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Bárður Larsen, medritsjtóri

Sjálvræði og stjórnarlóg

Í hesum riti sum undanfarnum verður høvuðsdentur lagdur á stjórnarrættarlig og altjóðarættarlig viðurskifti. Evnini hesuferð eru eisini liður í, at stór ráðstevnu um grundlógarsmíð og stjórnarrættarlig viðurskifti verður í mars mánaði í ár. Í sambandi við ráðstevnuna verður eisini kjak millum danskar og føroyskar serfrøðingar um ríkisrættarligu støðu Føroya. Við hesum riti verður hol sett á hetta kjak, og seinni verður væntandi meira tilfar í ritinum frá ráðstevnuni.

Í stríði føroyinga fyri sjálvsstýri er sjálvsavgerðarrættur ein afturvendandi spurningur. Føroyingar hava ofta lagt danir undir ikki at viðurkenna, at føroyingar hava rættin til avgera egnu ríkisrættarligu viðurskiftuni framyvir. Serliga hava mong heft seg við, at danir halda fast um, at skulu føroyingar loysa, má danska fólkatingið eisini samtykkja. Hetta vilja fleiri føroyingar skilja so, at danir als ikki viðurkenna okkum sum eina serstaka tjóð, ið sjálv kann taka støðu uttan mun til, hvat danir halda.

Tað er ivaleyst nógv um tað, at danir hava ringt við at viðurkenna, at vit eru serstøk tjóð og tí royna teir heldur ikki at geva umheiminum slíka mynd av okkum. Men kjakið um rættin til loysing er í mangar mátar eisini er farið av sporinum. Trupuleikin tykist at vera, at partarnir tala yvir høvdið á hvørjum øðrum. Føroyingar nýta ofta altjóðarætt sum argument, meðan danir hinvegin ofta taka støði í donsku grundlógini og halda uppá, at ein loysing má fara fram sambært hesi lóg.

At danir meta grundlógina sum viðkomandi lóg í loysingarhøpi, nýtist ikki at merkja, at teir, tá samanum kemur, ikki politiskt, moralskt og kanska eisini altjóðarættarliga viðurkenna, at vit hava rætt til loysa frá og stovna egið ríkið. Høvdu danir beinleiðis ella óbeinleiðis latið rætt føroyinga til at

loysa úr ríkinum sæst aftur í donskum stjórnarrætti, hevði tað verið undunarvert. Uttan mun til, at ásetingar hava verið í grundlógum, sum geva aðrar ábendingar, so liggur tað djúpt í einhvørjari politiskari skipan, at hon heldur vil liva enn ganga undir heilt ella partvíst.

Nú Kári á Rógvi í grein síni viðger spurningin um tvískilda sjálvsavgerðarættin, er tað helst fyrstu ferð, at spurningurin verður lýstur á henda hátt í føroyskum ella donskum sambandi. Ein høvuðsboðskapur hjá Kára tykist vera, at skulu Føroyar loysa, verður tað bert eftir at eitt politiskt stríð er vunnið, ið liggur uttanfyri donsku grundlógina.

Nú er eisini tíð at mana í jørðina ta fatan, at Føroyar hava verið partur av Danmark í 600 ár. Neyðugt er at siga dønum og øðrum útlendingum, at Føroyar heilt fram til 1814 vóru partur av Noregi og ikki Danmark. Greinin hjá Zakariasi Wang frá seinasta riti kemur nú í aftur ritið, hesuferð á enskum.

Hóast Zakarias í greinini kemur til víttgangandi niðurstøður, sum mong ivaleyst eru ósamd við hann í, so varpar hann ljós á, at Noreg rættarliga var til sum ríki fram til 1814 og at Føroyar høvdu verið partur av hesum ríki heldur enn Danmark. Hetta ger hann við m.a. at vísa til dómin hjá fasta altjóða dómstolinum frá 1933 í málinum um Eysturgrønland. Við hesum dómi er fyrstu ferð, og higartil einastu ferð, at slíkt forum av høgum og óheftum løgfrøðingum fær høvi til at viðgera spurningin um ríkisrættarstøðuna hjá atlondum Danmarkar.

Danskir myndugleikar og serfrøðingar hava alt ov leingi verið tigandi um niðurstøðurnar í Eysturgrønlandsdóminum viðvíkjandi m.ø. Føroyum. Tí er tað eisini so týdningarmikið, at umheimurin verður gjørdur varður við, hvat fremstu løgfrøðingar innan altjóðarætt í 1933 hildu um ríkisrættarstøðuna hjá norrønu londunum í vestri.

Bárður Larsen, editor

Independence and Constitution

In this issue as in previous ones, the main focus is on constitutional and international law questions. The subjects this time are also coincide with the preparation for a Faroese Constitutional Conference in March. The Faroese Law Review will organise a debate between Faroese and Danish scholars on the current constitutional position of the Faroe Islands. With this issue we have initiated the upcoming debate. The Faroese Law Review will hopefully feature many learned thoughts from the Conference in coming issues.

In the struggle of the Faroese for Independence the question of Self-determination is ever present. The Faroese have often accused the Danes of not recognising the right of the Faroese to determine their own constitutional structure, within the Realm or otherwise. Many have commented on the Danish insistence that the Danish Parliament must give its formal approval if the Faroe Islands want to secede from Denmark. This is understood by many Faroese as Danish refusal to recognise us as a Nation that can determine its own course regardless of the Danish position.

It is probably true that it is difficult for the Danes to recognise that the Faroes are a Nation in our own right and, therefore, they seem to distort the outside world's view of the Faroes. But, the discussion is also somewhat derailed. The problem is that the parties are talking past each other. The Faroese use international law as basis for their arguments, whereas the Danes often base their position on the Danish Constitution and insist that secession must happen in accordance with that document.

That the Danes consider their Constitution relevant when discussing Faroese secession does not necessarily mean that they ultimately do not believe in

political, moral terms and, even, in terms of international law that the Faroese have a right to break away and establish their own Realm, their own state. Should the Danes have let the Faroese Right to Separate from the Danish Realm be reflected in the Danish understanding of Danish constitutional law, it would be truly surprising. Although many other constitutions have mentioned the right of secession, it will always be fundamental to any political structure that it will crave for surviving intact rather than perish or loose its parts.

Now that Mr. Kári á Rógvi in his note discusses the question of the double nature of the right to self-determination, it is probably for the first time that the question is described in this way in Faroese or Danish context. The main point of his seems to be that should the Faroe Islands secede it will be as a result of a struggle being won outside the Danish Constitution.

It is also time to banish the perception that the Faroe Islands have been part of Denmark for 600 years. We have to tell the Danes and other foreigners that the Faroe Islands until 1814 were a part of Norway and not Denmark. The article written by Mr. Zakarias Wang published in our last issue is now published in English.

Even though Zakarias Wang in his article reaches somewhat extreme conclusions, many are probably disagreeing with him, he enlightens us on the existence of the Norwegian Realm until 1814 and that the Faroe Islands were a part of that Realm, that State, rather than of Denmark. This is demonstrated by referring to the International Court of Justice in the case of Eastern Greenland. In that case for the first time, and for the only time so far, a learned and independent body has ruled on the constitutional position of the associate lands of Denmark.

Danish authorities and experts have for too long been silent on the judgements of the East Greenland case regarding, inter alia, the Faroe Islands. That is why it is so important that the wider world is made aware of what the foremost experts of international law ruled in the constitutional relations of Nordic polities to the West.

At halda FLR

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Zakarias Wang[1]

The Constitutional Status of Greenland and Faroe

English summary

In its judgment of April 5, 1933, in the case between Denmark and Norway with regard to the legal status of East Greenland, the Permanent Court of International Justice in the Hague based its decision partly on the fact that Greenland, Faroe, and Iceland belonged to Norway until the peace treaty signed in Kiel on January 14, 1814. This article describes the consequences of this ratio decidendi for the present constitutional status of Greenland and Faroe. As part and parcel of Norway, the Norwegian Constitution before 1814, the Hereditary Absolute Monarchy Act of 1661/1662, applied to them in 1814. This constitution gave the King legislative power, but not the power to change the constitution laid down by the Rigsdag. It is shown that the constitutions of the kingdom of Denmark, which later on have been proclaimed in Greenland and Faroe, in this area only have been promulgated on the King's authority. Reference is made to the fact that constitutional accounts agree that it is impossible to alter a constitution by ordinary legislation, and the conclusion is therefore that the constitution of 1661/1662 still applies to Greenland and Faroe, which is further confirmed by the fact that all laws given in Greenland and Faroe in the entire period since 1814 have been passed in accordance with this constitution. Finally the question is posed of whether it is compatible with Denmark's responsibilities to the international community to omit to ensure that

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[1] A graduate of political science, publisher, and author of: Stjórnmálafrøði (first edition 1988, second edition 1989); Bergen-Unionen eller EF-union, 1993; Føroyar á vegamóti, 1999.

Greenland and Faroe are given a new constitution in a proper democratic manner.

Eqikkaanerit – Greenlandic Summary
Tunup Danmarkimut Norgemulluunniit atanissaa pillugu Haagimi naalagaaffiit akornanni Eqqartuussiviup Aalajangersimasup 1933-imi apriilip 5-anni eqqartuussinermini aalajangernerminut ilaatigut tunngaviliuppaa Kielimi januaarip 14-anni 1814-imi eqqisseqatigiinnermi isumaqatigiissuteqarneq tikillugu Kalaallit Nunaat, Savalimmiut Islandilu Norgemut atasuunerat. Artikelimi tassani nassuiarneqarpoq tunngavigisakkut tassuuna Kalaallit Nunaanni Savalimmiunilu massakkut tunngaviusunik inatsiseqarneq qanoq kinguneqartinneqarsimanersoq. Nunatut 1814 tikillugu Norgemut atasuusutut aamma piffissaq taanna tikillugu Norgemi inatsit tunngaviusoq aamma taakkunani atuuppoq, tassalu kingornuttakkamik kisermaassilluni naalakkersuisoqarneq pillugu inatsit 1661/62-imeersoq. Inatsisikkut tunngaviusukkut tassuuna kunngi tamaginnik inatsisiliorsinnaatitaavoq kisiannili inatsisinik rigsdagip atulersitaanik allanngortitsisinnaanermut inatsisitigut pisinnaatitaafeqarani. Uppernartunngortinneqarpormi kunngeqarfimmi Danmarkimi tunngaviusumik inatsisit Kalaallit Nunaannut Savalimmiunullu atortuulersinneqartarsimasut, taamaallaat atortuulersinneqartarsimasut naalagaaffimmi tassani nalinginnaasumik inatsisiliortut naammassinnittarnerisigut. Innersuussutigineqarpoq naalagaaffiit inatsisitigut tunngavigisaasa allaaserineqartarneranni tamanit isumaqatigiissutigineqarmat inatsisit tunngaviusut inatsisitigut nalinginnaasutigut allanngortinneqarsinnaanngitsut, taamaattumillu inerniliunneqarluni inatsit tunngaviusoq 1661/62-imeersoq Kalaallit Nunaannut Savalimmiunullu suli atuuttoq, tamannalu suli uppernarsarneqaqqippoq 1814-ip kingornagut Kalaallit Nunaanni Savalimmiunilu atuuttussanngorlugit inatsisiliarineqartartut inatsit tunngaviusoq taanna naapertorlugu inatsisiliarineqartarmata. Naggataagut Danmarki Kalaallit Nunaani Savalimmiunilu innuttaasut naqisimaneqanngitsumik aalajangeeqataasinnaanerat atunngitsoortillugu inatsisinik tunngaviusunik nutaanik pilersitsisimanginnermigut naalagaaffiit tamalaat akornanni inuiassuit naapertuilluarnermik paasinnittarnerannut pisussaaffimminik naammassinnissimanersoq apeqquserneqarpoq.
Eqikkakkamik kalaallisuunngortitsisoq: Kristian Poulsen

