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CHAPTER 4

Distribution of Legislative Powers in a Sub-State Context – A Comparison of Double Enumerations in Federal and Autonomy Settings

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1 Introduction

There exist various kinds of sub-state entities that are based on the idea of self-government in the sense that the population of the area participates, primarily by means of electing regional decision-making bodies, in the exercise of law-making powers for the territorial entity. Primarily, such arrangements include constituent states in federations, such as Canada,[1] or autonomies in states that in principle are unitary, such as Denmark and Finland.

In a regular federation, the distribution of legislative powers between the federation and the states is normally arranged so that the federal legislature has enumerated powers, while the states are in the possession of so-called residual powers, perhaps as a reminder of their original sovereignty as states before being incorporated into the federation.[2] For a typical autonomy arrangement embedded in a unitary state, the situation is often the reverse: the parliament of the country functions on the basis of residual powers, while the autonomy arrangement has enumerated powers, granted to the autonomous entity either under the constitution of the country or by delegation under ordinary legislation of that country.

1 The author wishes to thank Director John Packer and the Human Rights Research and Education Centre at the University of Ottawa for hosting me during October-November and thus facilitating my research. This work was supported by the Pool of Professors (via Svenska Kulturfonden) in Finland under Grant Decision of 13 June 2013 and the Finnish Society of Sciences and Letters under Grant Decisions of 29 April 2015 and 24 August 2015.

2 In principle (although some variations of the theme exist), this seems to be so, for instance, in the United States, Australia, Switzerland, Germany (with a list of concurring powers), and Austria, supported by a supremacy clause or a principle of federal preemption. The distribution of powers in Belgium seems to be a further variation of this theme, and in Switzerland, too, the cantons are in the possession of an original sovereignty and residuality in legislative powers, although the Swiss constitution actually lands in an enumeration of both the federal and the cantonal powers, subject to the provision that federal law takes precedence over cantonal law.

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Amongst the 100 or so countries in the world that are either federally organized or that contain an autonomy arrangement, there exist a number of states where the distribution of legislative powers is organized in an atypical manner so as to warrant a study of these constitutional arrangements as a separate contingent:[3] constitutional systems that organize the distribution of legislative powers in a sub-state setting along two lists of enumerations, one for the national level and another for the sub-state level, are likely to feature interesting similarities and differences

Canada is an unusual federation in relation to its federal units, the provinces, just as Denmark and Finland are unusual unitary states in relation to those self-governing or autonomous entities that are part of their constitutional set-up (the Faroe Islands and the Åland Islands, respectively).[4] In Canada, the legislative powers of both the federal level and the provinces are enumerated in lists of law-making powers that in principle are meant to be exclusive in relation to each other. In fact, Canada has sometimes been characterised as a quasi-federal.[5] In Denmark, the position of the Faroe Islands (and Greenland) in relation to Denmark proper is often characterized in terms of a commonwealth, while in Finland, the Åland Islands has a *sui generis* status typical of a host of other autonomous territories in the world. In a manner similar to Canada, in Denmark and Finland, the legislative powers of not only the legislative assemblies of the autonomies but also the national parliaments are enumerated. The focus of this article is therefore on the issue of double enumeration of legislative powers, because the distribution of powers in

3 Other examples that could be mentioned are the relationship between mainland China, on the one hand, and Hong Kong and Macau, on the other, as well as the relationship between France and New Caledonia. In India, both the Union and the states exercise their legislative powers on the basis of their respective exclusive enumerations of legislative competences and both orders of government on the basis of a listing of concurring powers, but the federation or the centre nonetheless seems to be in the possession of the residual powers. This feature makes India at least an untypical federation. It could be argued that the Indian distribution of powers should also be dealt with in this analysis, but for reasons of space, India will be excluded here, although might be analysed at some further point of time in another piece of research.

4 The distribution of legislative powers between the Danish Parliament and the Legislative Assembly of Greenland is organized in a manner that comes close to the solution concerning the Faroe Islands, but does not entail any enumeration of powers for the Danish Parliament and allows the Greenlandic legislature to transfer by its own decisions law-making powers from Denmark to Greenland for the purposes of legislating for Greenland. In fact, in the Self-Government Act concerning Greenland 2009, the Danish Parliament went so far as to make possible the transfer of all legislative areas to Greenland and the declaration of independence by Greenland.

5 *See* K.C. Wheare, *Federal Government*, (OUP, 4th edn, 1964) 19. *See* also Gregory J. Inwood, *Understanding Canadian Federalism – an Introduction to Theory and Practice* (Pearson 2013) 108, 264–267.

federal settings and also for more regular autonomy arrangements has already been dealt with in other pieces of research.[6] The aim is here to draw attention to double enumeration as one strategy of determining how legislative powers could be delineated in a sub-state setting. Until now, this method of distribution of powers has not been subjected to much systematic analysis.

The research questions in this article relate to the phenomenon of divided sovereignty, which poses a more general legal-theoretical problem: how and where can law be made and under which conditions? More specifically on the issue of double enumeration of legislative powers, how is it possible to split up the legal order in two material spheres that are exclusive to each other so that each legislator knows, at least by and large, its own area of competence? As a consequence of law-making in two separate fields of competence, the issue is the following: how are possible competence problems adjudicated?

This article examines the topic of distribution of legislative powers from the perspective of constitutional law and uses the method of comparative law to provide replies to the research questions. It is hoped that the article could provide some reference points for different countries when constitutional changes involving sub-state matters are contemplated and that the article could contribute to debates concerning sub-state solutions by shedding light on how sovereignty can be divided internally within a state.

II A Framework for Various Sub-state Situations

From the point of view of self-government as a combination of participation through elections and exercise of law-making powers, various kinds of sub-state entities can be identified. On one dimension, there is a distinction between territorial autonomies and federal entities, while on another dimension, there is a distinction between legislative powers proper and mere exercise of governmental powers in the form of administrative self-government of a regional nature (*see* below, figure 1).

