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LOCKSTEPPING: A VIEW FROM A TINY NORTH ATLANTIC JURISDICTION*

Kristian Joensen†

INTRODUCTION

During the spring semester of 2018, I taught a master's level course at the University of the Faroe Islands entitled "Sub-state Constitutions." The background for the course was that around this time Løgtingið [the Faroese parliament] was debating a proposal for a new Faroese Constitution.[1]

On the reading list for the course were several articles from American sub-state constitutional theorists that had been a source of inspiration for a long time, but the first and foremost of these was Professor Williams's article, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*[2] This article was on the reading list and keeps reappearing in various courses because it has proven very helpful in shedding light on some aspects of Faroese legal practice, particularly given the Faroese position as a semi-autonomous polity within a larger Danish state structure. As preparation for teaching this course, I contacted Professor Williams to inquire if he had any examples of "divergence" cases. He graciously sent me some cases that I was then able to assign as readings for my course.

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* This article is dedicated to the memory of Kári á Rógvi (1973–2015), late Professor of Law at the University of the Faroe Islands. A wonderful human being and a pioneer in Faroese legal education and legal scholarship.

† MA, MA, Teaching Lecturer in Law, Department of History and Social Sciences, University of the Faroe Islands. I am grateful to Professor Williams and the organizers for the opportunity to participate in the Festschrift and related events. I would like to thank my colleague, Assistant Professor of Law, Bárður Larsen for helpful comments and feedback throughout the writing process, and my colleagues, the historians Andras Mortensen, Hans Andrias Sølvará, and Erling Isholm, for their helpful comments regarding historical sources. I am also very grateful for assistance of Alaina Billingham and Nina Rodriguez during the editorial process. All mistakes are however my own.

1. See more below on the background for the constitutional project.

2. *See generally* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499 (2005).

In this article I will use the conceptual framework from that article to analyze select Faroese cases in order to illustrate how lockstepping contra independent interpretation is a topic of relevance not only to a formal federation like the United States, but also to other legal systems that, although they are not formally federally arranged, have important de facto federal-like features. I will first give a basic overview of Faroese legal and political history, which will be followed by an explanation of the Faroese home rule system.

THE HISTORICAL BACKGROUND OF THE FAROESE HOME RULE SYSTEM

The Faroe Islands became a part of the Kingdom of Norway from very early in their history.[3] Although there is some debate about the exact nature of the relationship between the Faroe Islands and the rest of the then-Norwegian Kingdom, it is generally agreed that the Faroe Islands had some special status within the Kingdom.[4] This could be seen in some of the institutions in the Faroe Islands. For example, the Faroe Islands had a court system and also certain legislation that was unique to the islands.[5] At the apex of the court system was the Løgting, the predecessor of the modern Faroese parliament.[6]

Gradually the Kingdom of Norway and the Kingdom of Denmark linked through intermarriage and union treaties.[7] Formally there were still two separate kingdoms, but the reality of this soon faded.[8] However, it is worthy of note that the Faroe Islands were always considered a part of the Norwegian and not the Danish kingdom.[9] One event that illustrates this is the promulgation in 1687 of the "Norske Lov" [Norwegian Code], which was extended to apply to the Faroe Islands in 1688.[10] Earlier, in 1683, the King had promulgated the "Danske Lov"

3. *See* Kári á Rógvi, *The Land of Maybe: A Survey of Faroese Constitutional History*, *in* THE RIGHT TO NATIONAL SELF-DETERMINATION: THE FAROE ISLANDS AND GREENLAND 13, 24 (Sjúrður Skaale ed., 2004); *see also* JOHN F. WEST, FAROE: THE EMERGENCE OF A NATION 4–5 (1972).

4. FØROYA LANDSSTÝRI, HVÍTABÓK 23–24 (1999), http://tilfar.lms.fo/logir/alit/1999.07%20Hv%C3%ADtabók%20høvuðsbind.pdf. The Faroese government (the "landsstýri") created this report to prepare for independence negotiations with Denmark. *See also* Hans Andrias Sølvará, *Færøernes Statsretlige Stilling i Historisk Belysning—Mellem Selvstyre og Selvbestemmelse*, 3 FAROESE L. REV. 145, 151–52 (2003) (Den.).

5. Á Rógvi, *supra* note 3, at 24–25.

6. *Id.* at 24.

7. *Id.* at 26.

8. *Id.*

9. HVÍTABÓK, *supra* note 4, at 23.

10. *Id.* at 25.

[Danish Code] that never applied to the Faroe Islands.[11] This difference had little practical relevance since the two codes were mostly identical.[12] However, this event does show that the Faroe Islands were still considered a part of the Kingdom of Norway, rather than the Kingdom of Denmark.

A very important series of events in Faroese history occurred when the Napoleonic Wars ended, starting with the enactment of the Treaty of Kiel in 1814.[13] Although the Treaty ceded Norway to the King of Sweden, Greenland, Iceland, and the Faroe Islands were accepted and remained with the Kingdom of Denmark.[14] Then, in 1816, the Faroese Løgting was abolished due to general centralizing tendencies in the Kingdom.[15] Finally, in 1848, a convention drafted a democratic constitution for Denmark.[16] It was ratified and took effect in 1849, except in the Faroe Islands where it took effect in 1850.[17] Although the Faroe Islands were not, unlike Iceland, directly represented in the assembly that drafted and ratified the constitution, the King appointed an official to represent the interests of the Faroe Islands.[18]

In 1852 the Faroese Løgting was re-established, this time not including the old Germanic court element, but as a regional assembly in connection with Denmark's division into municipal regions called "amter."[19] However, in practice the Løgting had greater powers than that of the other regional assemblies, and it could suggest new legislation.[20]

The crucial developments that led to the introduction of the home rule system happened as a result of the Second World War. During the war, Denmark was invaded by Germany and the Faroe Islands were occupied by the United Kingdom.[21] This meant that the Faroe Islands were cut off from Denmark and an interim new constitutional system had to be put in place. On May 9, 1940, a temporary frame of government was

11. HANS JACOB DEBES, FÆRINGERNES LAND: HISTORIEN OM DEN FÆRØSKE NUTIDS OPRINDELSE 83 (2001); Kong Christian Den Femtis Danske Lov (* 1) (* 2) (Act No. 11000/1683) (Den.).