Dansk Resumé – Danish Summary

Ved dommen af 5. april 1933 i sagen mellem Danmark og Norge om Østgrønlands retsstilling lagde Den faste Domstol for mellemfolkelig Retspleje i Haag bl. a. til grund for afgørelsen, at Grønland, Færøerne og Island frem til fredsaftalen i Kiel den 14. januar 1814 tilhørte Norge. Denne artikel redegør for, hvilke konsekvenser denne del af præmisserne har for Grønlands og Færøernes nuværende konstitutionelle status. Som norske landsdele var den frem til 1814 gældende norske forfatning, arveenevoldsregeringsakten af 1661/62, også gældende for dem. Denne forfatning gav kongen al lovgivende magt, men ikke nogen hjemmel til at ændre den af rigsdagen givne forfatning. Det påvises, at de for kongeriget Danmark gældende forfatninger, der er blevet sat i kraft i Grønland og Færøerne, kun er blevet gennemført af den dér gældende almindelige lovgivende myndighed. Der henvises til, at der i statsretslige fremstillinger er enighed om, at det ikke er muligt at ændre en forfatning ved almindelige love, og konklusionen er, at det derfor er 1661/62-forfatningen, der gælder for Grønland og Færøerne, hvilket yderligere bekræftes ved, at alle love, der er givet for Grønland og Færøerne i hele tidsrummet siden 1814, er udstedt i overensstemmelse med denne forfatning. Til slut stilles der spørgsmålstegn ved, hvorvidt det er i overensstemmelse med Danmarks forpligtelser over for det internationale retssamfund at undlade at sørge for, at Grønland og Færøerne på demokratisk vis får en ny forfatning.

The starting point

The natural starting point for an investigation of the constitutional status of Greenland and Faroe is the judgment passed on April 5, 1933 by the Permanent Court of International Justice in the Hague. The dispute settled here was between Norway and Denmark with regard to the international legal status of Eastern Greenland (Eastern Greenland 1933).

The judgment agreed with Denmark that Norway's declaration of occupation of July 10, 1931 was a violation of the existing legal situation and accordingly was unlawful and invalid (Eastern Greenland 1933: 57).

In this connection the court came to a decision on a number of the points of law made by the parties with respect to Denmark's claim to have exercised sovereignty over Greenland for a very long period of time.

The status of Greenland, Faroe and Iceland prior to 1814

The judgment of April 5, 1933 includes these remarks on the status of Greenland, Faroe and Iceland prior to 1814:

"In 1380, the kingdoms of Norway and Denmark were united under the same Crown; the character of this union, which lasted until 1814, changed to some extent in the course of time, more particularly as a result of the centralisation at Copenhagen of the administration of the various countries which were under the sovereignty of the Dano-Norwegian Crown. This evolution seems to have obliterated to some extent the separation which had existed between them from a constitutional standpoint. On the other hand, there is nothing to show that during this period Greenland, in so far as it constituted a dependency of the Crown, should not be regarded as a Norwegian possession" (Eastern Greenland 1933: 9).

More specifically, it is stated in the judgment:
"Up to the date of the Treaty of Kiel of 1814, the rights which the King possessed over Greenland were enjoyed by him as King of Norway. It was as a Norwegian possession that Greenland was dealt with in Article 4 of that Treaty, whereby the King ceded to the King of Sweden the Kingdom of Norway, "la Groënlande .... non comprise ....". The result of the Treaty was that what had been a Norwegian possession remained with the King of Denmark and became for the future a Danish possession. Except in this respect, the Treaty of Kiel did not affect or extend the King's rights over Greenland" (Eastern Greenland 1933: 33).

This section of the judgment concludes with the following remark:
"In the early part of this judgment, it has been recalled that when the King of Denmark was obliged to renounce, in favour of the King of Sweden, his kingdom of Norway, Article 4 of the Treaty of Kiel of January 14th, 1814, excepted from that renunciation Greenland, the Faroes and Iceland" (Eastern Greenland 1933: 46).

The Kiel Treaty's article 4

The two definitive provisions of the Kiel treaty's article 4 are as follows (as translated and published in "Annual Register", 1814):
"Article IV. — His Majesty the King of Denmark, for Himself and his Successors, renounces for ever and irrevocably, all his rights and claims on the Kingdom of Norway, together with possession of the Bishoprics and Dioceses of Christiansand, Bergenhuus, Aggershuus, and Drontheim, besides Nordland and Finmark, as far as the Frontiers of the Russian Empire.

These bishoprics, dioceses, and provinces, constituting the kingdom of Norway, with their inhabitants, towns, harbours, fortresses, villages, and islands, along the whole coast of that kingdom, together with their dependencies (Greenland, the Ferroe Isles, and Iceland, excepted); as well as all privileges, rights, and emoluments there belonging, shall belong in full and sovereign property to the King of Sweden, and make one with his united kingdom" (Eastern Greenland 1933: 12).

The treaty was written in French, and the original text is as follows:
"Article Quatre. — Sa Majesté le Roi de Dannemarc, tant pour Elle que pour Ses Successeurs au Trone et au Royaume de Dannemarc, renonce irrévocablement et à perpétuité, en faveur de Sa Majesté le Roi de Suède et de Ses Successeurs au Trone et au Royaume de Suède, à tous Ses droits et titres sur le Royaume de Norvège, savoir les Evêchés et Baillages (:Stift:) ci-après spécifiés, ceux de Christiansand, de Bergenhuus, d'Aggerhuus et de Trondheim avec le Nordland et le Finmarken jusqu'aux frontières de l'Empire de Russie.

Ces Evêchés, Baillages et Provinces, embrassant la totalité du Royaume de Norvège, avec tous les habitants, villes, ports, forteresses, villages et isles sur toutes les côtes de ce Royaume, ainsi que les dépendances, — la Groënlande, les isles de Ferroë et Islande non comprises, — de même que les prérogatives, droits et émolumens, appartiendront désormais en toute propriété et souveraineté à Sa Majesté le Roi de Suède, et formeront un Royaume réuni à celui de Suède" (Eastern Greenland 1933: 12).

Greenland, part of Norway
If this judgment is perused attentively, one cannot avoid seeing what has taken place.

The geographical area known as Greenland became part of Norway at some point in the Middle Ages. The traditional date is 1261. Norway and Denmark formed a union, so that Denmark and Norway were no longer separate sovereign realms. Ostensibly, these realms constituted an international legal entity, united in war and peace. This does not, however, mean that Denmark vanished and became part of Norway, or that Norway vanished and became part of Denmark. Had the latter been the case, it would have been quite unnecessary to mention Greenland in the Kiel treaty's article 4. But because the kingdom of Norway still existed and Greenland was included in this kingdom, on relinquishing Norway it was necessary to make an exception for Greenland. Had this not been specified in the treaty,

Greenland, as well as Faroe and Iceland, would have been ceded as part of the kingdom of Norway.

Did Greenland become part of Denmark?

However, the Danish plea attempted to prove that the borders between Norway and Denmark had been altered during the period of union so that Greenland had become part of Denmark. The argumentation was put most strongly by Knud Berlin (1864-1954), who compiled it in a book (Berlin 1932), which was published in connection with the case. The book was not part of the documents presented to the court, as it had not been translated to English and French in due time, but Denmark's lawyers made use of his well-thought out reasoning in pleading their case.

The Hague judges were well aware that any redefinition of the borders between the parties to the union of Norway and Denmark must take place in accordance with the rules of international law. This was, for example, the case in the US in 1853, when the border between the states of New York and Massachusetts was regulated (Year-Book 1989-90: 1503). In such cases the agreement is settled between the competent bodies of the legal entities in question. An alteration of the border between states in a union can therefore not take place with the decision by one state alone that the other state must relinquish part of its territory.

Norway presented the documents relevant to this part of the case, and was heard.

The Agreement on Union between Norway and Denmark

The first document was the agreement on union between Norway and Denmark (Eastern Greenland 1933: 134 V.5; Norges gamle love 2nd række, II, 1: 54f.).

This treaty entered into in Bergen on August 29, 1450 determines that Norway and Denmark in future will choose a common King and be united in war and peace. The kingdoms are to be completely equal and each realm is to be ruled by native-born men. This agreement is the real letter of union for the coalition between Norway and Denmark (Aubert 1897: 8).

The Bergen treaty was altered in 1661 and 1662 (Eastern Greenland 1933: 134 V.8, Geheimearchiv [State Archives] 1856-60: 125-150).

The Hereditary Absolute Monarchy Act

This was a result of the war that Frederick III, with the consent of the Rigsraad[2], declared on Sweden in 1657 and which led both Norway and Denmark to the brink of disaster. However, the dual monarchy was not wiped from the face of the earth, and Frederick III came out of the war with greater prestige than the Rigsraad. But public opinion demanded that the government rule more effectively, and when a Rigsdag[3] was assembled in Denmark, its negotiations ended with the three Estates passing the Hereditary Absolute Monarchy Act of January 10, 1661. Special messengers were sent off to get the signatures of those who had left the Rigsdag early (Schlegel 1827: 165). Denmark now had, with the acceptance of its people, a new constitution, in which a significant change was that the elective monarchy laid down in the Bergen treaty was abolished. In fact, the assembled three Estates elected a King once and for all, for the new constitution determined that the throne was to be inherited by the rightful heirs of the King, begotten in lawful marriage. If there were no male descendants, women could be considered. The Estates also decided that Frederick III himself was to draw up a law more closely determining the rules for the order of succession and the governing of the country.

This new Danish constitution was written in three almost identical copies, one for each of the three Estates (nobility, clergy and commoners). The original Hereditary Absolute Monarchy Act can be seen in the National Archives and is also found in a diplomatic reprint (Geheimearchiv 1856-60: 125-143).

A special Norwegian Hereditary Absolute Monarchy Act

Since elective monarchy had been abolished in Denmark, it was necessary to obtain Norway's agreement to the alteration of the Bergen treaty on this point; otherwise, the continued existence of the union could be at stake. This was the reason that a Norwegian Rigsdag was called in 1661, in Akershus in what is now Oslo, where, on August 7, 1661, the three Norwegian Estates passed and signed a Norwegian Hereditary Absolute Monarchy Act, which gave the King the same powers in Norway as the Danish Rigsdag had given him in Denmark.

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[2] In the Rigsraad some members of the highest nobility and (before the reformation of 1536) the church reigned over the realm together with the King.

[3] In a Rigsdag (before 1661) representatives of all the Estates convened to decide on very important matters. In 1848 this name was used for the Danish Constitutional Convention. 1849 to 1953 this term was used for both houses of the Danish Parliament (landsting and folketing).

Iceland and Faroe
But did this constitution also apply to the more remote parts of the Norwegian realm, which had not been represented at the Rigsdag at Akershus?