As indicated above, in a classical federation law-making powers are enumerated for the federation, while the residual powers belong to the constituent states. At the same time, there is some form of institutional representation for the states at the federal level, while the populations of the several states

6 On distribution of powers in federal settings, *see*, e.g., Ronald L. Watts, *Comparing Federal Systems* (McGill-Queen's University Press 2008) and George Anderson, *Federalism: an Introduction* (OUP 2008). On distribution of powers in autonomy settings, *see*, e.g., Thomas Benedikter, *The World's Working Regional Autonomies: an Introduction and Comparative Analysis* (Anthem Press 2007) and Markku Suksi, *Sub-State Governance through Territorial Autonomy* (Springer-Verlag 2011).

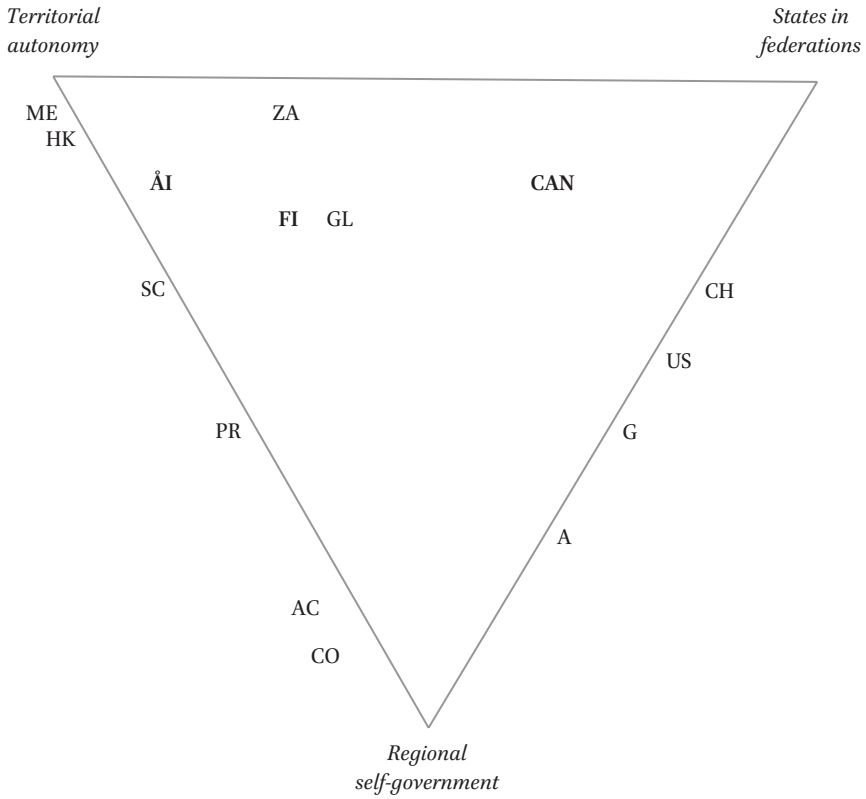

FIGURE 1 Comparison between Territorial Autonomy, States in Federations and Regional Self-Government
Please note that the positions of the different sub-state entities in the figure are approximate and of a work-in-progress nature. The abbreviations stand for the following: ME = Memel Territory; ZA = Zanzibar; HK = Hong Kong; ÅI = Åland Islands; CAN = Canada; FI = Faroe Islands; GL = Greenland; SC = Scotland; PR = Puerto Rico; AC = Aceh; CO = Corsica; CH = Switzerland; US = United States; G = Germany; A = Austria.

participate in the exercise of federal powers by means of regular elections. This set-up is practiced in, *inter alia*, Switzerland, Germany and Austria, and the European Union may also be said to conform to this idea of organization, although the EU is not normally referred to as a federation but as a union of states. What is typical for federations (and also for the EU) is the principle of federal supremacy, that is, federal pre-emption of the legislative powers of the constituent states in the event their legislative decisions are in conflict with the federal legislation. The principle of federal supremacy tends towards a piecemeal enlargement of the powers of the federal law-maker, because a constant re-definition of the competence line is taking place.

An autonomy arrangement is in many ways a mirror image of a federal arrangement. The legislative powers are residual for the national level, while they are enumerated for the autonomous entity. There is no institutional representation at the national level, but regular elections create an avenue for the population of the autonomous entity to participate in national decision-making. In addition, it appears to be a feature of a significant number of autonomy arrangements that there is an absence of the supremacy doctrine. This means that in principle, the legislative body of the central government is not competent to enact law within the sphere of competence of the sub-state legislature, although the central government might want to push its legislative powers in an illegitimate and unconstitutional manner into the area of the autonomy powers.

Apart from typical federal and autonomy situations, a number of mixed cases exist, such as Canada with respect to its provinces, Denmark with respect to the Faroe Islands (and in a similar manner with respect to Greenland, although Greenland will not be dealt with here) and Finland with respect to the Åland Islands. As concerns representation, there is no actual institutional representation of these entities in the national legislatures, but there is a senate in Canada that features appointed persons drawn from the various provinces, while the Faroe Islands and the Åland Islands have designated seats in the unicameral parliaments of the two countries. However, what makes all of these cases particular is that the legislative powers of both the national level and the sub-state level are enumerated, leading to exclusive law-making powers in both enumerations. At the same time, a defining feature emerges that unites these jurisdictions, namely the absence of a general supremacy doctrine or national preemption. This means that the central government and the lawmaker of the entire country is normally not going to interfere in the exercise of the law-making competences in the sub-state entities and that therefore, these sub-state entities are very autonomous in the exercise of their respective spheres of competence.