12. DITLEV TAMM, RETSHISTORIE: DANMARK, EUROPA, GLOBALE PERSPEKTIVER 215 (2d ed. 2009).

13. Á Rógvi, *supra* note 3, at 27, 45; HANS ANDRIAS SØLVARÁ, FÆRØERNE EFTER FREDEN [THE FAROE ISLANDS AFTER THE PEACE] 22–23 (Peder Bejder ed., 2020).

14. *Id.*

15. SØLVARÁ, *supra* note 4, at 155.

16. Á Rógvi, *supra* note 3, at 45.

17. *Id.*

18. HVÍTABÓK, *supra* note 4, at 26–27.

19. *See generally* WEST, *supra* note 3, at 89.

20. *See id.* at 160.

21. Á Rógvi, *supra* note 3, at 30.

adopted.[22] This involved a power-sharing arrangement between the Danish governor and the Faroese Løgting.[23]

In practice, the new arrangement gave the Faroe Islands a successful experience in self-government, and after the war there was a consensus in the Faroe Islands that it would not be possible to go back to the *status quo ante bellum*. After the end of the war, representatives of the political parties in the Faroe Islands negotiated with the Danish government about the future relationship of the two countries.[24]

The Danish government ultimately presented the Faroese side with a proposal that involved a limited degree of self-government.[25] On September 14, 1946, the government held a referendum in the Faroe Islands with a sharp choice between either independence or the proposal of the Danish government.[26] The result of the referendum was an unexpected victory for independence.[27]

After the referendum, a majority of the Løgting worked to implement the results of the referendum, which ultimately resulted in the Danish government (formally the King) calling for new elections to the Løgting.[28] The parties that had opposed independence won the election and new negotiations with Denmark led to the adoption of the Home Rule Act which took effect on April 1, 1948.[29] The Home Rule Act was based on the model that the Danish government had originally proposed but had a significantly expanded scope.

THE HOME RULE SYSTEM EXPLAINED[30]

The Home Rule Act granted the Løgting legislative powers and a new Faroese home government executive power in areas under special Faroese competence.[31] Specifically, there were two lists, the "A" list and the "B" list, attached to the act.[32] Thus, the system was one of

22. WEST, *supra* note 3, at 179.
23. Á Rógvi, *supra* note 3, at 31.
24. ZAKARIAS WANG, FØROYAR Á VEGAMÓTI 175 (1999).
25. Á Rógvi, *supra* note 3, at 33.
26. *Id.* at 46.
27. *Id.* at 35.
28. *Id.* at 35.
29. HVÍTABÓK, *supra* note 4, at 30.
30. Home Rule Act of the Faroe Islands, (Act No. 137/1948) (Den.) [hereinafter Home Rule Act]. For a source in English with the provisions of the Home Rule Act, see *Translation: Home Rule Act of the Faroe Islands*, STATSMINISTERIET, http://www.stm.dk/multimedia/FO_hjstyrlov_UK.doc (last visited Apr. 27, 2020) (providing an English translation of the Act from the Office of the Danish Prime Minister).
31. Home Rule Act § 4.
32. ZAKARIAS WANG, STJÓRNMÁLAFRØÐI 182 (2d ed. 1989).

enumerated powers to the Home Rule System, while the central Danish state authorities were granted residual powers.[33]

The Home Rule System also gave the Faroese authorities some influence over legislation in areas still under Danish jurisdiction due to a mechanism whereby the Faroese parliament could review Danish legislation before it was extended to apply to the Faroe Islands.[34] While it is not formally a veto power, in virtually all instances the wishes of the Faroese authorities have been followed.

One implication of this latter arrangement is that even in areas still under Danish jurisdiction there can be, sometimes even significant, differences between the legislation that applies in Denmark and that which applies in the Faroe Islands. There are examples of statutes that have been repealed in Denmark but still apply in the Faroe Islands or that have amendments which do not apply in the Faroe Islands.[35]

There is no kind of parallel or concurrent jurisdiction involved in the Home Rule System. In 1950, Faroese lawyer and politician Edvard Mitens wrote an article in the literature section of the Danish Weekly Report (Ugeskrift for Retsvidenskap), where he summarized the new Home Rule System. One of the things that he said was the following: "The Faroe Islands are not a state, but a country with partial qualities of a state."[36]

This statement is even more true now than it was then. In a way it could be said that the Faroe Islands are slowly evolving toward increasingly higher degrees of independence.

In the early 1990s, a big economic collapse occurred in the Faroe Islands, and the aftermath of the collapse led to a pro-independence coalition coming into power with the elections in 1998.[37] In 2000, the Faroese and Danish governments negotiated about Faroese

33. Home Rule Act § 6.

34. *Id.* at § 7.