This question has been thoroughly debated, especially as regards Iceland's position in the realm of Norway. The point of view put forth by Knud Berlin, on which there is widespread agreement, is that the Icelanders, who as a rule were unable to meet for the relevant assemblies on time, "in the Centuries previous to Absolutism, yea, even in the entire Period after the Union with Norway [of 1262], [have] regarded it as natural that Iceland with no further Ado was bound by the Laws and Agreements on the supreme Government of the whole Realm" (Berlin 1911: 133 f.).

Since this was the case for Iceland, there could be no doubt that the same applied to Faroe. Norway was divided into four statutory areas, and Faroe belonged to that of the Norwegian Gulating. Christian IV's Norwegian Law of 1604 had also been put into effect in Faroe, which for natural reasons was a special area of promulgation.

It would therefore be fairly hopeless to argue that the new Norwegian constitution was not valid on Iceland and Faroe, since it had been adopted by a legally assembled Rigsdag in Norway.

The Finmark
Another part of Norway that was not represented at the Rigsdag was the Finmark. No one has ever even hinted that the Finmark at this time was not part of Norway, or that the Hereditary Absolute Monarchy Act did not apply there. The reason, of course, is that the peace treaty in 1814 stated that this area in future was to be part of the kingdom of Norway, making any further discussion of this point purely hypothetical.

Greenland
Greenland was, as previously mentioned, also part of Norway, and Frederick III was extremely interested in everything to do with this part of his Norwegian realm.

Thus the King had granted a trading company formed by the powerful General Customs Inspector, Henrik Müller (Gad 1946: 21), permission to sail to "the widely conceived land of Greenland, whose navigation for many years' time has been unused and unknown". A result of this effort was that

the King in 1654 at Gottorp Castle could greet three of his subjects who had been taken captive on the coast of Greenland by David Dannel on his third expedition to Greenland (Bobé 1936: 16f.).

Norwegian constitution promulgated in Iceland and Faroe

It is in this light that we can view the action taken in the summer of 1662 to further confirm the Norwegian Hereditary Absolute Monarchy Act. While no delegation was sent to ensure that the inhabitants of the Finmark could participate in this decision-making process, two more copies of the Norwegian Hereditary Absolute Monarchy Act were sent to Iceland and Faroe. So there are five copies of the Norwegian Hereditary Absolute Monarchy Act : one for each of the three Estates, and one each for Iceland and Faroe. The leader of the delegation was a Norwegian, Henrik Bjelke, who, as well as being an admiral and a war hero, was also the Amtmand for Iceland, a member of the Rigsraad and the man who in 1661 had accompanied the Crown Prince to the Rigsdag in Oslo to receive the homage due to the heir to the throne, and to partake there in the passing of the Norwegian Hereditary Absolute Monarchy Act.

The version of Norwegian history in use around 1814 says of this that the assembled Estates and the Rigsraad relinquished their shares in the business of government to King Frederick III, along with elective monarchy, and the open letter thus proclaiming was signed by those so empowered by the Estates, which took place in Norway on August 7, 1661, "1662, the 28th Julius in Iceland and the 14th Augusti in Faroe" (Gebhardi 1778: 117).

The Icelandic copy was signed in Kópavogur (now a suburb of Reykjavík). On Faroe, the ceremony took place at an extraordinary Lagting in Tórshavn.

"Underlying Islands"

The documents for Iceland and Faroe differ in one detail from the Norwegian. In both, it states that the act applies to Iceland/Faroe and the "underlying islands" (Geheimearchiv 1856-60: ibid.).

With this, the great work of the constitution was finished and the King could begin to write the law on succession and government for which he had been authorised by the citizens of Denmark and Norway. This law is dated November 14, 1665, and was called the Act of Royalty.

The new Great Seal of the Realm was used to seal this Act.

In the above-mentioned history of Norway, it is said of the Norwegian coat of arms:
"The Coat of Arms of the Norwegian Realm is a golden lion, crowned, rampant on a red field, facing left, and grasping a curved halberd in its four claws. Under the Kings Christian IV and Frederick III, the arms of Iceland, Faroe and Greenland were incorporated into the Royal Seal. In the shield of Iceland, which is red, there is a white stockfish, crowned; in that of Faroe, which is blue, a white spotted goat or ram; and in that of Greenland, which is also blue, a white bear" (Gebhardi 1777: Cxiii f.).

Gad's history of Greenland expresses it as follows:
"A further witness to the royal interest in Greenland lies in its new coat of arms; a passant, later rampant polar bear on a blue field, which was incorporated into the other seals of the provinces and hereditary lands. This Great Seal probably originated in connection with the Act of Succession of 1665; it appears as far as we know for the first time in connection with the sealing of this law. In the fashion of the time, it was thus confirmed that the claim of sovereignty over Greenland was no mere empty phrase. It was now apparent to all, at home or abroad, who saw this seal, that the Danish-Norwegian King regarded this territory as part of the lands and realms to which he was heir, and it was this right among others, on which his hereditary right to rule rested" (Gad 1978: 286 f.).

This last sentence probably does not mean that Finn Gad thinks that the King's absolute right to rule rested on his hereditary right to Greenland! On the contrary, what is being expressed is that Greenland belonged to Norway, and by including Greenland's arms in the Great Seal of Norway, the King is emphasising that he regards Greenland as belonging to the kingdom that had now given him the absolute right to rule.

The formulation with the islands under Iceland and Faroe was common in the King's letters to Iceland and Faroe. But the possibility cannot be excluded that the King thought that it would strengthen his undeniably weak claim on Greenland if foreigners learned that he had used this formulation in Iceland and Faroe, for in it, it was possible to interpret a message that Greenland was included in the "underlying islands" belonging to Iceland and Faroe. The King attempted to further renew the connection to Greenland, but with no success. Sea captain Otto Axelsen is thought to have been shipwrecked on his second journey there in 1671 (Bobé 1936: 18).

It was not until the efforts of the Bergen Company, with the settlement established by Hans Egede in 1721, that Greenland was definitely confirmed as a Norwegian territory. Since Greenland's coat of arms was included in the Great Seal of the Realm which signed the Act of Royalty, along with the other Norwegian provinces to which the Hereditary Absolute Monarchy Act applies, it would have been unreasonable to assume that the Norwegian Constitution was not valid for this area within the boundaries of the Norwegian realm.

Judges Walther Schücking and Wang Chung-Hui had certain reservations with respect to recognizing this type of historically determined sovereignty over all of Greenland (Eastern Greenland 1933: 78), but the majority of the court did not share their doubts and could with no reservations, with the concurrence of the Danish ad hoc judge, state that Greenland as well as Faroe and Iceland belonged to Norway in 1814.

Could the King move borders between states?

But since the King had the absolute right to rule, could he not then alter the borders between the realms, so that one realm increased its territories at the expense of the other? Was he not the personification of the competent government with the authority to make such a change?

Not so.

To be sure, he did have the absolute right to rule, but his power was based on the acceptance of the Rigsdag. One of the few limitations the Rigsdag had placed on the King's absolute power concerned just this possibility. For the Norwegian Hereditary Absolute Monarchy Act states that one of the things the King could not do, was to "dismember" the realm. To dismember means to chop off the limbs of a body, so in this case it means that the King did not have the authority to alter the borders of the realm. The Hereditary Absolute Monarchy Act specifically forbids any division in favour of other members of the royal family, of the type in which Schleswig was partitioned off from the Danish realm. But since dismembering was expressly forbidden, a consequence must be that neither could the King carry out any such operation in favour of the other realm, without the authority of a newly assembled Rigsdag in each of the realms. This is already a consequence of the agreement on union and the rules of international law.

The word "Denmark" in the Kiel treaty

There are two words of decisive importance in the interpretation of the Kiel Treaty.

One of these is "Denmark". What does this word mean in the context of the treaty?

In 1850, the famous Danish jurist, Anders Sandøe Ørsted (1778-1860), wrote a book in which he argued for the continuance of the United Monarchy, i.e. that Schleswig, Holstein and Lauenborg should continue to be united with Denmark (Ørsted 1850).

In the book he painstakingly explains how a union has developed over the centuries between these duchies, with their common government, on the one hand, and the kingdom of Denmark on the other. Further, he says:

"In Relation to foreign States, these [i. e. the Duchies] certainly do not constitute any special political Body; they are ordinarily not mentioned separately in Treaties; but the whole monarchy united under the sceptre of the King is designated by the Name of Denmark. On this Unity in Relation to foreign States the common Flag furthermore bears Witness to " (Ørsted 1850: 223).

The ambiguous concept of "Denmark"

What Ørsted points out here is that, in Danish legal language, there is a clear precedence for the use of the name Denmark in two senses. One, ("Denmark 1") is the designation for the Kingdom of Denmark. In the other sense ("Denmark 2"), "Denmark" is the designation for the "entire monarchy united under the sceptre of the King".

How stringently this distinction is made can be seen in the fact that when Denmark, in the Versailles peace treaty of June 28, 1919, was granted the northern part of the Duchy of Schleswig, it was laid down in law no. 351 of July 9, 1919, that these territories were to be called the provinces of Southern Jutland, and included in the "kingdom" (Karnov 2000: 82). The treaty only determined that they were to belong to "Denmark 2". The law made them part of "Denmark 1".

There is no clause in the Bergen treaty prohibiting such a practice, for there is nothing in it about the name of this entity in international law. If we look

at the act of union between Scotland and England in 1707, it is far more concrete in this respect. Namely in stating:

"That the two Kingdoms of Scotland and England shall upon the first day of May next ensuing the date thereof, and forever after be united into one Kingdom by name of Great Britain" (Geater and Crosby 2001: 40).

Another well-known constitution took this problem into account in 1787: "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America" (Webster 1978).

"Denmark" in treaties

Since a comparable clause is lacking in the treaty of union between Norway and Denmark, the authorities issuing new treaties were free to decide how the entity they represented was to be designated in any treaty entered into with foreign powers.

Here it is worth mentioning that the problem of such amalgamated entities without an official name was known in other cases. "Austria" and "Prussia" had the same problem (Gustafsson 1985: 21). How did the diplomats tackle this problem?

In rare cases, such as in the treaty of alliance with Holland in 1673, the designation Denmark-Norway is used (Aubert 1897: 56). In one case of 1751 even Norway is said to be the entity concluding the treaty (Castberg 1964: 89). But already early in the union there is a tendency for Norway to disappear into the concept of Denmark. Gradually it comes to the point that even Norwegian herring become "hareng de la pêche danoise" in the treaty with France of September 30, 1758 (Aubert 1897: 58). In the treaty of Jönköping, December 10, 1809, the Finmark is said to be "de la domination danoise" (ibid.).

Especially near the end of the period, it had become common to use "Denmark" in the sense of "Denmark 2". There was no difficulty in this, for everyone knew that even though Denmark was given as the contracting party, it was not only the Kingdom of Denmark, but all the King's lands that were bound by an agreement signed on behalf of "the entire monarchy united under the sceptre of the King".

The Kiel treaty of 1814
As an example of this practice, Ørsted uses the peace treaty with Sweden, on January 14, 1814 [Ørsted 1850: 223 note**)].

A. S. Ørsted had been assessor (judge) at the municipal court and the Supreme Court until, in 1813, he became a deputy in the Danish Chancellery, which was the supreme governmental organ for the internal affairs of Denmark and Norway. He was thus involved in all practical questions with regard to the peace treaty. He also had power of attorney for the chancellery (generalprokurør) from 1825-48. The person in this position was the legal adviser to the crown and all drafts of royal decrees were submitted to him for consideration. After his outstanding career during the absolute monarchy, he became a member of the constitutional national assembly and the Landsting, and Prime Minister of Denmark from April 21, 1853 – December 12, 1854.