III Sub-state Arrangements with Double Enumerations

In the Constitution of Canada 1867,[7] the principal enumeration of competences for the two law-making spheres is established in Section 91 on the powers of the Parliament and Section 92 on the exclusive powers of the provincial legislatures. With certain additions from other provisions in the Constitution,

7 For the Constitution Act 1867, *see* <http://laws-lois.justice.gc.ca/eng/Const//index.html #docCont> accessed 4 January 2018.

such as the treaty powers, the matters such as regulation of trade and commerce, unemployment insurance, naturalization and aliens and criminal law are assigned to the federal level on the basis of Section 91 of the Canadian Constitution. With certain additions from other provisions in the Constitution, the matters such as direct taxation for provincial purposes, local government, property and civil rights in the province, administration of justice in the province and penalties for violation of provincial law are assigned to the provincial level on the basis of Section 92 of the Canadian Constitution.

Interestingly, the enumerations of the powers of the federation and of the provinces are defined as exclusive in the opening paragraphs to the two Sections, although there is an indication of some residuality attached to the federal powers in the opening paragraph of Section 91 by means of the grant to the federation of powers to make laws for the entire country for the peace, order and good government (hereinafter: p.o.g.g.) in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces. This partial and – as we shall see – limited residuality for the federal law-maker is yet another indication of the unusual construction of the Canadian federalism when compared with other federations, because normally, one would expect to find residuality in federations at the sub-state level. The double enumeration in Canada also indicates that the federation is in control of a greater part of so-called public law at the same time as the federal law-maker is in charge of certain important facets of so-called private law, while the provinces are competent in both public and in particular private law and in matters of a merely local or private nature in the province. The characteristics of this double enumeration are at least in part explained by the fact that the legal order of Quebec is of a French provenance. Because the two enumerations are already 150 years old and have remained largely unamended, there exist pressures on the constitutional interpretation to accommodate the double enumeration to the conditions of today.

The set-up is somewhat similar concerning structure of the double enumeration for the Åland Islands, although it is not directly established by provisions in the Constitution of Finland 2000. Section 75(2) of the Constitution makes reference to the fact that the Åland Islands have legislative powers, but Section 75 and Section 120, in particular, are based on the idea that there is a separate piece of law that ~~establish~~ the modalities of the self-government or autonomy of the Åland Islands. The recognition of the principle that two legislators exist within the Finnish constitutional order is followed up in the Self-Government Act of Åland 1991,[8] which establishes two lists of legislative powers, one for the

8 For a translation into English of the Self-Government Act 1991, *see* <http://www.finlex.fi/fi/laki/kaannokset/1991/en19911144.pdf> accessed 4 January 2018.

national parliament in Section 27 and another for the Legislative Assembly of the Åland Islands in Section 18. Hence the double enumeration is not found in the Constitution, as in Canada, but in an Act of a constitutional nature that in some countries would be understood as an organic law.

Under Sections 27 and 29 of the Self-Government Act, the issues such as freedom of association, freedom of movement, general criminal law, abortion, telecommunications and social insurance are under the legislative competence of the Parliament of Finland also in respect of the territory of the Åland Islands. According to Section 18, the Legislative Assembly of the Åland Islands shall have legislative powers in the territory of Åland in respect of issues such as local government law and elections, firefighting and rescue service, education, social welfare, health and environment.

The starting point with the two enumerations in relation to the Åland Islands is to establish, once and for all, the distribution of legislative powers for the jurisdiction of Åland so that in some matters, the Parliament of Finland is competent to legislate for the Åland Islands, meaning that Åland is not exempted from the application of the national law in these fields of law, while in some other matters, the Legislative Assembly of the Åland Islands is competent to legislate for the Åland Islands, meaning that the jurisdiction of Åland is exempted from the application of national law in those fields of law, where the legislator of the Åland may enact law or may refrain from enacting law (in which case national law shall not gain applicability so as to fill the normative vacuum). This constitutional arrangement is established in the Self-Government Act 1991, which in itself is not, however, part of the formal Constitution, although it certainly is of a constitutional nature, for instance, because it can only be amended in the same order as the Constitution and by the consent of the Legislative Assembly of Åland.[9]

Generally speaking (but with certain exceptions), the Parliament of Finland is in charge of the so-called private law for the purposes of the Åland Islands

9 Currently, the Government of Finland is considering a committee proposal to enact a new self-government act for the Åland Islands, where the principle of double enumeration would be formally changed so that in principle, the Parliament of Finland would keep enumerated powers, while the Legislative Assembly of the Åland Islands would have residual powers. However, in practice, double enumeration would result from the fact that the current lists of enumeration would constitute the starting point for transfer of competence decisions by which the Legislative Assembly of the Åland Islands would determine, in individual pieces of legislation, that a certain competence is transferred from the Parliament of Finland to the Legislative Assembly of the Åland Islands. The proposal is modelled against the background of the distribution of competence system of the Faroe Islands. A smaller portion of the powers of the Parliament of Finland can already now be transferred, under Section 29, from the Parliament of Finland to the Legislative Assembly of the Åland Islands, but the legislative decision is then passed by the Parliament of Finland. *See* Suksi (n 6) 303 f.

and of the general criminal law, while the Legislative Assembly is in charge of the so-called public law for the purposes of the Åland Islands, including such criminal law that introduces sanctions within the fields of competence of the Åland Islands. Because most of the Ålandic powers are in the sphere of public law (with some exceptions for private law), they clearly imply the need and the existence of relatively broad administrative decision-making machinery in individual cases of implementation of the acts of Åland. In fact, the public sector of the Åland Islands appears, proportionally speaking, to be greater than that of mainland Finland, partly because of this public law orientation.