35. This can happen both in areas still under Danish control and in areas under Faroese control. In the former case, this occurs due to the consultation mechanism in section 7. *Id.* In the latter case, this occurs due to section 13, which states that after a transfer of a policy area to Faroese jurisdiction, the old legislation will still apply until amended or repealed by the Faroese authorities. *Id.* at § 13. An example of an area currently still under Danish control is the immigration statute, which has had numerous amendments that have never been extended to the Faroe Islands. *Compare* Faroe Islands Immigration Act (Act. No. 182/2001) (Den.), https://logir.fo/Anordning/182-fra-22-03-2001-ikrafttraeden-for-Faeroern e-af-udlaendingeloven (the Faroese version of the statute), *with* Promulgation of the Immigration Act (Act No. 572/2010) (Den.), https://www.retsinformation.dk/eli/lta/2019/10 22 (the Danish version of the statute).

36. Edvard Mitens, *Færøernes selvstyre*, UfR 1950 B, 89–93.

37. *See* Á Rógvi, *supra* note 3, at 47.

independence.[38] During the negotiations, the Danish government offered to grant greater autonomy to the Faroe Islands as a way to negotiate an alternative agenda.[39]

After the collapse of the independence negotiations, the Faroese government announced a new plan of gradually assuming jurisdiction over additional policy areas, including some that were not possible according to the Home Rule Act.[40] This new plan necessitated negotiations with the Danish government over reforms to the Home Rule System.[41]

This process culminated in 2005 with two new statutes that supplemented the Home Rule Act.[42] Due to the implications of a mainly symbolic and political-ideological character related to a formal change of the Home Rule Act, the act itself was neither repealed nor amended explicitly, so instead the two statutes functioned as appendices and a way to de facto amend the Home Rule Act. One of the two statutes concerned treaty-making powers and the other concerned the expanded abilities to transfer policy areas under Faroese jurisdiction.[43]

I will not go into further detail concerning the former statute, but the so-called Takeover Act substantially changed the possibilities for the transfer of jurisdiction. Where the Home Rule Act had been based on a principle of reserved powers being under Danish jurisdiction, the new Takeover Act flipped this on its head with the introduction of a so-called negative list that switched the reserved powers over to the Faroese side and left the central authorities with the enumerated powers.[44]

38. *Id.* at 47–48.

39. For the answer given on December 15, 2000 by then-Danish Prime Minister Poul Nyrup Rasmussen to a question by then-Faroese member of the Danish Parliament Jóannes Eidesgaard, see *Svar på § 20-spørgsmål: Om forslag til selvstyrelov kan danne grundlag for de nye forfatningsmæssige relationer mellem Færøerne og Danmark* [*Answer to § 20 question: On whether the proposal for new Self-government Act can form the basis for the new constitutional relationship between Denmark and the Faroe Islands*], FOLKETING, http://webarkiv.ft.dk/?/Samling/20001/spor_sv/S719.htm (last visited May 13, 2020).

40. *See Uppskot til samtyktar*, LØGTING, https://logting.elektron.fo/logtingsmal/logting smal00/vanlig%20tingmal/114.00%20Sjalvstyri.htm (last visited May 13, 2020). This was the Faroese government's proposal for a Parliamentary Resolution detailing their new plan for self-government/independence.

41. *See* Á Rógvi, *supra* note 3, at 40.

42. *See The Faroe Islands Home Rule Arrangement*, STATSMINISTERIET, http:// www.stm.dk/_a_2956.html (last visited Apr. 27, 2020) (the Danish Prime Minister's Office English language information page regarding the Faroese Home Rule System).

43. *Id.*

44. Bárður Larsen, *Grundlovsargumenter i dansk færøpolitik* [*Constitutional law arguments in Danish politics towards the Faroe Islands*], 87 JURISTEN [THE JURIST] 84–85 no.3 (2005) (Den.).

Because of the reform in 2005, new areas could be transferred including criminal law, tort law, contract law, intellectual property law, and so forth.[45] The most principled concessions from the Danish side were allowing the Faroe Islands to set up its own court system,[46] prosecution service, and prison system.[47] So far, the Faroe Islands have not taken advantage of those opportunities, but several policy areas have been transferred that were previously impossible, including virtually all areas of private law, criminal law, and, perhaps most significantly, family and inheritance law.[48]

Also worth mentioning in relation to the Home Rule arrangement is the fact that a project of drafting a Faroese Constitution started as a result of a pro-independence coalition coming to power 1998.[49] A drafting committee consisting of politicians representing all the political parties—lawyers, political scientists, and other experts—was put together.[50] After the collapse of the negotiations with the Danish government over Faroese independence in 2000, the committee's task was redefined to create a constitution that would be flexible enough to serve as the foundational document of the Faroese polity regardless of its status as a fully independent state or its continued position as an autonomous sub-state polity within the larger Danish constitutional frame. The project at this

45. Danish Act Relating to the Takeover of Affairs and Fields of Affairs by the Faroe Islands Public Authorities (Act. No. 578/2005) (Den.) [hereinafter Takeover Act]. For a source in English with the provisions of the Takeover Act, see *Translation: Danish Act Relating to the Takeover of Affairs and Fields of Affairs by the Faeroe Islands Public Authorities*, STATSMINISTERIET, http://www.stm.dk/multimedia/FO_OTL_UK.doc (last visited May 13, 2020) (providing an English translation of the Act from the Office of the Danish Prime Minister).