He had thus been closely involved with all aspects of the internal implementation of the Treaty of Kiel, and his comments on this international agreement have considerable weight.

What A. S. Ørsted says in his book on the United Monarchy is therefore plainly, that "Denmark" in the treaty of Kiel exclusively designates "Denmark 2", i.e. "the entire monarchy united under the sceptre of the King", and not "Denmark 1": "the Kingdom of Denmark".

The concept of Denmark in The Hague judgment
In what sense did the court at The Hague in 1933 then use the word Denmark?

There is no doubt here.

The court uses the word in the sense that, according to Ørsted, it has in the Kiel treaty ("Denmark 2"). It is this monarchy united under the sceptre of the King that on July 10, 1931 had sovereignty over all of Greenland (Eastern Greenland 1933: 64).

After 1814, Greenland, Faroe and Iceland were therefore still united with Denmark, but there had been no change in their legal status in the union

with the kingdom of Denmark. They were still subject to the Bergen treaty's provisions stating that they were to be together with Denmark and have their King in common with this realm. Greenland, Faroe and Iceland therefore now composed a legal entity in the union with Denmark, of which union the duchies were also a part until 1864.

In the entity comprising Greenland, Faroe and Iceland, the constitution in 1814 was the Hereditary Absolute Monarchy Act passed in 1661/62.

"Dependency" in the text of the treaty

The other word that is decisive for the interpretation of the treaty is the word "dependency". Greenland, Faroe and Iceland were designated as dependencies in the Kiel treaty; could they then be integrated parts of Norway?

The treaty is written in French, and the word used is "dépendances". In French one can say "Les iles Loyauté sont une dépendance de la Nouvelle-Calédonie" (Larousse 1972). The English translation uses the same word: "dependency". In English, "dependency" is defined as: "a land or territory geographically distinct from the country governing it, but belonging to it and subject to its laws" (Webster 1979).

Therefore, "dépendances" means an area subject to the country to which it belongs, without being an integrated part of it.

Is this a correct description of Greenland, Faroe and Iceland?

Naturally, one can say that they are geographically separate from Norway; but were they subject to Norway?

If we look at just one of them (they are placed in one common category in the Kiel treaty), and analyse the status of Faroe, we find that Christian IV's Norwegian law was valid there in 1662. In article 11 of this law, it states that the oath of allegiance must be sworn to "my gracious King and Lord, and the kingdom of Norway" (Castberg 1964: 84).

Why swear allegiance to Norway and not to Faroe?

The answer is obvious. Faroe was part of the kingdom of Norway. There was nothing in the King's title to show that he was King of Faroe (or Greenland or Iceland), for that was given, in that he was King of Norway.

Until the reformation in 1536, the Catholic bishops of Faroe, Iceland and Greenland were sworn members of the Norwegian Rigsraad, among those choosing the King and proclaiming his coronation charter, which at that time was the written constitution of the kingdom. The citizens of Faroe had thus had a part in deciding how the realm of which they were an integrated part was to be ruled. In 1662, they had accepted the decision of the Norwegian Rigsdag that the King was to be given absolute monarchy. The constitution of Norway was their constitution. They were an integrated part of Norway, just as Amager was an integrated part of Denmark. Their status could therefore not be compared to that of "dépendances", because these have no hand on the tiller of state, but are ruled from afar by a legally superior entity.

"Dépendances" and "Dependencies"

Then how did it happen that these areas were termed "dépendances" in the treaty?

The explanation is that with the Hereditary Absolute Monarchy Act, everyone living in the kingdom of Norway had given the King jura majestatis, i.e. all legislative, executive and judicial power. The King therefore had a completely free hand as to how he ruled his realm, and if he so pleased, could use the term "dependencies" for parts of his realm. But this did not alter their status of being inseparable parts of their kingdom, which they had enjoined the King not to dismember.

Thus in the Danish language there was no doubt as to how the word dependency was to be understood with regard to these three areas. But this word did not mean the same as the French "dépendance", which was used in the treaty.

So how does one interpret the treaty in this respect? Does one stress the French meaning of the word, and say that because in this language it designates a subordinate administrative area, then Greenland, Faroe and Iceland must have been subordinate to Norway in 1814, or is it outweighed by their constitutional status, laid down in the Hereditary Absolute Monarchy Act, as parts of the Norwegian kingdom on an equal footing with all other parts?

The choice between these two interpretations cannot be difficult.

A treaty cannot alter the past. The purpose of a peace treaty is to procure peaceful conditions between the warring parties. The price of peace can be the relinquishing of lands, and the new borders must be unequivocally specified in the wording of the treaty.

The negotiators in Kiel decided in 1814 that the part of the Norwegian kingdom comprising Greenland, Faroe and Iceland was not to be relinquished to Sweden. The diplomats knew that these areas had been termed "dependencies", and they found that this word could probably be translated as "dépendances" in French. The use of this French term can in no way alter the legal status of the area prior to 1814, and that means that the only thing the treaty determines is that this area is not to be relinquished to Sweden. The treaty makes no comment on the constitutional status of this area prior to 1814, in 1814, or after 1814, a fact clearly expressed in the judgment from 1933.

Were the dependencies colonies?
Was Greenland, for instance, not a colony?

Greenland, Faroe, and Iceland all had the same legal status in relation to the Hereditary Absolute Monarchy Act and the treaty of Kiel. In the same way that the King could term them dependencies, he could also term them colonies, and frequently did. But not only the King used this term, so did the inhabitants of the areas.

In the preface dated June 18, 1773 to the dictionary of the Faroese language written by the Faroese Jens Christian Svabo (1746 –1824), he says: "Since Faroe is a Norwegian colony and its first inhabitants were Norwegians, there can be no doubt that the language was in the beginning the same as that spoken in Norway of the time" (Svabo 1970: XIII).

He uses the word colony in its original sense, as meaning a new settlement, and both Faroe and Iceland were considered Norwegian settlements, as was Greenland at that time.

The judgment states:
"It is now known that the settlements must have disappeared at an early date, but at the time there seems to have been a belief that despite the loss of contact and the loss of knowledge of the whereabouts of the settlements, one or both of them would again be discovered and found to contain the descendants of the early Settlers" (Eastern Greenland, 1933: 29).

As late as 1814, it was considered possible that there was a Norwegian colony on the east coast of Greenland, the so-called Austrbygð (East Settlement). In the above-mentioned history of Norway, one could see that "In the eastern Mountains live still, according to the natives, some foreign people, who perhaps descend from the old Norwegian Greenlanders" (Gebhardi 1777: CVIII). It was only Graah's journey to the east coast in 1829/30 that confirmed that at any rate, there was no Austrbygð south of 65° N latitude (Bobé 1936: 21), which not unnaturally led all the experts to conclude that there could be no Norwegian colony at all in Greenland. But because this conclusion had not been reached earlier, Greenland, like Faroe and Iceland, was included in the constitution of 1661/62 and came into the same category as the other two groups of islands in the peace treaty of 1814.

The discussion of the Treaty of Kiel in legal literature

Clearly, a correct understanding of the constitutional status held by Greenland and Faroe in 1814 is necessary for the consideration of their current legal status.

What, if any, traces of the judgment passed on April 5, 1933 by the Permanent Court of International Justice in the Hague, have since been found in international legal literature?

Frede Castberg

The Norwegian jurist Frede Castberg (1893-1977) commented on the judgment in his Constitutional Law (Castberg 1964).

Castberg treats the development of constitutional law in Norway extremely thoroughly. He stresses Norway's Hereditary Absolute Monarchy Act from 1661, and concurs with Aubert's assertion that it is the fundamental constitutional law of the Norwegian State (Castberg 1964: 88). Castberg concurs with the Danish State Archivist C. F. Wegener's (1802-93) documentary proof that the Hereditary Absolute Monarchy Act passed in Iceland and Faroe is a variant of the Norwegian (Geheimearchiv 1856-60: 143-150). To Castberg, it is therefore given that Greenland, Faroe and Iceland belonged to Norway until 1814. But he does not touch on the actual constitutional status of this part of the Norwegian kingdom in 1814, nor does he consider the consequences of their status at that time for their subsequent constitutional development.

Poul Andersen

In Denmark, the jurist Poul Andersen (1888-1977) wrote his description of constitutional law after the judgment in the Hague. He follows this judgment with regard to Faroe and Norway being connected to Denmark in 1380 (Andersen 1954: 83). But then he says that after 1537 Faroe, like the remaining Norwegian dependencies, was ruled by the King of Denmark. This was one of the Danish arguments presented to the court, which, however, based its judgment on the fact that the King ruled Faroe as King of Norway. That the King of Norway was also the King of Denmark according to the treaty of Bergen, which is not mentioned by Poul Andersen, does not alter the fact that he was not the regent of Faroe in his capacity as King of Denmark.

Poul Andersen mentions the Hereditary Absolute Monarchy Act, in that he states that the Faroese, like the Icelanders, signed it in 1662. However, he does not point out that what they signed was the Norwegian Hereditary Absolute Monarchy Act.

He says, agreeing with the judgment, that their separation from Norway in 1814 did not bring about any significant change in their status (Andersen 1954 ibid.). However, no more than Castberg does he explain the actual constitutional status of the islands at that time.

With respect to Greenland, he refers to the judgment from the Hague (Andersen 1954: 89, note 1). Here, he states, in complete accord with the judgment, that "the relinquishing of Norway in 1814 did not include Greenland, any more than it did Iceland and Faroe" (Andersen 1954: 90). But he does not explain the consequences of this statement for the understanding of the constitutional status of Greenland, Faroe and Iceland, either then or later.

Alf Ross

Alf Ross (1899-1979), in his study of constitutional law, has no mention whatever of this judgment (Ross 1966). In his textbook on international law, he has a few remarks on the judgment (Ross 1972: 173 f.), but he does not explain the constitutional status of Greenland and Faroe after 1814. He has an account of the judgment in his casebook on international law, but does not quote the court's remarks on the status of this legal entity in 1814 (Ross 1967: 171-177).

Frederik Harhoff

Frederik Harhoff (1949-) has written a dissertation on the constitutional status of Greenland and Faroe in relation to Denmark (Harhoff 1993). For this thesis he became Dr. jur. at the University of Copenhagen.

Firstly, it can be noted that Harhoff has not listed the judgment in the Hague among the sources for his book in his references or in the book's text, nor has he discussed the importance this judgment might have for the subject of the dissertation. Nor does he mention the Hereditary Absolute Monarchy Act, neither the Danish nor the Norwegian version.

Harhoff says that Denmark and Norway were united in 1380 and that with this Faroe, Greenland and Iceland also became subject to the Danish King (Harhoff 1993: 44f). This is in direct contradiction to the judgment from the Hague, which states that the King ruled these areas in his capacity as Norwegian King.

Next, Harhoff says that Faroe was transferred to the diocese and county of Sealand in 1709 and was thus completely separated from Norway (Harhoff 1993: 45).