For Faroe Islands, no provisions on the distribution of legislative powers exist in the Constitution of Denmark 1953, which is curious because the autonomy arrangement was instituted as early as 1948 by ordinary legislation and it could have been taken into account and recognized when the Constitution of Denmark was enacted in 1953 by means of inserting explicit provisions on the autonomy of the Faroe Islands.[10] Perhaps the arrangement is today best described as one based on customary constitutional law or a constitutional convention. At any rate, the legislative powers of the Faroe Islands, first identified in the Home Rule Act 1948,[11] are today supplemented by the provisions in the Act on the Transfer of Legislative Powers 2005 (hereinafter: the Takeover Act),[12] both of which are pieces of ordinary law enacted by means of simple majority in the Danish Parliament. The latter act amends the former by making it possible for the Faroese legislative assembly to transfer, by its own legislative decisions, legislative powers from the Danish Parliament and add them to those powers that the Legislative Assembly of the Faroe Islands already has either on the basis of explicit reference in the 1948 Act or on the basis of earlier transfer decisions. This means that an enumeration of legislative powers of the Faroe Islands is emerging in a piecemeal manner, but is of a more fragmentary nature than any explicit listing in a constitution or comparable act: the various separate transfer decisions can, taken together, be understood as such an enumeration. At the same time, the situation is exceptional in that the sub-state

10 However, four provisions in the Danish Constitution mention the Faroe Islands (sections 28, 32, 42, 86), but they deal with the representation of the Faroe Islands in the Danish Parliament and with the organization of the national referendum in the Faroe Islands and with the voting age in local government elections.

11 Lov nr. 137 af 23. Marts 1948 om Færøernes Hjemmestyre, or the so-called Home Rule Act 1948, available in translation into English at <http://stm.dk/_p_13089.html> accessed 4 January 2018.

12 Lov nr. 578 af 24. Juni 2005 om de færøske myndigheders overtagelse af sager og sagsområder, or the so-called Takeover Act 2005, available in translation into English at <http://stm.dk/_p_13089.html> accessed 4 January 2018.

entity can take over by its own decision legislative powers from the national law-maker. There is, however, a limit to this take-over, because Section 1(2) of the 2005 Act prohibits the transfer of a small number of enumerated matters, leaving the following ones in the hands of the Danish Parliament: the Constitution; citizenship; the Supreme Court; foreign-, security- and defence policy; and currency and fiscal policy.

With these limitations by means of the listed matters, an enumeration is established also for the national law-maker, mainly in the core areas of public law.[13] The powers that can be transferred after negotiations between the governments of Denmark and the Faroe Islands include matters such as industrial property rights, air traffic, passport, criminal law and aliens affairs (several of the matters have since been transferred). In addition to these, enumerations of matters can be found in the 2005 Takeover Act and in the 1948 Home Rule Act that place powers with the Parliament of Denmark and that can be transferred without negotiations on the basis of legislative decisions of the Legislative Assembly of the Faroe Islands. Apparently in order to establish which competences that still remain with the Danish Parliament, the Legislative Assembly of the Faroe Islands enacted on 10 May 2006 a particular Faroese Act in which all those 24 competences were listed that had not as of that point of time been transferred from the Danish Parliament to the Faroese Legislative Assembly but that could be transferred (and which, as a consequence, are not featured in the enumeration of matters that according to Section 1(2) of the 2005 Takeover Act belong to the Danish Parliament).[14] The matters still held by the Parliament in 2006 that can be later transferred without negotiations to the Legislative Assembly included matters such as emergency services, general retirement pension, health, hospitals and lighthouses (several of the matters have since been transferred).

Because individual matters are transferred from the Danish Parliament on the basis of separate legislative decisions of the Legislative Assembly of the Faroe Islands, it is possible to say that an ever increasing list of competence, fragmented in nature ~~manifesting~~ itself in separate legislative enactments, is being created in the Faroe Islands. Hence in principle, both law-makers are

13 Concerning Greenland, where takeover can be complete so as to lead to independence, because no list of matters exist where transfer from the national parliament to the Faroe Islands is prohibited.

14 Løgtingslóg nr. 41 frá 10. mai 2006 um ræði á málum og málsøkjum, sum seinast broytt við løgtingslóg nr. 55 frá 26. mai 2011, at <http://www.logir.fo/Logtingslog/41-fra-10-05-2006-um-raedi-a-malum-og-malsokjum-sum-seinast-broytt-vid-logtingslog> accessed 4 January 2018.

operating on the basis of an enumeration, although current practice could display characteristics that deviate from this general proposition.

IV Management of Double Enumerations

As established above, the federal parliament of Canada has, according to Section 91 of the Constitution, legislative powers both in the field of public law (including criminal law) and private law, and the federation also exercises treaty powers, while the provincial legislatures have law-making powers in similar spheres, except that the provinces do not have treaty powers. Only a minimum of amendments have introduced new matters into the above scheme of distribution of legislative powers, which means that over time, a need has emerged to develop the relationship between the legislative powers of the federation and the provinces by means of interpretation. Initially, the Judicial Committee of the Privy Council in Britain was the body that interpreted the competence line, but since 1949, the Supreme Court of Canada is in charge of this dimension of constitutional interpretation.

From the outset, the starting point has been, on the basis of the chapeaus to Sections 91 and 92, that the legislative powers of the federation and the provinces are exclusive in relation to each other. For a good part of the time the Constitution has operated, the ideology concerning the two spheres of competence was based on the idea of watertight compartments, which means that there was little or no interaction between the two spheres of competence. During the past several decades, however, the understanding of cooperative federalism has been gaining ground and constitutes today the main approach to how law-making powers are exercised in Canada. Cooperative federalism is often driven by the federal government with financial incentives created for the provinces, but provinces have also developed horizontal mechanisms of cooperation.

Even within the paradigm of cooperative federalism, the spheres of competence established in Sections 91 and 92 are highly relevant for law-making activities in Canada, when both the federal and the provincial legislators feel the need to act in the modern society with changing legislative objectives. As a consequence, the Supreme Court of Canada has developed a testing sequence for breach of the competence line that is, at least in principle, applicable in relation to both federal and provincial legislation. The first step of the testing sequence is the so-called pith and substance test, which deals with the validity of the impugned legislation. If the law is not faulted on this basis, the second step could be the so-called interjurisdictional immunity test, which deals with

the applicability of the impugned law. In case the law is not declared inapplicable on this basis, a third step could follow, the so-called paramountcy test, which deals with the operability of the impugned law.