46. Except for a supreme court. *Id.* at § 1.

47. Takeover Act, app. at 5, 9.

48. *Fælleserklæring i forbindelse med de færøske myndigheders overtagelse af sagsområdet "person-, familie- og arveretten* [*Family and Inheritance Law and the Law of Persons* (Danish translation)], *Felags yvirlýsing í sambandi við yvirtøku av málsøkinum "persóns-, húsfólka- og arvarætti* [*Family and Inheritance Law and the Law of Persons* (Faroese translation)], LØGTING, https://www.logting.fo/files/casestate/16849/108.16%20Fylgiskjal%201%20Felags%20yvirlysing.PDF (last visited September 9, 2020). The declaration was signed on December 19, 2016 by Mai Mercado, the then-Minister of Children's and Social Affairs in Denmark, and Sirið Stenberg, the then-Minister of Health and The Interior in the Faroe Islands. The transfer of Family and Inheritance Law and the Law of Persons to Faroese jurisdiction was effective July 29, 2018. *Id.*

49. *See Samgonguskjalið 1998*, LØGTING, https://logting.elektron.fo/Ymiskt/Samgonguskjol/samgonguskj98.html (last visited May 13, 2020) (the coalition agreement for the coalition that came to power after the 1998 election).

50. GRUNDLÓGARNEVNDIN [THE CONSTITUTIONAL COMMITTEE], FYRRA FLAGDAGSÁLI: FRÁDGREIÐING FRÁ FORMANNINUM Í GRUNDLÓGARNEVNDINI 16–17 (2004) http://tilfar.lms.fo/logir/alit/2004.04%20Fyrra%20flagdags%C3%A1lit.pdf.

point became more or less identical with developing the internal frame of government into a fuller constitutional document, including a part on basic commitments and values as well as a bill of rights.[51] In 2006, the committee published its final report, which included a draft for a constitution.[52] Various versions of that draft have since been put before the parliament for debate but have never gotten to the point of being voted on.[53]

Political disputes internally in the Faroe Islands and statements by the Danish Prime Minister and the Ministry of Justice had complicated the drafting process.[54] The main issue of contention had been how a constitution for the Faroe Islands as a self-governing territory within the Kingdom of Denmark could fit the metropolitan constitution.[55] There had been suggestions both internally and from Danish quarters that the various versions of a draft for a Faroese Constitution would be unconstitutional. [56]

This constitutional project, in no small part inspiring the comparative sub-state constitutional course mentioned in the beginning of this Article, seems to have lost momentum over the years, and is now officially taken off the agenda with the new coalition, between the

51. Of course there is no settled view on what elements a fully developed constitutional document needs to include, but as a descriptive matter modern constitutions—including sub-state constitutions—seem to include at least three elements: 1) frame of government, 2) bill of rights, and 3) a description of basic values and commitments (credo). For more information on these three elements, see Ruth Gavison, *What Belongs in a Constitution?*, 13 CONST. POL. ECON. 89, 89 (2002).

52. For the original Faroese version of the December 2006 final report, see STJÓRNARSKIPANARNEVNDIN, STJÓRNARSKIPAN FØROYA: ÁLIT (2006), http://tilfar.lms.fo/logir/alit/2006.12%20%C3%81lit%20Stj%C3%B3rnarskipan%20F%C3%B8roya.pdf; *see also* FORFATNINGSUDVALGET, FÆRØERNES FORFATNING BETÆNKNING (2006), https://www.ft.dk/samling/20072/almdel/uff/spm/6/svar/531936/536461.pdf (providing a Danish translation of the report); Tim Murphy, *Reflections on the "Other Rights" Provision in the Draft New Constitution of the Faroe Islands*, 6 FØROYSKT LÓGAR RIT [FAROESE LAW REVIEW], no. 1, 2006, at 10.

53. For a discussion in English language of the legal disputes this process has raised, see Bárður Larsen & Kári á Rógvi, *A New Faroese Constitution? – Faroe Islands Between Parliamentary Sovereignty and Sub-Sovereign Constitutionalism, Between Statutory Positivism and Pragmatic Reasoning*, 4 Y.B. POLAR L. 341, 341–43 (2012).

54. *Id.* at 346–50.

55. *Id.* at 352–55.

56. *Id.* at 355–59.

People's Party, the Unionists, and the Center Party, formed in the Faroe Islands in September 2019.[57]

LOCKSTEPPING IN THE FAROE ISLANDS

The special status of the Faroe Islands within the Kingdom of Denmark invites the question: To what extent does lockstepping, as described in Professor Williams's article, take place? Preliminarily, it should be pointed out that currently the Faroe Islands do not have a court system of their own.[58] So, the question of one set of courts borrowing doctrine from another set of courts from another jurisdiction is not relevant. But the question of lockstepping still remains because of the autonomous Faroese legislative jurisdiction. The question then arises: To what extent is central Danish law in the broad sense, i.e. legal doctrine, implemented towards Faroese legislation that is either identical or similar to Danish legislation?

As an example, the text of the Faroese frame of government from 1995 is mostly copied and translated from that of the Danish Constitution, which was originally implemented in 1849 and last amended in 1953. Yet the courts could well be imagined to construe the frame of government differently than the Danish Constitution due to its age, different circumstances, context, and historical background.

In addition to this, the Faroe Islands have several institutions that perform adjudicatory functions of a kind similar to courts. An example of this is the system of administrative appeals boards. Another prominent example is the Løgtingins Umboðsmaður (the parliamentary ombudsman), the Faroese parallel to the Danish "Folketingets Ombudsmand" institution. Since these institutions are indeed Faroese institutions, they certainly could have the potential for an independent approach to the construction of Faroese legal texts, even when the texts have been borrowed from Danish legislation.