This was one of the pleas presented by Denmark in the Hague. The Norwegian lawyers shot the argument full of holes and brought forth among other things a letter written from the Chancellery on June 7, 1842 to the Prefect and the Bishop of the diocese of Sealand. In it, their attention is drawn to the fact that, in spite of Faroe being under the administration of the diocese of Sealand, it was neither part of this diocese nor of the kingdom, since until 1814 it had been part of Norway, and Norwegian law was still valid there (Appendix to Duplikk 1932: 269). The History of Norway has the following to say on this question: "The Dean of Faroe and Greenland is subject to the Bishop of Sealand, because all ships travelling to these deaneries depart from Copenhagen and the deans can therefore more conveniently make their reports to Copenhagen than to Norway" (Gebhardi 1777: CXII f.). The Norwegian argument resulted in the court rejecting this as well as all other Danish claims that Norway in 1709 – or at any other time prior to 1814 – had been dismembered in contravention with the provisions of the Hereditary Absolute Monarchy Act (which in itself would have been a serious charge against Denmark). Therefore, the court could state with authority that Faroe belonged to Norway in 1814; something it could not have done if the argumentation put forth by Harhoff had won the acceptance of the court.

Remained in Danish hands

Furthermore, Harhoff, says: "When the Danish King was forced by the Kiel peace treaty of January 14, 1814 to relinquish Norway to the Swedes, Faroe, Iceland and Greenland remained in Danish hands" (Harhoff 1993 ibid.).

The expression is almost the same as that used by the court in 1933, in the sentence:

"The result of the Treaty was that what had been a Norwegian possession remained with the King of Denmark and became for the future a Danish possession" (Eastern Greenland 1933: 33).

The decisive word in this sentence is "remained". The meaning of that word is "to continue; to go on being; as, he remained a cynic" (Webster 1979). With this word the court says that their status was the same after, as it was prior to, 1814. Since the court lays such emphasis on the fact that prior to 1814 they had been part of the kingdom of Norway, which was united with the kingdom of Denmark, by using the word "remained", it states that after January 14, 1814, they continued in this union. It is this union, this united monarchy ("Denmark 2"), which, as shown by Ørsted, is designated "Denmark" in the treaty, and whose ruler is designated in the treaty as "Sa Majesté le Roi de Dannemarc".

The court strongly emphasises that the only change in the status of Greenland, Faroe and Iceland in 1814 was that an internationally recognised border was established between the new Norwegian realm, which was united with Sweden, and the part of the previous Norwegian realm which continued to be united with Denmark. It was neither the task of the court nor of the treaty to determine the constitutional consequences for this legal entity, which continued to be a part of the monarchy united under the sceptre of the King. This must naturally be determined constitutionally by the relevant competent bodies.

What does this mean in relation to the current question?

Can the fact that Greenland, Faroe and Iceland had a different constitution than the kingdom of Denmark in 1814 have any bearing on their constitutional status today?

In order to treat this question, we must look at the legal gradation, with the three steps of: 1) Constitution, 2) Law, and 3) Ordinance (Sørensen 1973: 29).

It is typical of a written constitution that it determines how other rules of law are to be drawn up. If the constitution is to be altered, it must be done according to a specific procedure. "This means that any alteration of the structure established by the constitution cannot be carried out by the same method applied to the creation of other rules of law" (Sørensen 1973: 29).

The validity of a law depends on its being passed in the manner prescribed in the constitution and on its contents being compatible with the provisions of the constitution. If the law is not passed in the correct manner or its contents are in conflict with the constitution, it is legally defective (Sørensen 1973: 29).

Administrative regulations or decrees are subject to the law. It can be determined by law which authorities can issue decrees, as well as the procedure to be followed, and the content any such decree should have. If these conditions are not fulfilled, a decree can be overruled by the courts (Sørensen 1973: 29 f.).

Why is a constitution put into effect?

Just as any norm, written or not, arises based on people's need for security in interaction, in every society there is a need for rules organising the governing of the state.

These constitutional norms have generally been unwritten, but mankind's inherent need to create order in his existence has meant that written constitutions have appeared in one state after another.

What happens when we get a written constitution is that the body issuing the constitution defines the rules of the state in question with regard to the supreme bodies of the state: those who, according to Montesquieu (1689-1755) issue laws and with the authority of these laws make administrative and juridical decisions (L'Esprit des Lois 1748).

The decision to change or abolish a constitution must be made by the body issuing the constitution.

If we apply this model to the constitution valid in 1814 for Greenland, Faroe and Iceland, and ask how their specific constitution could have been abolished, it is clear that it would have been the case if their union with the

Kingdom of Denmark had ended, for according to their constitution, they had the monarch in common with this kingdom. This took place in the case of Iceland with the Danish-Icelandic Treaty of Union of November 30, 1918, according to which Iceland became an independent nation on Dec. 1, 1918 (Berlin 1933: 5). After this, Iceland was no longer, along with Greenland and Faroe, part of the legal entity united with the kingdom of Denmark. It was necessary to issue a new constitution in the new Icelandic state, valid for this realm. Similarly, we must conclude that if the referendum called by the Danish government in Faroe on Sept. 14, 1946 (which resulted in a vote of 50.7% for independence) had been implemented, the Faroese realm would have had to have a new constitution, while the Norwegian Hereditary Absolute Monarchy Act would still have applied to Greenland, which continued to be united with the kingdom of Denmark.

But Faroe did not become the 75th member of the United Nations in 1946, and the situation in the 21st century is therefore that the kingdom of Denmark on the one hand, and Greenland and Faroe on the other, constitute a "monarchy united under the sceptre of the King".

In contrast to the 125-year younger "Constitution of the United States", the Hereditary Absolute Monarchy Act does not contain any determination as to what body is competent to issue a new constitution. This was quite common in the seventeenth century. The constitutions of the time were written in the coronation charters of the Kings, which naturally were of limited duration. In principle, the Hereditary Absolute Monarchy Act was only valid as long as there were descendants of the reigning King, but if this was not the case, who was then to issue a new constitution?

Of this, there could be no doubt. It must be the same body that had passed the Hereditary Absolute Monarchy Act, namely a Rigsdag representing the citizens of the realm.

Such a Rigsdag could, of course, be assembled at any time by the reigning absolute monarch, if he felt there was a need to revise the constitution.

There was such an assembly in Denmark in 1848, resulting in the King's issuing, on June 5, 1849, a new constitution, which in its epilogue states that this new constitution abolishes the Act of Royalty which Frederick III "according to the Powers invested in him by the Danish Estates" had drawn up (Himmelstrup and Møller 1958: 72).

The powers invested at the Rigsdag by the Danish Estates are the Danish Hereditary Absolute Monarchy Act. The new Danish constitution, the June Constitution of 1849, is thus the constitution for the areas for which the Danish Hereditary Absolute Monarchy Act was the valid constitution from January 10, 1661 until June 5, 1849.

This means that the June Constitution cannot apply to Greenland and Faroe.

One constitution for Greenland and Faroe, another for Denmark

The constitutional status of Greenland and Faroe is therefore that they are a constitutional entity with one and the same constitution. This specific constitutional entity is united with the kingdom of Denmark ("Denmark 1"), which likewise is a constitutional entity. These two entities are joined in a union with a common monarch, who, as well as being the King of "Denmark 1", is the King of the constitutional entity of Greenland and Faroe and the head of state of the union ("Denmark 2"). He does not reign over Greenland and Faroe as King of "Denmark 1", but as King of this constitutional entity, in that the constitution of Greenland and Faroe determines that they have the same monarch as "Denmark 1".

The King has jura majestatis in Greenland and Faroe, i.e. all legislative, executive and judicial power. He also has the freedom to determine with which foreign powers he will make agreements and on what subjects.

The King can authorise others to exercise his power. Therefore it is not inconsistent with the constitution that the King has deposited part of the legislative power with elected bodies in Greenland and Faroe as well as to individuals (ministers of the government) who he has requested to occupy themselves with legislation in this constitutional entity.

The legislative authority in the 21st century with respect to the Hereditary Absolute Monarchy Act

If we, for example, look at the exercise of legislative authority in Faroe in 1814, we see that the King, on March 13, 1813, had resolved, and made public in the Public Notice from the Chancellery of March 23 that same year, that: "The judge in Faroe had been issued an ordinance to hold extraordinary courts in the districts for the publication of royal decrees, as soon as they arrive in the country."

The legislative body was therefore structured so that the King had been given legislative authority by the Norwegian people. The inhabitants of Greenland and Faroe have bestowed upon the King *jura majestetis.* If he considered that it was necessary to issue a new law for those of his Norwegian citizens who lived in Faroe, then the law was sent up there, and the judge, who was a civil servant appointed by the King, was to hold courts in all the districts in order to promulgate the new law, so that the inhabitants knew how they were to comport themselves in future. Faroe was a special area of promulgation for ordinary laws and there was nothing new in that, for these islands had also been so designated in the Middle Ages, when they were under the jurisdiction of the Norwegian Gulating. But it was obvious that the legislative power given to the King only concerned ordinary laws and not constitutional laws.

There was no change in this state of affairs with the Kiel treaty of 1814. Laws were sent to Faroe and proclaimed there on the strength of the legislative power of the absolute monarch.

On April 1, 1896, a new law (no. 51) was proclaimed in Faroe on the authority of this Chancellery Proclamation of 1813, regarding the publication of laws and royal and ministerial decrees, regardless of the title under which they might be issued (decrees, open letters, circulars, proclamations, public notices, rules, regulations, instructions, articles, etc.). Neither did this law give the King nor the civil servants appointed by the King the authority to promulgate constitutions.

This law was replaced by law no. 735 of June 12, 1989 on the proclamation of laws, decrees and statutory instruments in Faroe.

The system is completely unchanged and therefore in accord with the Hereditary Absolute Monarchy Act of 1661/1662.

Unconstitutional laws in Greenland and Faroe

According to the jurist Max Sørensen (1913-81), who on this point is in agreement with jurists all over the world, a new constitution cannot be put into force by an ordinary legislative body, but only by a special constitutional body. Here, we can refer to both the verdict of USA's Supreme Court in 1803 in the case of Marbury v. Madison (Heffner 1959: 74-83), and to the verdict of the Supreme Court of Denmark in 1999 in the Tvind case (Ugeskrift for Retsvæsen [The Danish Law Review] 1999: 841).

This universal rule is of course also valid for Greenland and Faroe.

The constitution Greenland and Faroe had in 1814 can therefore only be revoked if the body having the competence to issue a new constitution, namely a Rigsdag elected by the citizens, meets and passes a new constitution instead of the still valid Hereditary Absolute Monarchy Act from 1661/62.

This has not taken place, and therefore the constitution of Greenland and Faroe is unchanged.

Nevertheless the argument has been advanced that the constitution of the kingdom of Denmark has become the constitution of Greenland and Faroe. This is partly true. With the authority vested in the King's power to put ordinary laws into effect in Greenland and Faroe, he has authorised his ministers to proclaim in Faroe the constitutions established for the kingdom of Denmark in 1849, 1855, 1863, 1866, 1915 and 1920, as well as the present constitution, from June 5, 1953, which also has been proclaimed in Greenland.

The Danish constitution of June 5, 1849 was registered in extraordinary courts in the districts of Faroe on Dec.1st, 6th and 21st, 1849, and on Feb. 16 and March 27, 1850 (Wang 1988: 156, Thorsteinsson 1990: 161).

