkja sáttmálan og fremja lógarbroytingar við somu samtykt og sama skjali. Men sáttmálin sjálvur inniheldur ikki tær einstøku lógirnar, eiheldur útgreinar hesin nakrar lógir.

Sáttmálin er í veruleikanum „arbeiðsskjalið„ sum sigur, á hvørjum økjum, vit samstarva, og undir hvørjum treytum, vit samstarva, tvs. rætningslinjur til nýtslu partanna millum.

Tað er tí sera umráðandi at sjálvt lógarverkið fylgir við og verður dagført, so at fyrst

og fremst vinnan veit, hvat alt hetta inniber, hvat er møguligt og ikki. Somuleiðis er tað eisini umráðandi, at borgarin hevur greiðar lógarkarmar at halda seg til.

Hetta arbeiðið skal verða gjørt áðrenn sáttmálin verður ígildissettur eftir teimum vanligu mannagongdunum. Talan er um trýpartasáttmála, og fremja bæði íslendingar og danir sáttmálan á henda vanliga háttin. Hinvegin velja løgmaður og hansara umsiting heldur ta „smartu loysnina" at gera sjálvan sáttmálan til lóg og harvið samtykkja og seta „allan pakkan„ eisini ósundurgreinaðar lógarbroytingar, í kraft við lóg heldur enn at staðfesta hann fyrst við løgtingssamtykt saman við fylgilógunum, og so ígildisseta hann endaliga, tá fylgilógirnar eru tillagaðar – eins og hinir sáttmálapartarnir, Ísland og Danmark, gera.

Samráðingartilgongdin

Men trupulleikarnir byrjaðu nógv fyrr. Tað var jú soleiðis, at hesin sáttmálin bleiv samráddur undir fyrru samgongu við Anfinni Kallsberg sum løgmanni, og tískil var einans „fínpussing" eftir at gera av orðingum í sjálvum sáttmálanum, áðrenn hann bleiv lagdur fyri Løgtingið til fyrstu viðgerðar.

Eg havi tó mangan undrast á, hví okkara menn fóru júst til Íslands at fáa slíkan sáttmála og ikki til Noregs ella ES at royna at fáa betri sáttmálar í lag. Kanska eru okkara menn blindaðir av ógvusliga íslendska íløguhuginum og framferð teirra í Evropa á handilsliga økinum og vilja tí royna at læra føringar at hugsa og virka sum hesir?

Løgmaður ráðførdi seg við uttanlandsnevndina og var í fleiri umførum innkallaður til fundar undir viðgerðini, ikki minst tí semja var ikki um, eftir hvørjum leisti sáttmálin skuldi setast í gildi. Løgmaður og hansara fyrisiting høvdu tó frá fyrsta degi sett sær fyri at nýta hendan nýggja leistin, nevniliga at seta sáttmálan sjálvan í gildi sum løgtingslóg og ikki sum samtykt. Hetta var helst tí at løgmansumsitingin óttaðist at koma í tíðarneyð við teimum lógum, sum teir kanska ikki náddu at tillaga, áðrenn tingsetan var av. Serliga var hetta sera einføld loysn eftir teirra metan, men sum lógarsmíð var hetta sera vánalig loysn.

Henda nevnda tíðarneyð komst av, at forarbeiðið var ikki gjørt nóg væl. Eingin tók stig til at taka uppgávuna upp á seg at samskipa tað neyðuga arbeiðið. Einstøk ráð royndu tó hvørt í sínum lagi at gera tað, sum eftir umstøðunum bar til innan teirra øki. At eingin hevði sett seg inn í, hvat ítøkiligu avleiðingarnar av sáttmálanum vóru, varð ein trupulleiki longu í sambandi við fyrstu ráðførðslurnar undir samráðingunum, og hetta gekk aftur sum ein reyður tráður heilt til endans, og eru hesi viðurskifti framvegis ikki greið. Eg haldi, at hesin hugburður er ræðandi og elvir til nakrar grundleggjandi spurningar um útlitini fyri framtíðar lóggávu í Føroyum.

Sjálvur haldi eg, at løgmaður ráførdi seg tað, sum neyðugt var, men at umsiting hansara pressaði á at fáa just ta loysn, sum fyriliggur í dag, og sum eftir míni meting í veruleikanum hevur sum endamál at gera Føroya Løgting til eitt stempulkontór heldur enn lóggevandi vald. Tað sýnist sum at løgmansumsitingin við hesum snildisliga vil tiltuska sær meira og meira vald og harvið yvirrula løgtingið. Hvør onnur grund er at gera, sum gjørt varð?

Hinvegin hevur danska stjórnin enn ikki fingið sín part av ríkislógarbroytingum framdar, og vit hava ikki enn fingið endaligt svar uppá, hvørjar hesar eru – hervið meini eg eitt komplett yvirlit yvir hvørjar lógir skulu broytast. Her er eftir mínum tykki gjørt alt ov lítið frá løgmansfyrisitingini fyri at fáa endaliga avklárað, hvørjar ríkislógir veruliga verða neyðugar at broyta/tillaga.