The question then becomes, which of Professor Williams's models of doctrinal borrowing is best able to explain the practice that is seen in the Faroe Islands? The main models are the following: Unreflective Adoptionism; Reflective Adoption; and Prospective Lockstepping.[59]

57. *See generally* FÓLKAFLOKKURIN, SAMBANDSFLOKKURIN & MIÐFLOKKURIN, SAMGONGUSKJAL (2019), https://lms.cdn.fo/media/13038/samgonguskjali-14-september-2019.pdf?s=
8bcdc2MyPm9aH_vmrsVxqsMEPYQ (the coalition agreement from September 14, 2019).

58. For the Danish government's list of policy areas that have been transferred to Faroese jurisdiction, see Home Rule Act of the Faroe Islands, (Act No. 137/1948) (Den.) app. at 1–5, http://www.stm.dk/multimedia/FO_oversigt_sagsomr_der_300120_EN.pdf.

59. Williams, *supra* note 2, at 1505, 1506, 1509.

The first model involves state court judges adopting federal doctrine without providing any reasons for doing so or acknowledging the choice involved.[60] The second model, on the other hand, involves a conscious choice on the part of the state courts in question to adopt federal doctrine, perhaps because they consider the federal constitutional protections to be adequate.[61] In these instances, the state courts make their decisions based on their own considered judgements.[62]

Finally, prospective lockstepping can be said to be a more extreme form of the first model, where the state courts take it one step further by changing their own doctrine retroactively as a result of new cases from the federal Supreme Court or announcing ahead of time that they will conform their doctrine to the federal doctrine.[63]

Given the fact that the Danish court system does not have the concept of *stare decisis* or binding precedent, prospective lockstepping is not as relevant to the Danish-Faroese situation as the other models. It is not unknown in the Danish system for courts to reach conclusions incompatible with prior precedent, even that of higher courts.[64] In addition to this, the sparse reasoning of Danish courts means that they do not tend to elaborate on matters such as how the judgment in a particular case fits with prior precedent. This tendency makes it hard to classify cases as being an example of prospective lockstepping.

Another phenomenon that Professor Williams mentions in his article is that of state courts borrowing a test from the federal courts.[65] In these cases, while the test is taken from the federal courts, the state court does not necessarily apply the test in the same way when confronted with a situation that the federal courts have already ruled on.[66] Given the currently unified court system, this is less relevant in the Danish-Faroese situation as far as the courts are concerned. It could be relevant for other institutions, but clear tests are not as prevalent in the Danish-Faroese system as they are in the United States.

I will now turn to a couple Faroese cases that provide examples of lockstepping[67] in the Danish-Faroese context. The first case I will look at

60. *Id.* at 1505–06. As such, these courts are guilty of formalism in the second, and more pejorative, sense that Frederick Schauer discusses in his article, *Formalism*. *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988).

61. Williams, *supra* note 2, at 1506.

62. *Id.*

63. Id. at 1509, 1512.

64. For a discussion on the value of precedence in Danish law, see chapter 4 in RUTH NIELSEN & CHRISTINA D. TVARNØ, RETSKILDER & RETSTEORIER (Jurist ed., 3d ed. 2011).

65. Williams, *supra* note 2, at 1514.

66. *Id.*

67. Here I am using "lockstepping" as an overall term for all the models discussed in Professor Williams's article.

is a lawsuit that the municipality of Tórshavn filed against the Faroese environmental agency.[68] This agency is responsible for the Faroese land register, specifically the process called "matrikulering" in Faroese. "Matrikulering" is the division of land into what perhaps can be best described as parcels. The specific controversy in the case concerned the fees that the agency charged for this process. A municipality was readying an area to build housing, but the agency had set the fees for the "matrikulering" at 2% of the value of the land.[69] The municipality felt that this conflicted with prior case law by the Danish Supreme Court concerning the interpretation of section 43 of Danish constitution, which deals with tax statutes.[70] Section 43 is worded as follows: "No taxes shall be imposed, altered, or repealed except by Statute; nor shall any man be conscripted or any public loan be raised except by Statute."[71]

In the Danish constitutional law literature, this provision had been interpreted as requiring any fees that exceeded the costs of providing a service to be directly provided for in a statute.[72] In a 1993 case by the Danish Supreme Court, this interpretation was basically accepted, but they adopted a fairly broad conception of the cost concept.[73] That case involved the fees for issuing passports, and the Supreme Court accepted the argument of the government that they could include things like border control in the costs this fee was supposed to cover.[74]

What is of interest from the point of view of lockstepping is that the municipality also invoked the corresponding provision in the Faroese frame of government, section 41:

> No direct or indirect taxes may be imposed, altered, or repealed except by Statute.
> Sub-section. 2. Direct or indirect taxes cannot be imposed for income, imports, exports, sales, payments or such that have taken place in the time before the bill was proposed.

68. UfR 2018.2177 H.

69. UfR 2018.2177 H.

70. *See* Email from Christian Andreasen to Bárður Larsen (Apr. 5, 2018, 2:09 PM) (on file with author) (Samenfattende Processkrift, Højesteretssag [Supreme Court]). This is one of the main briefs for the municipality by attorney Christian Andreasen.

71. See *Denmark's Constitution of 1953*, CONSTITUTE PROJECT, https://www.constitute project.org/constitution/Denmark_1953.pdf?lang=en (last visited Apr. 28, 2020) (providing an English translation of the Danish Constitution from the Constitute Project).

72. UfR 2018.2177 H. 2183,

73. UfR 1993.757 H. 760-61.

74. *Id.* At 777.