In the fall of 1850 the draft of a law on elections in Faroe to the Rigsdag in Denmark was brought before the Rigsdag. A. S. Ørsted protested in the Landsting against the Faroese being included under this new system without being given the opportunity to express their own wishes. This caused the Minister of the Interior, Matthias Hans Rosenørn (1814-1902) to declare: "It cannot be denied that this system, aimed at by this draft of an electoral law, and which the constitution, I believe, also has had in mind, can have its irregularities. If one is to characterise this system, one might almost refer it to a legislative union, one cannot say that with it any incorporation is aimed at" (Rigsdagstidende 1850, Landstingets Forhandlinger [The official report of parliamentary proceedings, proceedings in the Landsting]: 874). He even says that this system "grants them quite the same position as they have had hitherto" (ibid 875).

It was Rosenørn who had ordered the proclamation of the June constitution in Faroe. It is therefore interesting to see that he was so uncertain with respect to the consequences his official order had had for the constitutional

status of Faroe. It can be added that neither was the legislative union he predicted realised.

This is a matter of course, for when a constitution is only put into effect by an ordinary legislative body it has no validity as a constitution, but only as ordinary law. The authorities that are to administer such a law must decide on the extent to which it can be used without derogating the valid constitution.

A number of the provisions to be found in the Danish constitution can with no further ado be put into effect in Greenland and Faroe by virtue of the legislative power conferred on the King by their citizens. Since he has jura majestatis, i.e., the unlimited power of the absolute monarchy, he can without doubt decide that the citizens are, for example, to have freedom of speech. This type of provision is, of course, valid, in spite of being part of a law which is unconstitutional on other points.

What then is the case in this respect with regard to article 3 of the current Danish constitution, which puts Montesquieu's teaching on the division of power into effect in the administration of the Danish state, so that legislative power lies in the hands of the King and parliament?

In Greenland and Faroe, the King still has this power. There is, of course, no provision preventing the King from placing a bill on Greenlandic and Faroese matters before Parliament if he considers it desirable to hear their opinion, but he has, as we know, also determined that the Home Rule parliaments (hjemmestyrerne) are to partake in his legislative power. The competence of the Home Rule parliaments is therefore not delegated by the Danish Parliament, but by the King, on whom it has been conferred by the citizens of Greenland and Faroe.

There is nothing new in this. In 1814 there was a Lagting in Faroe which, by virtue of its judicial authority, participated in decision-making with regard to the registration of laws. It had pleased the King to maintain this democratic element in his absolutist reign right from the inception of the absolute monarchy, but in 1816 he decided to abolish the Lagting. In 1852, it was re-established by the King, in that a law so deciding was registered in the districts in accordance with the public notice of 1813. The idea that the Lagting was now simply a municipal body was not shared by the King's Minister of Justice, who, on March 29, 1860, stated that the Lagting is "a Representative of the People, whose main Task is advisory Participation in

legislative Cases, notwithstanding that in Addition to this it has the Task of treating and deciding on municipal Affairs" (Lovsamling (Statute Book) 1901: 147 f.).

The result is that all laws pertaining to Faroe up until now have been carefully decreed by the absolute monarch and those he has authorised to practice his legislative powers.

In Greenland it has always been accepted that the citizens have their own legislative body, in that common law is considered part of the legal basis for the courts. But the laws put in force in Greenland by the King were sent to the settlements. There was no specific procedure of proclamation for these laws, and therefore they were printed in the Law Gazette of Denmark, but were, of course, not valid until they arrived at the widespread settlements (Karnov 2001: 86, note 12).

Treaties imposing democracy on "Denmark 2"

In democratic states, questions of the compatibility of ordinary laws with constitutional laws can be put before independent courts. According to the constitution valid in Greenland and Faroe, not only legislative but also judicial power lies with the King. Courts processing ordinary cases in Greenland and Faroe are therefore not competent to decide on the possible incompatibility of proclaimed laws with the valid constitution.

This is one of many proofs that the constitutional status of Greenland and Faroe today is not in accordance with the responsibilities accepted by Denmark when it became one of the founding members of the United Nations in 1945. In article 55 of the Charter, member countries accept the obligation to "promote universal respect for, and observance of, human rights and fundamental freedoms". According to the Universal Declaration of Human Rights, article 21: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures".

The most basic freedom we can imagine is the freedom to decide on the constitution under which one is to live. Greenlanders and Faroese had this freedom as citizens of the kingdom of Norway until January 14, 1814, and according to the Hague judgment of 1933, their legal status should be unchanged.

But when Denmark (1) got a new constitution in 1953 the question was put to the electorate in a referendum. In order to ratify the constitution, 45% of the electorate had to vote yes, which they did, with 46% voting yes. But in Greenland and Faroe this constitution was afterwards put into effect by royal decree as an ordinary law, in spite of not having been put to the Greenland electorate in a referendum, and of only being accepted by 6.7% of the electorate in Faroe.

Denmark has ratified the United Nations Charter and the Convention on Human Rights as well as the International Covenant on Civil and Political Rights without any reservations as to the validity of these treaties in Greenland and Faroe. Therefore, Denmark has taken on the responsibility in relation to international law to ensure that the inhabitants of Greenland and Faroe themselves can decide what constitution is to be valid there.

It is doubtful whether it is compatible with this responsibility that the Danish government maintains that the constitution in Greenland and Faroe is to continue to be that which was passed in 1661/62.

No wonder then that the Human Rights Committee of UN has stated its desire to have more information concerning the implementation of the Covenant on Faroe (UN document CCPR/CO/70/DNK of October 31, 2000) and has expressed regrets about "the paucity of information about the covenant and its implementation" in Faroe (Guðmundur 2001: 53).

It is time to recognise that the people of Greenland and Faroe comprise a constitutional entity with a legally well-founded claim to be allowed themselves to choose a Rigsdag that can decide on their constitutional status. [4]

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Kári á Rógvi[1]

Except by some Action not provided for in the Instrument itself.

- *A Short Note on Opting Out of the Danish Realm*

> I hold that in contemplation of universal law and of the Constitution the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our National Constitution, and the Union will endure forever, it being impossible to destroy it except by some action not provided for in the instrument itself.
> ***Abraham Lincoln First Inaugural Address***

> But since the point of a revolution is to reject the established order, it is unclear why constitutionalization of any such right would be a useful step at all.
> ***Cass R. Sunstein***[2]

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[2] Constitutionalism and Secession 58 U. Chi. L. Rev. (1991) 633 at 66

Føroyskt Úrtak
Kári á Rógvi viðger í greinini, um føroysk loysing frá Danmark er í samsvar við donsku ríkisgrundlógina. Føroyingar tykjast leggja stóran dent á, um tað ber til at loysa sambært donsku stjórnarskipanina, og um danskir myndugleikar vilja geva bindandi tilsøgn um at virða føroyka loysing. Hetta er at misfata støðuna. Tað liggur í donsku skipanini eins og í øllum øðrum stjórnarskipanum, at skipanin skal varveitast í allar ævir, um ikki politiskar rembingar skaka skipanina av lagi. Velja føroyingar at enda tað samveldið, sum í verki nú er ímillum Føroya land og Danmarkar ríki, er hetta eitt politiskt sig, ið stríður ímóti grundlógini, men sum donsku stjórnarstovnarnir kunnu velja at góðtaka, og helst eisini fara at góðtaka. Danski hægstirættur fer óiva at lata Fólkatingið gera spurningin av eftir tilmæli frá Stjórnini. At loysa frá verandi støðu er við kollvelting at birta politiskan jarðskjáta, ið hevði skakað politisku skipanina, men sum so mangan áður hevði hetta ført við sær, at ein nýggj stjórnarskipan og nýggj løgskipan gjørdust veruleiki. Heimildin er ikki at finna í grundlógini, men heldur uttanfyri grundlógina.

1. What's the Problem?

From time to time, including at present, the political establishment and inhabitants of the Faroe Islands are actively considering leaving the Danish Realm. The Faroe Islands and Greenland are both associated to Denmark in constitutional arrangements that have puzzled a number of people. The debate on the position of these two entities in constitutional as well as international law is long and wide-ranging, as are the parallel discussion on political, historical, economical and cultural aspects of the matter.[3]

[3] I have written on this in unpublished paper at the Greenland International Conference on International Identity called "Our Land" and in the article "Færøsk Retspleje frem fra glemslen" in Lov & Ret 2002.
Other and more notable writers on the subject include:
Zakarias Wang, on the Faroese position vis-à-vis Norway and Denmark, previous article 2 FLR (2002) 159.

a. In the words of the Powers that be

The Problem can be articulated in the words of the politicians, first a question from the Faroese Nationalist side:

> "Will the Prime Minister recognise the following indisputable facts:
> a) that the Faroese People in accordance with international law is a nation,
> b) that the Faroese people is a subject of international law, and
> c) that the Faroese people has external self-determination in accordance with international law?"
> **Question to the Danish Prime Minister[4] submitted by the Honourable Mr. Tórbjørn Jacobsen, Member of the Danish Parliament (Faroese Republican Party)[5]**

Having refused this assurance, the Prime Minister, summed up the Danish position, indicating that the Danish Parliament is likely to give its blessing, albeit not upfront and not with reference to international law:

Jákup Thorsteinsson and Sjúrður Rasmussen on the question of the Faroese position being based on treaty or delegation. in Folketingets Festskrift Grundloven 150 år ISBN 87-00-39106-9 491 at 505.

Frederik Harhoff Rigsfællesskabet ("The Community of the Danish Realm") ISBN: 87-7724-335-8 Århus 1993. English Summary at 501.

A number of articles published in the FLR deal with the status question under international law:
A. Geater and S. Crosby: 1 FLR (2001) 11 at 34
G. Alfreðsson: 1 FLR (2001) 45
Halgir Winther Poulsen: 1 FLR (2001) 59
On the distinction between sovereignty and independence B. Larsen 1 FLR (2001) 89

The newest Danish textbooks deal only briefly with the Faroe Islands; Henrik Zahle Dansk Forfatningsret 2 at 259; Peter Germer Statsforfatningsret I at 19.

Older ones seem almost absurd in their total neglect and disregard of the Faroese position and the importance of history, culture, politics, precedence and common sence in constitutional law; most notably the one that caracterised the Home Rule Compact as a form of delegation that could as well as have been awarded to two Danish islets, one of them a metropolitan suburb, the other enjoying a similar political non-existence.

[4] In this note the terms for the various political bodies and offices are used thus: 1) the Danish term "Statsministeren" and the corresponding Faroese term for that office "forsætisráðharrin" is translated into "the Danish Prime Minister", 2) the Danish Legislature "Folketinget" is translated into "the Danish Parliament", 3) the Faroese term "Løgmaður" and the corresponding Danish term "Lagmanden" are translated into "the Faroese Prime Minister". This use corresponds with the official use of those institutions themselves. More controversially, perhaps, I use the word "Government" in the American fashion to mean the entire power structure, not just the executive branch, and "the Executive" to describe the executive branches. The Danish term for the Danish executive is "regeringen", the Faroese term for the same is "danska stjórnin", the Faroese term for the Faroese Executive is "landsstýrið", the Danish term for that is "landstyret".

[5] Question no. S 1737 – answered 17 April 2002 – Danish Parliament Session 2001/2002

> "To Mr. Tórbjørn Jacobsen I will say this in all tranquillity that Mr. Tórbjørn Jacobsen may freely suggest that the Faroe Islands and the Faroese Parliament, the Faroese People, are above the Danish Basic Law, but it is and will remain a theoretical discussion, because it is of no practical importance for it has been indicated by a massive majority in the Danish Parliament and by successive Danish Executives that if there comes a wish from the Faroese side for sovereignty, they can have it."
> ***Oral answer in Parliament by the Danish Prime Minister the Right Honourable Mr. Anders Fogh Rasmussen***

The Danish position seems to be that the Danish Government accepts the political eventuality of the Faroe Islands leaving the realm, but will not state this as a legal right, nor indicate the legal source that secession rights may be based upon, and, furthermore, the Danish Government reserves its formal response until such day that a formal request is put forth.