The analytical framework applied to a piece of law, whether federal or provincial, when inconsistency with the distribution of legislative powers in Sections 91 and 92 is claimed, starts with a so-called "pith and substance" text, which tries to extract the dominant feature, the main thrust or the true nature and character of the law, after which the court assigns the legislation to a federal or a provincial head of power. This is done for detecting whether the impugned legislation aims at a subject matter outside the jurisdiction of the legislative body enacting it.[15] The aim of this test is actually not to enforce exclusivity, because it instead creates tolerance for the co-existence of laws of the two orders of government in the same field, that is, recognizes the possibility of overlap *intra vires* between federal and provincial laws as long as the enactment of the one legislator does not enter the essence of law-making powers of the other legislator.[16] However, if such an intrusion into the essential character of the powers of the other law-maker is found, there is a successful validity attack at hand and the review will result in the legislation in question being declared of no force or effect, that is, the impugned law is invalid (*ultra vires*).[17] Invalidity is in such a case *ex tunc*, that is, from the moment of entering into

15 Peter W. Hogg, *Constitutional Law of Canada* (Thomson & Carswell, 5th edn suppl, Vols 1 & 2, 2014) ss. 15.4 – 15.5(a).

16 As the Supreme Court said in the *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66, [2011] 3 S.C.R. 837 (S.C.C.), "the Canadian constitutional law has long recognized that the same subject or 'matter' may possess both federal and provincial aspects. This means that a federal law may govern a matter from one perspective and a provincial law from another. The federal law pursues an objective that in pith and substance falls within Parliament's jurisdiction, while the provincial law pursues a different objective that falls within provincial jurisdiction (*Canadian Western Bank v Alberta*, [2007] S.C.J. No. 22, 2007 SCC 22). This concept, known as the double aspect doctrine, allows for the *concurrent application* of both federal and provincial legislation, but it does not create *concurrent jurisdiction* over a matter (in the way, for example, s. 95 of the Constitution Act, 1867 does for agriculture and immigration)".

17 In the *Reference re Securities Act*, *ibidem*, the Supreme Court found that the pith and substance of the draft Act was outside of the federal power in Section 91(2), "the regulation of trade and commerce" and entered the provincial legislative powers established in Section 92(13, 16) on "property and civil rights" and on "matters of a merely local or private nature", namely the regulation of contracts, property and professions. In *Canadian Western Bank v Alberta*, [2007] S.C.J. No. 22, 2007 SCC 22, application of provincial insurance legislation under Section 92(13) to banks created under Section 91(15) by federal legislation was found constitutionally valid in the "pith and substance" test, without any need to engage interjurisdictional immunity or paramountcy.

force. If only a part of a law is challenged, the provision of the act may be saved under the so-called ancillary doctrine or necessary incidental doctrine, but that requires that the statute considered as a whole must be valid.[18] It is also possible to use this test in relation to draft laws in situations where they are referred to the Court for advisory opinion. This doctrine of "pith and substance" facilitates cohabitation of two legislators, but it has sometimes been held that the "pith and substance" test seems to be somewhat tilted in favour the validity of federal law over provincial law.

The second part of the analytical framework is the "interjurisdictional immunity" test, which asks whether law, having been found to be constitutionally valid, is inapplicable to particular persons, places or things by virtue of those subjects being within the exclusive jurisdiction of the other level of government.[19] In practice, interinstitutional immunity provides for a limited degree of immunity mainly for federal undertakings from laws enacted by the provinces and thus deals with the application of the law. After the *Canadian Western Bank* and *Lafarge* judgments, the scope of this doctrine is narrower than it used to be, because it is not enough that the impugned law affects undertakings regulated by the other order of law, but actually impairs their activities.[20] A successful applicability attack results in the legislation being left intact as drafted, but the law is "read down" so as to be inapplicable in the context in question. This test has mainly been used to protect federal acts, rarely provincial acts, in a manner which produces some lack of reciprocity, but this doctrine was limited by the Supreme Court in a number of relatively recent cases.[21]

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18 *See* Hogg (n 16) s. 15.6, 15.9(c). For the ancillary powers test, *see General Motors of Canada v City National Leasing*, [1989] S.C.J. No. 28. The application of the ancillary powers doctrine could be seen as favouring the federal parliament's powers, but in the case of *Quebec* (*Attorney General*) *v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, it is clarified that the doctrine can also be applied for the benefit of the provinces.

19 *See* Hogg (n 16) s. 15.8(c), s. 15.9.

20 *British Columbia v Lafarge* [2007] S.C.J. No. 23, 2007 SCC 23. *See Quebec* (*Attorney General*) *v Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536, in which a divided court (7–2) found that provincial law on protection of agricultural land that had the effect of preventing aerodromes, enacted under Section 92(13, 16) of "property and civil rights" and "matters of a merely local or private nature" as well as Section 95 on "agriculture" and thus valid, violated the federal general power in the area of aeronautics enacted on the basis of the chapeau of Section 91 "to make laws for the peace, order, and good government of Canada". The paramountcy doctrine did not apply, because there was not found any operational conflict or frustration of federal purpose.