> Sub-section 3. Taxes referenced in Sub-section 1 cannot be collected before an appropriation bill or a temporary appropriation bill has been approved by the parliament.[75]

It is notable that the Faroese provision, while closely copied from the provision in the Danish Constitution, has some differences. The most prominent difference is the retroactivity ban in Sub-section 2. This could perhaps be one indication that the drafters wanted the Faroese provision to be construed more strictly than the provision in the Danish Constitution. The historical context surrounding the Faroese frame of government was also one of a law written and enacted against a huge economic crisis that struck the Faroe Islands in the early 1990s.[76] Against that background it could easily be argued that the Faroese provisions on financial and taxing matters ought to be interpreted more formally than the parallel Danish ones. And, in continuation of the same, if there is something to the view that constitutional documents tend to be interpreted less formalistically as they age,[77] then there is no easy comparison between the Faroese provision, which dates back to 1995, and the Danish provision, which has survived untouched through all Danish constitutional amendments and is precisely the same one as in the original 1849 constitution, latest formally amended in 1953.

No matter the actual merits of such an argument for an independent interpretation of the Faroese frame of government provision, one could expect that the Danish Supreme Court, which since 2007 has been elevated to a court of precedents and so is only supposed to deal with cases of high principle, would address the question concerning the potential relevance of the Faroese frame of government provision in addition to the Danish constitutional one, especially considering that the municipality specifically invoked both provisions.[78] Furthermore, the lawyer representing the municipality, in one of his briefs and during oral argument, claimed that there was basis for the view that section 41 in

75. *See Løgtingslóg nr. 103 frá 26. juli 1994 um stýrisskipan Føroya, sum broytt við løgtingslóg nr. 75 frá 25. mai 2009*, LÓGASAVNIÐ, https://logir.fo/Logtingslog/103-fra-26-07-1994-um-styrisskipan-Foroya--om-Faeroernes-styrelsesordning (last visited Apr. 28, 2020) (author's translation) (providing the frame of government on the official Faroese database of statutes); *see also* Email from Christian Andreasen to Bárður Larsen, *supra* note 70.

76. *See* Á Rógvi, *supra* note 3, at 47.

77. *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 924 (1996).

78. Jan Schans Christensen, *Højesterets domsbegrundelser i historisk lys* [*The Supreme Court's Reason-Giving Practice in Historical Perspective*], 100 JURISTEN [THE JURIST] 138, 144–45 no.3 (2019) (Den.).

the frame of government ought to be interpreted more strictly than the parallel provision of section 43 in the Danish Constitution.[79]

However, the court did not at all discuss the relationship between the two provisions. Instead, they simply mentioned both provisions and two earlier Danish cases relating to § 43 of the Danish Constitution, as if they took for granted that the protections of the Danish Constitution and the Faroese frame of government had to be identical.

Another case of interest was a case by the Løgtingsins Umboðsmaður involving the very small Faroese municipality of Húsavík, comprised of approximately one hundred inhabitants, which hired a secretary. The municipality in 2013 had announced a job opening for a secretary on a website dedicated to news from the island of Sandoy, where Húsavík is located. They hired a member of the municipal council for the job. This caused another applicant to lodge a complaint with the Løgtingsins Umboðsmaður.[80]

The complaint contained several allegations, not all of which are relevant for present purposes. The matter of interest here was the question of whether a member of the municipal council could also be employed by the municipality as a secretary. The provision at issue in this case was section 11, subsection 1 of the Act on the Governance of Municipalities, which says the following: "Nobody that is employed by the municipality may be a member of a committee that is related to his job."[81]

The rationale behind this provision is the same as the unwritten norm on *impartiality/bias* in Danish administrative law, which protects against having a person who is a member of a collegial organ, like a municipal council or a sub-committee in a municipality, from entering dual positions as both a committee member and part of the administration in the same system at the same time.

It should be noted that depending on their size, Faroese municipalities are required to have certain permanent committees.[82] The

79. *See* Email from Christian Andreasen to Bárður Larsen, *supra* note 70 at 2-3,

80. *Álit, viðvíkjandi klagu um setan av skrivara í Húsavíkar kommunu*, LØGTINGSINS UMBOÐSMAÐUR (LUM 14/00038), http://lum.fo/Default.aspx?ID=10202&Action=1&NewsId=5740&currentPage=3 (last visited Aug. 1, 2020) [hereinafter LUM 14/00038].

81. *Løgtingslóg nr. 87 frá 17. mai 2000 um kommunustýri (Kommunustýrislógin), sum broytt við løgtingslóg nr. 71 frá 6. mai 2003*, LÓGASAVNIÐ, https://logir.fo/Logtingslog/87-fra-17-05-2000-um-kommunustyri-kommunustyrislogin-sum-broytt-vid-logtingslog-nr-71-fra-6 (last visited Apr. 28, 2020) (author's translation) (providing the Act online).

82. *See id.* at § 58.

municipality of Húsavík is too small[83] to require its municipal council to be organized into separate permanent committees. The question then arises as to what implications, if any, there might be for such very small municipalities.

According to the Løgtingsins Umboðsmaður, in such cases the same provision should be applied by analogy as if the entire village council was a committee.[84]

The conclusions of the Løgtingsins Umboðsmaður might seem less than obvious for a number of reasons. First, the Danish administrative law principle that section 11 embodies might not seem very apt for a municipality of one hundred people and a council with a mayor getting some help from an old-style secretary. The presupposed distinction, lying behind section 11, between two different levels—administration and local politics at the level of the council, and sole administration and execution at the level of the secretary—is hardly present in a tiny municipality like this.