Further to this point, a proposal for a formal resolution put forth by the Honourable Mr. Tórbjørn Jacobsen calling upon The Danish Executive to "...notify the United Nations that the Faroe Islands have unlimited right of self-determination in accordance with international law. " was not adopted.[6]

The Faroese Parliament, for its part, has set up timetable for achieving sovereignty – though as always with considerable dissent – that is based on language referring to legal rights:

> "Recognising that the Faroese People is a Nation with inalienable and continuous right of self-determination, the Parliament approves that a determined effort of achieving Sovereignty is undertaken. The Parliament therefore approves that the Faroese Executive implements the following:
>
> - That the Faroese Government at the latest on January First 2012 assumes the full powers over all Policy Matters in accordance with the legal status of the Faroese people, except for those Matters that are directly connected to assuming sovereignty and, furthermore, that the Faroese Government in accordance herewith pays in full for these policy matters.
> - That [certain policy matters such as the State Church and family law] will be transferred to Faroese control on January 2002 at the latest.

[6] Danish Parliament Beslutningsforslag B. 107 Session 2001/2002.

- That [certain policy matters such as the judicial system] will be transferred to Faroese control on January 2004 at the latest.
- That [certain policy matters such as the police and currency] will be transferred to Faroese control on January 2006 at the latest.
- That [certain policy matters such as emergency services] will be transferred to Faroese control on January 2008 at the latest.
- [To develop the Faroese Economy from subsidy based to self-sustained, and to reduce the block grant by 300-400 million DKK by January 1 2002 and then further until it is eventually abolished].
- [To establish a Faroese Economic Fund].
- That before the Faroe Islands are established as a Sovereign State, it shall be conditioned on the Faroese People deciding so in a referendum held in the Faroe Islands."

Faroese Parliament Resolution (Bill no. 114/2000)

As is so often the case, the Faroese were not united on this occasion; Parliament passed the resolution with 18 votes in favour, 12 against, and one abstention (with one of the 32 members – an assumed nay-vote – absent). Furthermore, the timeframe for transferring policy matters has not been observed so far, but, and perhaps more important for the independence prospects, the reduction of the block grant has, indeed, happened.

Earlier the Danish Parliament articulated its position thus:

> "The Parliament recognizes that it is the Faroese population that decides the future relationship between Denmark and the Faroe Islands.
> The Parliament accepts the Prime Minister's account of the Danish Executive's position in the negotiations that have been initiated with the Faroese Executive.
> The Parliament will elect a committee of 21 members to follow the negotiations and discuss questions regarding a regeneration of the relationship between Denmark and the Faroe Islands."
> **Danish Parliament Debate Resolution V 68 / 1999**[7]

Although, as indicated by the Danish Prime Minister, the political event of a break-up is lurching in the Danish collective political psyche, the emphasis in the formal position is always on the "*future relationship* between

[7] Danish Parliament Folketingsvedtagelse V 68 ved Forespørgselsdebat F 47, 6. April 2000, Session 1999/2000.

Denmark and the Faroe Islands", however unorthodox this less than blissful cohabitation may prove to be.

b. The Supreme Power

More acutely, the question that always pops up in the mind of the Faroese is: Can the Faroes unilaterally withdraw from the present arrangement with Denmark and become a sovereign and independent Nation in its own right? Or does a successful transition from association to independence rely on Danish acceptance? If so, can the Danish Realm give its assurance that it will accept a Faroese wish to secede or is it bound by certain constitutional procedures? Or is it perhaps impossible to get untangled from the Danish Realm because of some constitutional bar to secession?

In other words: Who decides When and If, and How, it can be done?

To some foreigners it might seem confusing that the Faroese get so wound-up over this question, since the position of the Danish Executive and Parliament alike seems to be that the Faroese are free to go, though the Danes evidently would prefer that the Faroese stayed and will offer goodies aplenty to the remaining extremities.

In the Faroese debate, however, enormous importance is attached to the formal positions. Any sign of preconditions, mandatory procedures or constitutional quirks is seen as proof of "ófrælsi" (literally "unfreedom") and taken as a reason for leaving the Realm to protect our right to self-determination.[8]

Indeed, in political rhetoric (external) self-determination is often expressed as synonymous to secession. The better view, in my opinion, is to regard self-determination as the right to choose between association and independence and the numerous ways that both options can be realised, as well as – in this is very fundamental in our day and age – *the right to change one's mind* and opt again.

Now, this might seem controversial. Often, the analogy used is that of overseas colonies choosing either integration or independence at the time

[8] The Danes for their part could have been more flexible in recognising the Faroese potential. The last Prime Minister Poul Nyrup Rasmussen refused to accept international observers or mediators as part of the negotiations regarding a proposed Treaty recognising the Faroes Islands as a Sovereign state in Free Association with Denmark, this in possible violation of international law, see G. Alfreðsson: 1 FLR (2001) 45.

when they 'wake up' politically. However, the better analogy, at least in the Faroese case, is that of the European tradition whereby the various polities have been able to associate, disassociate and re-associate themselves to one another. As touched upon below, Denmark has itself been an active part of this tradition. Crucially, the question is, if the Faroese right to choose depends on proving a status as 'non-self-governing'. It is my submission, that the Faroes Islands have had and have claimed a right to remain self-governing even in association and a right to renegotiate the terms of association without thereby implicitly agreeing to a perpetual state of total integration.

2. What are the rules?

a. Danish Constitutional Law

The Basic Law of the Danish Realm (Danmarks Riges Grundlov – literally Denmark's Realm's Base law – or the Basic Law of the Danish Realm) is perhaps one of the most irrelevant constitutional documents in the western world. There are almost no cases of the courts annulling Parliamentary Acts or Secondary Legislation on the basis of the Constitution and lawyers are generally derided for referring to constitutional provisions. Its real function is being a national symbol of the establishment of democracy. The Basic Law is featured in Parliamentary debates, and certainly the text itself and its understanding has significant political importance, but ultimately the Parliamentary majority of the day decides its meaning – not the Supreme Court.

In 1999, to the great relief of those, who have clung on to the legal relevance of the Basic Law, the Danish Supreme Court finally (almost) invalidated an Act of Parliament[9]. However, there is no vengeance and furious anger in the opinion of the Court. It merely states that "§ 7 of [the Act] is invalid in relation to the appellant the Free School of Veddinge Bakker." The Act was a blatant example of a Bill of Attainder that refused grants to certain named private schools as a reprisal for alleged past misconduct. The Court struck one of its provisions down with reference to § 3 of the Basic Law that provides for the Division of Powers. Note, however, that the Act itself was not annulled and no general pronouncement made, only a particular provision found invalid in relation to one individual party in that specific case.

[9] See Den Selvejende Institution Friskolen i Veddinge Bakker v. Undervisningsministeriet, Ugeskrift for Retsvæsen U.1999.841H

When it comes to matters of sovereignty and the like, the Supreme Court is even more expressly non-political and timid. In the question of EU-membership being compatible with the Danish constitution, the courts for a number of years held that Danish citizen didn't even have legal standing to challenge its constitutionality[10]. When the question was finally admitted, the Court held inter alia that: "It must be seen as vested in Parliament to decide if the Executives participation in the EU-co-operation shall be subject to further democratic control."[11]

The power to guard Democracy (and presumably other Fundamental Principles of the Danish Constitution) is, therefore, vested in Parliament. Furthermore, this apparent doctrine is that only picking on individuals – as opposed to determining the faith of the great plurality – will be struck down by the Supreme Court. This understanding leaves rather certain the assumption that of the Danish Political Bodies, it is the Parliament that ultimately decides the If and How of a secession in accordance with the Danish Basic Law or the wider Danish Constitution. Parliament will do so upon the recommendation of the Executive, with which it is to a large extent intermingled, given the Parliamentary system that has evolved. Most members of the Executive, the cabinet members, are also at the same time members of Parliament. Their political parties will either hold the majority of the seats in Parliament or govern with the consent of a majority in Parliament. As the debate resolution above shows, there is a very strong tradition of striving for a national consensus in Parliament on important issues. Even the opposition parties not consenting to the administration of the day will often vote in favour of so-called "forlig" – political concords.

An example of the gradual substantive evolution of the Basic Law is its § 56. It used to be interpreted to mean that political parties were not allowed in Parliament – that is not the position anymore. Likewise, "The Executive" has in interpretation that is now second nature to Danish lawyers supplanted the "King" (in numerous provisions). The division of power between Legislature and the Executive (§ 3) has been blurred through "Parliamentarianism" by which the same majority effectively controls both bodies and most of the Cabinet Ministers are at the same time Members of Parliament. The Danish Constitution, thus, has evolved immensely without amendments to the text of the Basic Law, and without the groundbreaking

10 See Helge Tegen v. Statsministeren, Ugeskrift for Retsvæsen U.1973.694.Ø overruled in Hanne Norup Carlsen et al v. Statsminister Poul Nyrup Rasmussen U.1996.1300H.

11 Hanne Norup Carlsen et al v. Statsminister Poul Nyrup Rasmussen U.1998.800H.

reinterpretations of landmark court cases. Rather, there is and ever-developing compromise between the political agents and a legal tradition that always portrays the current consensus as self-explanatory, discarding earlier readings of the Basic Law. Illustrating this point is the fact that the debates of the Danish Constitutional Convention of 1848 can only be discerned by those proficient in reading 'gothic letters'.

The theory that the Danish Supreme Court will allow gradual constitutional change, even contrary to the language of the Basic Law, seems to hold up in the only reported case dealing with the division of powers between the Danish Realm and the Faroese Government. The case dealt with taxation in the Faroe Islands, where a Danish physician was denied the same tax deductions as the native Faroese. Although the Basic Law § 43 expressly hands over the Power of Taxation to the (Danish) Parliament, and Parliament only, the Appeal Court implicitly accepted the Taxation Powers of the Faroese Parliament, but ruled that the § 10 (2) of the Home Rule Compact forbids such discrimination between natives and other citizen of the Realm and gave the good doctor the same deductions[12].

b. "The Parts"

The provisions pertaining to the Faroes and Greenland are obscure to say the least:

> "**§ 1.** This basic law applies to all parts of the Danish Realm"

It is, alas, difficult to discern just what this mentioning of the "parts" means. The provision seems to infer that there is a "Realm" (Rige in Danish, Reich in German, Ríki in Faroese) that is Danish and includes more than the state or land of Denmark. Historically, the King of Denmark has always been head of a number of entities outside of Denmark (see later) and the change in the wording to "all parts" was to signify the entry of Greenland into the Constitutional Sphere, wheras it previously had lingered outside in a state of colonial limbo.

The provision signifies that there is a division between Denmark Proper and the Realm. Unfortunately, however, the Constitution does not explain the difference between the Parts, nor does it define any political bodies

[12] See Føroya Landsstýri v. Karsten Werner Larsen, Ugeskrift for Retsvæsen U.1983.986Ø. See also a recent case accepting a Greenland statute as "legislation" rather than "administrative regulation" Perorsaasut Ilinniarsimasut Peqatigiiffiat som mandatar for A v. Paamiut Kommuniat, U.2002.2591.Ø.

exclusively representing the parts or the whole. It says nothing, furthermore, on the possible dissolving of the Realm.