21 As concluded in Hogg (n 16) s. 15.8(f), "[t]he doctrine of interjurisdictional immunity ought to be reciprocal, protecting provincial subjects from incursions by *federal* laws", with examples provided. *See* also the cases of *Reference re Assisted Human Reproduction*

The third part of the analytical framework is the "paramountcy" doctrine, that is, whether a provincial law, found to be both valid and applicable, is inconsistent with valid federal law and therefore inoperative under the doctrine of paramountcy. The doctrine of paramountcy can be viewed as an exception to the "pith and substance" doctrine, because it provides for the priority of federal law in cases where there is, in individual application situations, a direct conflict between federal and provincial law that affects the operability of provincial law.[22] In the case of *Canadian Western Bank*, the Supreme Court summarized the doctrine by holding that conflict can manifest itself in two ways, in a narrow "impossibility of dual compliance" when it is not possible to comply with both laws at the same time, and in a broader "frustration of federal purpose" when the operation of a provincial law would frustrate the purpose of federal law.[23] However, the "standard for invalidating provincial legislation on the basis of frustration of federal purpose is high",[24] which means that the paramountcy doctrine is not the same as a general doctrine of federal preemption or precedence. A successful operability attack results in provincial legislation being declared inoperative for as long as the conflict in question continues to exist.[25] In areas where the paramountcy doctrine can be applied, the federal Parliament is therefore ultimately supreme and the provincial legislatures are subordinate.[26]

Although far-reaching exclusivity, to the point of amounting to an idea of "watertight compartments" of an earlier Canadian type, exists between the

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Act and *Canada* (*Attorney General*) *v PHS Community Services Society* for arguments that interjurisdictional immunity should also apply to provinces, not only to the federation.

22 As concluded in the case of *Marine Services International Ltd v Ryan Estate*, [2013] S.C.J. No. 44, 2013 SCC 44 (S.C.C.) "federal paramountcy applies where there is an inconsistency between a valid federal legislative enactment and a valid provincial legislative enactment, but not between a common law rule and a valid provincial law".

23 *Canadian Western Bank v Alberta*, [2007] S.C.J. No. 22, 2007 SCC 22. For an analysis of the paramountcy doctrine, rich in case materials, *see* Hogg (n 16) ch. 16.

24 *Marine Services International Ltd v Ryan Estate*, [2013] S.C.J. No. 44, 2013 SCC 44 (S.C.C.).

25 As stated in Hogg (n 16) s. 16.6, the paramountcy doctrine "will affect the operation of the provincial law only so long as the inconsistent federal law is in force. If the federal law is repealed, the provincial law will automatically 'revive' (come back into operation) without any reenactment by the provincial Legislature".

26 *See British Columbia v Lafarge* [2007] S.C.J. No. 23, 2007 SCC 23, in which the Supreme Court did not find the interjurisdictional immunity test applicable, but decided the case on grounds of federal paramountcy, because there was the federal Marine Act enacted on the basis of Section 91(10) and a provincial land use by-law enacted on the basis of Section 92(8, 13, 16) simultaneously in force, both incapable of simultaneous enforcement so as to create an operational conflict because a judge could not have given effect to both the federal law and the municipal law, and therefore, federal law set aside provincial law.

legislative competences of the Parliament of Finland and the Åland Islands, some pith and substance and even ancillary powers thinking is from time to time visible in the opinions of the Supreme Court concerning the competence of the Åland Islands. In an Opinion concerning the Ålandic Act on the Amendment of the Ålandic Act on the Application in the Åland Islands of the Parliament's Enactments concerning Alcohol,[27] the Supreme Court noted that already early drafting documents to the Ålandic Act had made the point that the obligation for the holder of a license to serve alcohol to offer a receipt when alcohol is sold belongs to the legislative competence of the Parliament of Finland, while the Ålandic Act itself would be applied within the Ålandic jurisdiction. For reasons such as fight against corruption, tax control, accounting, and consumer protection, the proposal of the Government of the Åland Islands to the Legislative Assembly goes on to hold, on the basis of Section 27(42) and the principles underlying the Self-Government Act, that lawmaking competence is on the Parliament. However, the Supreme Court held that there is no reason to focus on smaller terminological differences and that handing over a bill, receipt and other certificate can be connected with the same act of verifying that payment of a purchase has taken place.

Neither the fact that the Parliament of Finland was going to receive a legislative proposal that would introduce an overlapping rule, nor the fact that both the government of Finland and of the Åland Islands are of the opinion that general rules on handing over a receipt is within the legislative competence of the Parliament were relevant factors for the determination of whether or not the Åland Islands have legislative competence in the matter. Instead, the Supreme Court thought that as long as no general duty to hand over a receipt has existed, it has been natural to derive such a duty from the area of law within which this duty has been introduced. As a consequence, it is natural to refer the limited duty to hand over a receipt on the occasion of serving alcoholic beverages to the same area of law as the actual sale. Therefore, a business operator who has a license to serve alcoholic beverages can also be placed under a duty to hand over a receipt for such sales. The fact that this duty serves several objectives of control does not diminish its proximity to the license to serve alcoholic beverages. It seems that in this case, the Supreme Court was thinking that the introduction of a duty to hand over a receipt in the Ålandic Act on the sale of alcoholic beverages was an ancillary provision to Section 18(13) (licenses for the sale of alcoholic beverages) and therefore within the competence of the Legislative Assembly of the Åland Islands.

27 Opinion of the Supreme Court, 6 June 2013 (Dnr OH 2013/86).

A consequence of simultaneous application of the Ålandic Act and the draft act in mainland Finland, once adopted, would be that there would, in the Åland Islands, exist a double sanctions system (criminal law in the Åland Islands and administrative law sanctions according to the legislation enacted by the Parliament) for an act that only means that no receipt has been handed over in the process of selling and serving alcoholic beverages. The Supreme Court was of the opinion that this was not a circumstance that affected the distribution of legislative competence and that, if such a situation would occur, the rule of *ne bis in idem* would become applicable.

In spite of the fact that the Ålandic and the mainland Finnish legislative competences are exclusive in relation to each other, it is not prohibited for the Legislative Assembly to take in provisions from Finnish law. In fact, under Section 19(3) of the Self-Government Act, it is possible, for the purposes of achieving uniformity and clarity of an act of Åland, to include provisions in acts of Åland on matters relating to the legislative powers of the Parliament, provided that in their substance, they coincide with the corresponding provisions of an act of Parliament. The inclusion of such provisions in an act of Åland shall, however, not alter the separation of the legislative powers of the Legislative Assembly and the Parliament of Finland.