In addition, the municipality is so small that it can be hard to find people for various positions with relevant qualifications. The fact that the legal text does make a distinction between municipalities depending on their size counts against the conclusion of the Løgtingsins Umboðsmaður. The Løgtingsins Umboðsmaður seems, on the other hand, to do what Danish-educated Faroese jurists tend to do, namely playing it safe by invoking Danish administrative law doctrine as a kind of background law; thus, the analogy from section 11 to a one-size-fits-all model locks together Danish and Faroese doctrines rather than reaching an independent rational solution for this tiny municipality.

In continuation of the above, it is worth mentioning that there is a provision in the Faroese equivalent of the Administrative Procedure Act that ought to be of some relevance in situations like these. Section 4, Subsection 1 of the act is an exception to the recusal rules of the act and it is worded like this: "The provisions of § 3 do not apply, if it will be

83. According to Hagstova Føroya, the statistics office of the Faroese government, 110 people lived in the municipality, spread over three villages, on January 1, 2019. The mentioned statistic is available on the website of Hagstova Føroya. Although it appears to be impossible to link directly to this particular statistic, you can find this statistic by following a guide on the website. *See* Hagstova Føroya, *Changes in population by born, dead, migrated and village, monthly (1985-2020)*, STATBANK, https://statbank.hagstova.fo/pxweb/en/H2/H2__IB__IB01/fo_vital_md.px/table/tableViewLayout2/ (last visited July 3, 2020).

84. LUM 14/00038, *supra* note 80.

impossible or it will lead to big problems or uncertainty to let somebody else participate in the decision of the case."[85]

This provision, like the rest of the act, is copied and translated from the corresponding Danish act.[86] However, one would think that this provision would be more commonly applied in the Faroe Islands, where due to the tiny size of the country,[87] one would expect that the problem of finding suitable replacements or substitutes for public officials would be more common than in Denmark, where the population is more than one hundred times larger. However, there is very little or no evidence indicating this. According to Danish practice, this provision would not apply in situations like the one presented by this case since it would not be totally impossible for the village councilor in question to forfeit her seat on the village council and let her alternate replace her.

That being said, the presence of a provision like this in Faroese law legitimizes taking account of the size of the Faroe Islands in a case like this one where there is not a clear textual requirement for recusal. Even in a large country like the United States, there can arise situations where independence and impartiality on the one hand need to be set aside for practical reasons or because other values are deemed to be more important.[88] This applies with even greater force in a tiny jurisdiction like the Faroe Islands. But nothing like this is even discussed at all by the Løgtingsins Umboðsmaður.

While this case does not directly reference Danish doctrine or textbooks, there can be little doubt that the source of the rigid insistence for requiring recusal in a case like this is the fact that the Løgtingsins Umboðsmaður to a large extent can been seen as a sort of mouthpiece for the parallel Danish institution.

The Danish "Folketingets Ombudsmand" that was the inspiration for the Faroese institution has been said to be a kind of "soft-paternalist" that has taken a large role in the development of Danish administrative

85. Løgtingslóg um fyrisitingarlóg [Administrative Procedure Act] (Act. No. 132/1993) (Den.), https://logir.fo/Logtingslog/132-fra-10-06-1993-um-fyrisitingarlog--om-forvaltning (author's translation) (providing the text of the act). This provision has some similarity to the American common law "Rule of Necessity," which has been applied in, for instance, United States v. Will, 449 U.S. 200, 213–14 (1980).

86. Bekendtgørelse af forvaltningsloven [Administrative Procedure Act] (Act. No. 988/2012) (Den.), https://www.retsinformation.dk/eli/lta/2014/433 (providing the Danish parallel to the Faroese statute).

87. According to the Hagstova Føroya, as of January 1, 2020, the population of the Faroe Islands was 52,124. *See supra* note 83 and accompanying text.

88. *See generally* Adrian Vermuele, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 384 (2012).

law.[89] The Faroese institution on the other hand does not have nearly the same resources as its Danish counterpart, and it seems, rather than nudging the Faroese administration towards good solutions, to have taken on the role of applying what was already considered the Danish administrative law in the literature.

This can be seen in the many references that the Faroese institution makes to Danish legal literature, in particular the commentaries to the Danish Administrative Procedure Act and the Danish Freedom of Information Act by John Vogter as well as the textbook on Administrative Law by Hans Gammeltoft-Hansen[90] et al.[91] For example, a search for "John Vogter" on their website[92] gives twenty-nine results and similarly a search for "Hans Gammeltoft-Hansen" gives fifty-nine results.[93]

Often, the quotes from the literature by Hans-Gammeltoft Hansen et al., John Vogter, and others are followed by little or nothing explaining the implications of the quote(s) in question to the case at hand. It is just assumed that it is obvious for the reader why and how the quotes are relevant.

There is also never any critical evaluation of, or disagreement with, the provided quotes. The assumption is that what is said is both correct and applicable, and which implies that the very fact that these authors have said these things means they are correct. While such a method may be questioned even in a Danish context, it is even less appropriate in the Faroese context since these authors quite naturally are not concerned with adapting administrative law to Faroese needs and realities. In other words, relying so heavily on these particular Danish sources is indeed a radical form of lockstepping of the unreflective kind.

CLOSING REMARKS

While Professor Williams wrote his article in the context of the federal system in the United States, a society that is quite different from the Faroe Islands in many respects—not least its size—it is quite relevant for a Faroese and Danish context. There are a few caveats that need to be kept in mind before applying his concepts to that context. For

89. *See* Bárður Larsen & Kári á Rógvi, *Ombudsmandens misforståede autoritet*, 2 JURISTEN [THE JURIST], 67–78 (2012) (Den.).