Í løtuni liggur sáttmálin til ummælis/viðgerðar í Justitsministeriunum

Uttanlandsnevndin royndi sjálv undir viðgerðini at fáa neyðugu upplýsingarnar frá dønum, men fingu at vita at teir ikki út í æsir í teimum ymsu ministeriunum høvdu gjøgnumgingið hvat neyðugt var at broyta. Løgmaður vísti til tað yvirilitið, sum sent varð saman við lógaruppskotinum yvir lógarbroytingar.

Stýrisskipanarlógin – er nakar tulkingarivi?

Nú kundi alt skyldast iva um stýrisskipanina, men tað er als ongin ivi um hvat stýrisskipanarlógin og tingskipan løgtingsins siga. Reglurnar um góðkenning av sáttmálum eru at finna í stýrisskipanarlógini § 52, stk. 2 og stk. 3, har sagt verður, at „Uttan samtykki løgtingsins kann landsstýrið tó ikki gera avtalur, sum krevja luttøku løgtingsins fyri at verða útintar, ella sum annars eru týdningarmiklar.„

Útgangsstøðið í § 52, stk. 2, og § 52, stk. 3, er, at samstundis sum avtalan verður góðkend, verða eisini tær lógarbroytingarnar samtyktar, sum eru neyðugar at fremja avtaluna í verki. Legg til merkis, at her verður als ikki tosað um at gera hesa til lóg.

Hinvegin hava løgmaður og umsiting hansara við at leggja uppskotið fram sum lógaruppskot og ikki sum uppskot til samtyktar „bypassað“ hesar ásetingar, tí nú er tað – í gásareygum – jú ikki ein millumtjóðasáttmáli, vit hava við at gera og viðgera, men eitt lógaruppskot, og tískil kemur hann ikki í stríð við stýrisskipanarlógina grein 52, stk. 2, og grein 52, stk. 3, – snildislig um ikki sørt ódámlig parering av hesum máli, ið Løgtingsskrivstovan ikki metti seg kunna avvísa.

Vísast kann eisini til skrivið frá Halgir W. Poulsen til uttanlandsnevndina í sambandi við viðgerðina av málinum, har hann eisini viðger grein 55 í

stýrisskipanarlógini. Sjónarmið hansara hesum viðvíkjandi í sambandi við sáttmálan eru sera áhugaverd.

Tingsskipanin grein 48 sigur annars eisini heilt greitt, hvussu slíkar avtalur skulu viðgerast á Føroya Løgtingi, og hava tingmenn við at samtykkja sáttmálan sum lóg eisini tilonkisgjørt sína egnu tingskipan. Tað sigur ikki so lítið.

Í samstarvinum millum løgtings- og løgmansskrivstovuna eru viðurskifti, sum als ikki eru nøktandi eftir míni metan, tí hesar báðar áttu at samstarva tætt, men ofta virkar tað, sum umsitingin í Tinganesi vil tiltuska sær meiri vald enn gott er, og tí verður tíverri eisini stríð og gný millum hesar báðar stovnar.

Eg má her skoyta uppí, at eg als ikki skilji Løgmann, at hann letur umsitingina soleiðis „trilla" runt við sær í tí sum hendi við íslandssáttmálanum. Hetta tænir ikki honum til sóma, tí løgmaður eigur sum ein ørn at verja okkara stýrisskipan og tingskipan heldur enn at finna snildisligar hættir at yvirrula hesar.

Aðrir millumtjóðasáttmálar sum lóg

Tað hevur eisini verið róð fram undir undir viðgerðini, at aðrir millumtjóðassáttmálar undan hesum hava verið framdir við lóg, m.a. Evropeiski Mannarættindasáttmálin og skattaavtalan við Grønland um sjómenn.

Til hetta er at siga, at tann seinni sáttmálin hevur so neyvar skattatekniskar lógartekstir, tí mælti toll- og skattastovan til at gera sáttmálan til lóg fyri ikki at ógreiða skattalóggávuna óneyðuga; víst varð á, at allur neyðugur lógartekstur var tilstaðar. Tá fyrstnevndi, Mannarættindasáttmálin var fyri, var eisini allur lógarteksturin tilstaðar á enskum og donskum, og tí var ikki trupult at implementera hendan, men hartil hoyra mannarættindi annars til slíka yvirskipaða, opið orðaða og heilt serliga regulering – har fordømini hjá mannarættindadómstólinum stýra í mestan mun – at ein samanbering við ein handilssáttmála við Ísland ber als ikki til.

Tí haldi eg, at tað hevur verið heilt burturvið, tá løgmansfyrisitingin hevur brúkt hesar báðar sáttmálar sum fyrimynd fyri eisini at fremja Hoyvíkssáttmálan sum lóg, tí tað er sera stórur munur á hesum sáttmálum og Hoyvíkssáttmálanum, sum meira er at samanbera við eitt arbeiðsskjal við góðum intentiónum, og sum ikki hóska seg til at verða framdar sum lóg í einum framkomnum rættarsamfelag – sum vit helst vilja kallast, men eg eri nú farin at ivast, um vit eru tað.