Such inclusion of provisions from laws enacted by the Parliament of Finland in the acts of Åland results in the enactment of acts of a mixed nature in the Åland Islands. This "mixity" is a result of the fact that the exercise of legislative powers in the Åland Islands does not always produce clear-cut regulation of legal relationships within the Ålandic sphere of competence only, but spills over to the other side of the competence line. The consequence is that a part of the provisions that should be included in the act of Åland with a view to the regulatory logic of the enactment might not belong to the legislative competence of the Legislative Assembly. Therefore, Section 19(3) makes it possible to enact coherent and systematically structured acts of Åland by using in the act of Åland such norms that belong to the legislative competence of the Parliament of Finland and that materially coincide with the corresponding norms in an act enacted by the Parliament of Finland. The possibility to enact mixed legislation tries to ensure that an act of Åland is informative in relation to all those persons to whom the act is applied. The incorporation of provisions from acts enacted by the Parliament of Finland into acts of Åland does not, however, change the legislative competence between the two lawmakers in any way. If a deviation from the competence has taken place, then the Legislative Assembly has made an incursion into the legislative competence of the Parliament of Finland. A deviation in the choice of words only does not constitute a breach

of competence unless it at the same time involves a material deviation from competence.

The consequence of Section 19(3) of the Self-Government Act is that an act of Åland can contain provisions that originally have been enacted within the competence of the Parliament of Finland. In such a situation, the provision originally enacted by the Parliament of Finland continues to be applicable in the Åland Islands on the basis of the legislative competence of the Parliament of Finland. The further consequences of this become apparent if the Parliament of Finland amends the original provision, because then the provision amended by the Parliament of Finland applies in the Åland Islands as amended, but the Ålandic mixed act would continue to feature the original wording in its unamended form. At such a point, the good aim of producing an informative act of Åland is, of course, countered. In order to satisfy the need of an individual or a business enterprise to always receive correct information about the contents of legal provisions, acts of Åland of a mixed nature should be automatically amended if the Parliament of Finland amends provisions that have been incorporated into acts of Åland.

As concerns the quantity of "mixity" in an act of Åland, it has sometimes been suggested that the proportion of provisions stemming from an act enacted by the Parliament of Finland should not exceed 50 percent. There is no such rule in the Self-Government Act, and the interpretations of the Supreme Court do not indicate that such a rule of proportion would be imposed in practice. However, there exist some opinions of the Supreme Court that indicate that Ålandic enactments that consist entirely or mainly of provisions that belong to the legislative competence of the Parliament of Finland cannot be passed by the Legislative Assembly.[28]

It is also important to take note of the fact that the Legislative Assembly may, within its legislative competence, enact so-called acts of reference (Swedish: *blankettlag*), which means that an act enacted by the Parliament of Finland is made applicable in the Åland Islands within the legislative competence of Åland by means of an act of Åland. The situation is in this respect different from the acts of a mixed nature, because the acts of reference are enacted within the competence of Åland. This method of enactment is often used to legislate on technical standards, such as foodstuffs, product safety, chemicals and motor vehicles.[29] By choosing to enact an act of reference, the Legislative

28 *See*, e.g., the following Opinions of the Supreme Court: 5 April 1963, 19 June 1979.

29 *See* also Sören Silverström, 'Implementation of EU legislation in the Åland Islands' in Sia Spiliopoulou Åkermark (ed), *Constitutions, Autonomies and the EU* (Åland Islands Peace Institute 2008) 45, who makes the point that the implementation of technical EU

Assembly has decided to apply the same provisions as in mainland Finland, and in such a situation, it is beneficial if the normative situation in the Åland Islands can follow the development of the provisions in mainland Finland. Typically, an act of Åland of this sort makes reference to the act or acts enacted by the Parliament of Finland by mentioning the name and number of the act or acts and declares that future amendments made by the Parliament of Finland to the act or acts will also apply in the Åland Islands.

The method of act of reference has also often been used in the implementation of EU law, because the short implementation period prescribed by an EU directive may leave such a narrow time-frame that the law-drafting mechanism of the Åland Islands does not have the time to react. In such situations, the Government and the Legislative Assembly of the Åland Islands may choose to enact the act of Åland according to the wording it received in the Parliament of Finland, which leads to certain savings in time and resources. The capacity to draft laws in such quantities as required by changes in the formal legal environment (the EU, international treaties) and by changes in society is, after all, limited in the Åland Islands.[30] Therefore, from time to time, acts of reference are used in a manner which incorporates by Ålandic legislative decision the contents of an act passed by the Parliament of Finland.

Sometimes, acts of reference are enacted by the Legislative Assembly so that they not only make reference to an act passed by the Parliament of Finland, but also contain one or a couple of material provisions, such as an exception of some sort to the contents of the referenced act of the Parliament of Finland. In such cases, the act of reference actually becomes of a mixed nature, too, albeit of a different kind than the above-mentioned acts of a mixed nature. The use of acts of reference may thus from time to time lead to normative situations which are not easy to understand for the individual or even the public authorities and courts that implement such acts of reference.[31]

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directives may cause the Legislative Assembly to choose such a legislative strategy that directives are implemented by way of referring to the relevant state implementing legislation. "However, there are also many directives requiring Ålandic legislation which are not simple copies of State legislation".

30 As pointed out in Silverström (n 30) 45, only eight civil servants are responsible for the drafting of legislation in the Government of the Åland Islands, which is very little in comparison with any Member State, although the volume of EU norms relevant for the Åland Islands is almost at the same level as the volume of EU norms relevant for a Member State.

31 One example of such a legislative technique could be the Åland Act on the Application on the Åland Islands of some Acts on Re-Districting of Municipalities 1997. According to this Act of Åland, the Act on Re-Districting of Municipalities 1997 of mainland Finland shall be applied in the Åland Islands, but with exceptions specified in the Act of Åland.