Other provisions give short reference to the Faroes and Greenland:

> "**§ 28.** Parliament is a unicameral house consisting of 179 members at the most, of which 2 members are elected on the Faroe Islands and 2 in Greenland."
>
> "**§ 32.** (5) There can be enacted in statute special rules regarding the Faroese and Greenlandic parliamentary mandates and their commencement and termination."
>
> "**§ 42.** (8) Particular rules on referendum, including to what extent a referendum shall be held in the Faroe Islands and Greenland, can be enacted by statute."
>
> "**§ 86.** [Special rules can be enacted in statute on voters' age for municipalities and church councils in the Faroe Islands and Greenland]."

These provisions mostly on elections and such trivia cannot be said to reflect in any meaningful way on the relationship between the Parts and the Realm. But these provisions would surely stick out like sore wounds if the relationship were terminated, especially if it happened without mutual agreement. Most acutely, a legitimate question is whether the provision on Faroese representation either precludes Faroese secession, or perhaps, allows die-hard unionist to continue returning MP's to the Danish Parliament, even after the Realm is actually dissolved. The same goes for the question of continuously claiming Danish citizenship. Of course, the Danish position after a break-up or Faroese declaration of independence will be crucial in this respect – will the Danish Parliament treat the provisions as obsolete or lapsed, or as a basis for clinging to its North Atlantic outpost.

c. The rules – perpetuity or continuity

Assuming implied perpetuity, one way of breaking up would be to amend the Danish Basic Law. § 88 on the amendment procedure provides for a very cumbersome, but not impossible, way of amending the Constitution, two consecutive Parliaments and a referendum carried by a majority consisting of a minimum of 40 cent of all voters. The time involved, the unpredictability of the Danish voters, and traditional reluctance to amend the Basic Law all indicate that amendments are unlikely to pass in a time of "revolution". When the Faroese are ready to ram the door, they are probably not going to await amendments of obscure Basic Law provisions.

Slightly more apt when painted into a constitutional corner is § 19. It is the provision that has been given most practical consideration. It appears to be the underlying belief of the Danish Government and the Faroese as well that this is the correct procedure to be used for dissolving the Realm:

> **§ 19** (1) The King acts on behalf of the Realm in international matters. Without the approval of the Parliament, He cannot, however, undertake any action that increases or decreases the area of the Realm, or undertake any obligation when its fulfilment requires action by Parliament, or otherwise is of greater importance. Neither can the King without the Parliament's approval cancel any international treaty, which has been ratified, without the consent of Parliament.
> (2) [Armed conflicts]
> (3) [The Foreign Affairs Committee]

The Faroese Executive proposed in its White Paper on Faroese Sovereignty and a Treaty of Free Association with Denmark that a Treaty between the Faroe Islands and Denmark be signed and then ratified by both Parliaments, in Denmark by following the procedure in § 19.[13]

With all due respect, this is utter crap. The Basic Law § 19 is not a procedure for dismembering the Realm. § 19 is a very traditional enabling provision giving the Executive (the King) the power to act in international relations. However, he is not to act without democratic consent in certain situations (when treaties, internal legislation or borders are concerned) nor in any other matter of greater importance. The Basic Law is resoundingly clear when it comes the division of power between the Danish Legislature and Parliament. It can even be said whisper that the borders may be amended or seceded in favour of other states. But it is deafeningly silent on the prospect of a break up of the constituent parts. The "land-area" provision is seems more minted on border changes that wholesale renouncement of associated countries. Neither it nor § 19 as a whole can be said to give substantive powers of authorising a break-up of the Realm, rather, these are procedures for such external dealings that may upon a proper construction be found in the Basic Law or the "the wider Constitutional set-up".

d. Norway

[13] Hvítabók (Faroese Executive White Paper on Faroese Sovereignty and a Treaty of Free Association with Denmark) ISBN 99918-53-31-6.

Interestingly – especially for people who value our Norwegian connection – had we remained a part of Norway, the situation would perhaps seem more hopeless altogether:

> **"§ 1**. The Kingdom of Norway is a free, independent and indivisible and in-transferable Realm..."
> ***The Basic Law of the Norwegian Realm***.

I will not pursue this matter further. However, what Lincoln assumed, is here spelled out, and the same fundamentals apply: opting-out must be based on some action not in the instrument itself. The words "free, independent and indivisible and in-transferable Realm" only mirror the hopes and frustrations of the Norwegians, who have experienced their share of foreign domination, partition and transfer of allegiance.

e. The Faroese Procedures

Another question that I will leave for others to ponder is the question of how and by which procedures the Faroese themselves should decide to opt out. The options suggested include the following:

- The Faroese Parliament ratifies a Treaty with Denmark, with an optional referendum.[14]
- The Faroese Parliament unilaterally withdraws from the Realm.[15]
- The Faroese implement the 1946-referendum.[16]
- The Faroese secede by using the procedure for amending the Faroese Constitution.[17]
- The Faroese amend the Faroese Constitution to provide for a secession procedure.[18]
- The Danish Constitution must be amended to provide for an opt-out clause.[19]
- The Faroe Islands claim to withdraw from the original Association of 127.[20]

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[14] The White Book (supra 12) suggested this route.
[15] Favoured by many who favour independence in principle, but would like to postpone secession.
[16] The referendum is highly controversial and highly contested, but showed a majority favouring secession. The (extreme) Nationalist side traditionally favoured this route.
[17] This has been suggested in the works of the Faroese Constitutional Committee.
[18] This has been suggested by some in the Unionist camp, as it is the most cumbersome procedure in the book and, therefore, most appropriate when taking such a momentous constitutional step.
[19] This is the logical consequence of accepting that the Danish Constitution is a bar to secession by the Faroese, thus creating a legal basis for opting out.

- The Faroe Islands and Greenland collectively reveal themselves to be the lost Kingdom of Norway and formally end the Union of Bergen of 1450.[21]

All these options have been suggested by some quarters. Although the Faroese are one of the most homogenous and distinct nationalities of Europe they squabble loudly over this question. It seems that, just like the Danish Constitution, the Faroese Constitution is either silent or unclear as to the proper procedures to be used by the Faroese themselves.

3. Is there any History then?

Danish Constitutional History has plenty to tell us on how to adjoin to or dismember a constitutional conglomerate. The Present Queen is arguably a descendant of King Gorm the Old (about 900) and the Danish Dynasty has ruled a varying union of polities for the 1100 years since then. Originally they ruled the three Danish lands, Skåne (Scandia), Sjælland (Zealand) and Jylland (Jutland), which all by tradition were ruled by a Thing (Parliament) of their own that chose a King for that particular land. The descendants of Gorm managed by and large to get elected by them all throughout the Middle Ages. Adding to their core, the Danish monarchs ventured into the British Isles, Northern Germany, the rest of Scandinavia, the Baltics, they even joined the European colonialism establishing possessions in India, Africa and the Caribbean. Via their Norwegian branch the Danes even reached the North Atlantic and Northern America.

Arguably, politics, and especially politics continued through the means of armed conflicts had a lot more to do with the expansions and contractions of the Realm than had the intricacies of constitutional law. However, we must not dismiss constitutional or international law as made irrelevant by politics. Rather, we should accept that an interaction between the two will always exist.

To take but a few examples. Denmark and Norway were united through the union of dynasties. King Oluf in 1380 became King of both Realms. This led to the formal Union of Bergen in 1450. The Danish Princess Margrethe, who was the mother of King Oluf and the effective ruler of both Denmark and Norway for a number of years even managed to create a Union with Sweden, the Kalmar Union of 1397.

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[20] This would be adopting the line that Iceland maintained in relation to its own Association of 1262-64.

[21] This is the view of Mr. Zakarias Wang and others, see supra 1.

The Union with Sweden was dissolved through a series of bloody wars. The Union with Norway remained intact. The main difference seems to have been the relative strength of the nobility in each of the countries that Denmark sought to dominate.

As explained by Wang, Norway Proper was ceded by the Treaty of Kiel 1814.[22] Now, again the political events preceded the legal niceties. Denmark had joined the wrong side in the Napoleonic Wars, Copenhagen was strategically bombarded and the new ruler of Sweden, Prince Bernadotte, though originally one of Napoleon's Marshals, managed to wrist Norway out of Danish hands. The Norwegians had already spontaneously enacted their own constitution in 1814, but had to, for political and economical reasons, amend it in great haste and swap the Danish Prince they had elected as King for the erstwhile Marshal.

Throughout, there has been the acknowledgement that the lands could be surrendered by treaty or by grudging acceptance[23]. The King's Law of 1662 – the then written constitution of Denmark – and its Norwegian counterpart of 1665 – even had a precursor to the present day Land Clause of § 19. It would then seem that there is a great tradition for accepting 'some action' from abroad changing the constitutional composition. Mostly, though, the 'parts' have been taken over by others rather than left to their own contemplation.

4. How about Precedence?

Iceland was allowed to leave, but did so by a rather cunning ploy. The Icelanders, clever lawyers from ancient time as the sagas tell in epic ways, were able to get the Danes to accept Iceland as a separate Kingdom in a Personal Union with Denmark (sharing the head of State). A clause providing for the Compact to be dissolved through a referendum (qualified majority required), but not before 25 years later, was used to sever ties in 1943 when Denmark was conveniently (and literally) otherwise occupied.

The formal arrangement then – a 'law' enacted by both Parliaments rather than a treaty, even with special and unusual features such a preamble - seem

[22] Supra 20 at 172

[23] Until 1972 the Danish King claimed to be king of two lost peoples (de Vender og Gother), and Duke of several duchies, otherwise ceded to Prussia after the war of 1864 by the Vienna Treaty of 1864; the Danish King even had to be reminded by the Swedes that he was no longer eligible to the title of King of Norway after the Kiel Peace Treaty of 1814.

somewhat akin to the Faroese Home Rule Compact, which is also called a 'law'. No opt-out clause was provided, though, the Danes learning from previous error.

Iceland is especially relevant as an analogy, as the question of the applicability of the Basic Law to Iceland had been hotly and continuously contested. The Icelanders recognised the King but not the Basic Law. Now, whatever the correct position in Danish Law was, despite the Danish Claim that the Basic Law was in force, it was possible to recognise Iceland as a sovereign State and provide opt-out clause from the Union, without amending the Basic Law.

5. Conclusion

The Danish Constitution – both written and traditional – gives no guarantees of secession, not even any particularly suitable procedure for leaving the Danish Realm. The Faroe Islands as well as Greenland have to rely on a constitutional earthquake that leaves them on the right side of the fault line, should they wish to leave.

The Icelandic precedence, as well as some earlier ones, show us that the Danish Realm is apt at and used to accepting loss of Realms and Lands that have been attached to it. However, neither the Basic Law, nor the wider Constitution provide for clear Rights for 'Associates' to leave or Procedures for doing so.

The Courts will probably accept anything that is ratified by Parliament, and Parliament will follow the Executive and its recommendations.

Opting out of an Association is not a legal right to be exercised at will. It is a political action, a constitutional revolution that the system in question can absorb and accept with more or less ease. Secession from the Union with Denmark cannot be completed at will with reference to the Basic Law of the Danish Realm, *except by some Action not provided for in the Instrument itself.*