Politikkur og jura áttu at sampakkað væl saman, tí hesi bæði eru oftani tengd at hvørjum øðrum í politiska arbeiðnum, men tað er eftir míni meting sera óheppið, tá tann politiska loysnin tekur yvirhond og verður orsøk til eitt sera ússaligt lógarsmíð, sum ikki er nøktandi fyri hvørki vinnuna ella borgaran.

Hví verður so gjørt á hendan hátt?
Jú, við at lóggeva sáttmálan sjálvan, so yvirrular hann eisini lógararbeiðið í samband við sáttmálan, tí stýrisskipanarlógin staðfestir, at sáttmálin er yvir øllum føroyskum lógum, og í viðmerkingunum til § 2 í Hoyvíkssáttmálanum verður sagt: „Við hesum verður ikki neyðugt við fleiri uppskotum til løgtingslóg til tess at útinna sáttmálan, av tí at sáttmálin fær tjóðarrættarligt gildi viðvíkjandi nevndu málsøkjum.„

Altso, við at lata Hoyvíkssáttmálan fáa løgtingslógargildi hava Føroyar framt allar neyðugar broytingar í løgtingslóggávu, sum skulu til, fyri at sáttmálin kann verða útintur.

Við at lógarfesta sáttmálan geva londini eisini felagsnevndini sera rúmar heimildir.

§ 8, stk. 2, í sáttmálanum sigur: „Felagsnevndin kann í semju gera av at broyta grein 5, 6 og 7 (Tjóðskaparviðferð 5C iv, Undantøk frá Tjóðskaparviðferð og Samstarv á øðrum økjum) og somuleiðis frumskjølini í hesum sáttmála ella leggja frumskjøl afturat sum ásett í grein 7, stk. 2.„

Fyri at skera hetta út í papp: Felagsnevndin hevur eftir løgtingslógini um Hoyvíkssáttmálan hervið fingið neyðugu heimildinar frá Løgtinginum at fremja broytingar í grein 5, 6 og 7 og í frumskjølunum, hetta uttan at neyðugt er at koma aftur í Løgtingið við hesum, tí heimildin er givin teimum við løgtingslógini, og eisini við at løgmaður við kunngerð kann broyta lógirnar. Áður nýttar felagsnevndir hava havt langt frá somu heimildir.

Hendan áseting bleiv broytt undir nevndarviðgerðini og fekk felagsnevndin skerdar heimildir.
Grein 13 í sáttmálanum ásetir: „Hesin sáttmálin skal staðfestast, góðkennast ella samtykkjast av sáttmálapørtunum í samsvari við teirra innanhýsis mannagongdir.„

Tað er eyðsæð, at sáttmálin eigur at verða lagdur fyri Løgtingið sum uppskot til samtyktar saman við yvirliti yvir fylgilógir, sum skulu tillagast/broytast/dagførast samsvarandi sáttmálanum og fólkarættarligu krøvunum, ið hesin bindir okkum at lúka.

Við heldur at samtykkja lógaruppskotið hevur Føroya Løgting sjálvt verið við til at lata part av lóggávuvaldinum frá sær. Við 2. og 3. viðgerð vildi løgmaður ikki missa andlit, og tíverri spældu flestu løgtingsmenn við í hesum leiki, sum eftir míni metan er skamblettur fyri føroyskan politikk, og vísir hvussu tilvildarliga og lætt verður farið um lógararbeiðið.

Men sum nevnt er tað eitt samt løgting, ið vil seta sáttmálan í gildi. Fyrsti partur av hesum arbeiði er sjálvur sáttmálin, sum er heilt væl úr hondum greiddur. Seinasti parturin er staðfestingin av honum og lógarbroytingunum, sum skulu til.

Vit áttu sum løgting og umboðandi lóggevandi valdið her á landi at latið arbeiðið við íslandssáttmálanum úr hondum sum gott dømi um, at vit gera okkara arbeiði til lítar viðvíkjandi lógartillagingunum og samtykt sáttmálan sum løgtingssamtykt og ikki, ið sum endin bleiv, sum løgtingslóg.

Nevnast skal eisini at meirilutin í uttanlandsnevndini, – hóast hesin valdi at atkvøða lógini ígjøgnum, gjørdi greitt í áliti sínum, at hesin framgangsháttur ikki var tann rætti og ikki skuldi koma fyri aftur, og at sáttmálar av hesum slag í framtíðini áttu at blíva framdir samsvarandi tí mannagongd, sum stýrisskipan og tingskipan áseta.

Íslendingar hava gjørt sítt heimaarbeiði til lítar við at leggja sáttmálan saman við fylgilógunum fyri Altingið sum uppskot til samtyktar. Vit áttu at gjørt tað sama; tá kundu vit havt rætt ryggin og sagt, at arbeiðið er at enda komið og væl úr hondum greitt.