90. He is notably the former "Folketingets Ombundsmand" in Denmark.

91. JOHN VOGTER, OFFENTLIGHEDSLOVEN MED KOMMENTARER (1998); HANS GAMMELTOFT-HANSEN ET AL., FORVALTNINGSRET (2d ed. 2002).

92. *See John Vogter*, GOOGLE, https://www.google.com (find search box; type in "John Vogter site:lum.fo" and see search results).

93. *See Hans Gammeltoft-Hansen*, GOOGLE, https://www.google.com (find search box; type in "Hans Gammeltoft-Hansen site:lum.fo" and see search results).

one thing, the Faroe Islands do not currently have a court system of their own.[94] However, there are other institutions that are either of an adjudicatory or semi-adjudicatory nature, and the Faroe Islands can, if they so choose, set up their own court system. It would also be quite possible, even though maybe not likely, to imagine that the common Faroese/Danish courts could differentiate between their roles as interpreters and construers of Faroese legal texts in a Faroese context and interpreters and construers of Danish legal texts in a Danish context. This, however, is not what has been seen in practice. I have here for illustrative purposes—not as evidence, as that is not needed because the tendency is too pervasive for that—shown a few examples of lockstepping in the Faroese/Danish context.

A question this raises, is why that is so? One possible explanation is the lack of an independent Faroese legal interpretive community.[95] There are a few facts that illustrate this, such as the fact that Faroese legal education is a very recent phenomenon. The University started offering a Basic Course in law in 2001. The first individual Master's courses in law were later offered around 2009–2010, the full-time Master's program was launched in the fall semester of 2013, and the Bachelor's program was launched in the fall semester of 2019.[96]

Until now, almost all lawyers in the Faroe Islands have studied in Denmark. This means that they have come to regard Danish institutions, Danish statutes, and Danish doctrines in various areas of law as authoritative also in the Faroese context. When combined with important Danish adjudicative institutions in the Faroe Islands, such as the courts, it becomes natural for Faroese lawyers to adopt Danish doctrine as if it was authoritative, regardless of context.

One other explanation might be that the Scandinavian legal tradition, at least in the Danish variation, seems to resemble more the continental European tradition than the American one on the continuum between formalism and its opposites, pragmatism and realism.[97] Despite

94. Home Rule Act, § 6.

95. For this concept, see STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES 307–08 (1980).

96. When the Bachelor's degree was introduced, the intake of the Master's program was reduced from every year to every other year. *See generally Bachelor í lóg á Setrinum í heyst*, FRÓÐSKAPARSETUR FØROYA [UNIVERSITY OF THE FAROE ISLANDS], https://www.setur.fo/fo/setrid/tidindi/bachelor-i-log-a-setrinum-i-heyst/ (last visited July 6, 2020); *Master í løgfrøði*, FRÓÐSKAPARSETUR FØROYA [UNIVERSITY OF THE FAROE ISLANDS], https://www.setur.fo/fo/setrid/tidindi/master-i-logfrodi-1/ (last visited July 6, 2020).

97. This tendency is too multifaceted to be easily elaborated on, but one obvious indicator of formalism is the very summary reason-giving practice of Danish courts with standard rather than individualistic formulations, and a tendency to ground decisions in

occasional voices to the contrary, Danish law is pretty formalistic, and insights from realism about the difference between the law on the books and law in practice or, what amounts to the same, the distinction between legal meaning and legal doctrine will probably not resonate with many Danish lawyers.

To a certain extent, the borrowing of doctrine might be quite rational for a very small jurisdiction like the Faroe Islands, as the jurisdiction is so small that there is little prospect for sufficient case law to make up the foundation for an independent doctrine. Regardless, it makes a big difference whether that borrowing is reflective or not. It is possible to borrow doctrine for the most part while still adjusting and adapting it to Faroese circumstances. This could be the case, for example, when it comes to recusal rules within administrative law.

Another difference between the American context, about which Professor Williams has written, and the Faroese context is that the United States is a classical federation while the Kingdom of Denmark is not.[98] The last seventy-two years under the Home Rule System have seen a gradual withdrawal of Danish power in the Faroe Islands as the Faroese home rule authorities have assumed more powers and competencies. Even so, to the mind of many Danish lawyers—among which more than a few Faroese might be included—Denmark is, despite the factual state of affairs, perceived to be a classical unitary state. If independent interpretation at the state level of constitutions and other legal materials is a challenge in the United States, one can imagine the difficulties in the Danish Kingdom.

Be that as it may, Professor Williams's writing on sub-state constitutions and the dynamics and contestation between the central and local levels has proven to be a big source of inspiration for us struggling to establish a legal education in a tiny autonomous jurisdiction within the Danish Kingdom called the Faroe Islands.

statutory plain meaning, even when there obviously is none to be found, all suited to conceal the choice involved for the judges rendering the decision. See PETER HØILUND, *DEN FORBUDTE RETSFØLELSE* [THE FORBIDDEN SENSE OF JUSTICE] 206, 220–28 (1992) (illustrating the formalism of the courts with an extensive discussion of a Danish hard case in the league of Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889)).

98. For a discussion of the federative features of the Danish Kingdom, see Jens Christian Svabo Justinussen, Rigsfællesskabet i et føderalt perspektiv [The Danish Realm in a Federative Perspective], 51 POLITICA 441, 462–63 (2019) (Den.) (concluding that the Danish Kingdom is not a classical federation but rather a quasi-federative system).