In Section 32 of the Self-Government Act, a particular normative procedure is established that normally should not affect the formal distribution of powers but that distributes administrative tasks between the Åland Islands and state authorities. The procedure uses so-called consent decrees, issued by the President of Finland after the Åland Delegation has given an opinion on the draft. The purpose of consent decrees is to make possible transfers of duties belonging to the state administration to administrative agencies of the Åland Islands or duties of an agency of Åland to the state administration. Such transfer may be agreed upon by the Government of the Åland Islands and the Government of Finland, and the transfer may be arranged for a certain period of time or until further notice. If notice is given on an existing agreement by either of the two parties, the relevant consent decree shall be amended or repealed as soon as possible and in any case within one year from the date of the notice. Unless the decree is amended or repealed within the said time, the agreement shall be deemed to have been terminated one year after the notice. This means that it is the agreement between the parties that controls the validity of the decree. The mechanism of consent decrees has, however, some normative implications for the legislative powers of the Legislative Assembly, because under sub-section 2 of the provision, an act of Åland which is contrary to a consent decree shall not apply to the extent the act of Åland is contrary to the consent decree while the decree is in force. Here the principles of the hierarchy of norms are, at least to some extent, turned upside down, but in practice, the Åland Islands can always terminate such an agreement which has resulted in such application of a consent decree that raises competence problems.

Consent decrees are prepared jointly by the executive organs of the Åland Islands and mainland Finland, and they deal typically with such public functions that in one way or another leave the inhabitants of the Åland Islands without public services in certain matters that belong either to the legislative competence of the Legislative Assembly or the Parliament of Finland. Examples of matters where consent decrees exist are tasks related to the production of the list of voters for elections of the Legislative Assembly and municipal boards in the Åland Islands by the population registry authorities of the state of Finland and the emergency transportation of persons for medical reasons on vessels belonging to the Coast Guard. In these cases, organs of the Finnish

The exceptions mentioned in the particular Act of Åland transfer those functions that in mainland Finland were held by the Ministry of the Interior, the provincial government and the Council of State to the Government of the Åland Islands. In addition, this Act of Åland prescribes that costs that are caused by the implementation of the legislation on the re-districting of municipalities in the Åland Islands are payable out of the means of the budget of the Åland Islands instead of being paid from the state budget.

state administration have agreed to take care of functions which otherwise are the responsibility of the Åland Islands.[32] Hence there exists a certain measure of inter-governmental cooperation with the autonomy arrangement, made visible also in several other respects in the Self-Government Act 1991 by means of references to consultation and cooperation between the Governments of Finland and the Åland Islands. Although the competence line is strict, the practical management of issues requires cooperation.

The adjudication committee, created under Section 6(2) of the Home Rule Act 1948 to deal with competence disputes between Denmark and the Faroe Islands, has never been called to resolve any dispute concerning competence. Therefore, it is possible to say that this committee is not a body that would actively perform any dispute resolution function and as a consequence of that, there does not exist any interpretations that would amount to practice which could give rise to characterisations of the dispute resolution in the same way as concerning Canada in relation to the provinces or Finland in relation to the Åland Islands. However, it can be presumed that competence issues have arisen between the two entities, Denmark proper and the Faroe Islands, and that the competence issues have been solved through political negotiations between the governmental bodies of Denmark and the Faroe Islands. Given the ease at which the Faroe Islands can take over legislative competence from the Parliament of Denmark, one practical possibility from the Faroese side, at least after 2005, would be to transfer the contentious matter from the Parliament to the Legislative Assembly of the Faroe Islands according to the procedures of the Takeover Act 2005, that is, either with or without negotiations.

After 2006 and the enactment of the above-mentioned Faroese law listing the competences that still remain with the Parliament of Denmark, several competences have been taken over by the Faroe Islands, such as criminal law; media matters; emergency services; the established church and religious communities that deviate from the established church; matters that concern company law, economic associations and foundations as well as annual accounts (book-keeping); holidays; measures and weights; meteorology; copyright; property; criminal law; and pilotage. As a consequence, competences still held by the Danish Parliament are function as legal counsel; health; function as medical doctor; function as midwife; hospitals; care of disabled. Because of the principle that money follows legislative competence, it appears as if the

32 Åland Decree on the Taking Care of some Tasks that Relate to Elections to the Legislative Assembly and to Municipal Elections as well as to Advisory Municipal Referendums in the Åland Islands 1999 and Åland Decree of the President of the Republic concerning the Tasks of the Border Guards in the Åland Islands 2004.

expensive competences were still held by the Danish Parliament, and subsidies are paid to the Faroe Islands for taking care of (parts of) those competences in the Faroe Islands on behalf of the Danish government. In those areas of competences that have not been transferred from Denmark to the Faroe Islands, there exist some partly delegated law-making powers that the Parliament of Denmark has delegated to the Faroe Islands.

In spite of the fact that the double enumeration strategy for distribution of legislative powers purports to establish two clear-cut spheres of legislative competence, one for the national level and another for the sub-state level, the constitutional regulation of the interaction of the two spheres of legislation contains certain safety valves for such unusual situations where the regular distribution of competence is difficult to apply. Thus, when the existing material enumerations of competences are not able to provide all the answers, management of "unusual situations" is required. In such instances, the Constitution of Canada contains the possibility for the federation to legislate for the peace, order and good government (p.o.g.g.) on the basis of the chapeau of Section 91 of the Constitution, while for the Åland Islands, the two orders of governments can rely on their respective extension clauses implementing underlying principles of legislative competence in the Self-Government Act. However, none of these clauses in Canada or Finland establish any general doctrine of precedence of national law, but allow for limited adjustments in a circumscribed manner. For the Faroe Islands, the easy assumption of competence by the Legislative Assembly can, in such situations and as an extension, probably be viewed as a presumption of competence in the Faroe Islands.

v Concluding Remarks

Our review of exclusive enumerations of law-making powers in a context of duality of legislative competences in three countries, Canada, Denmark and Finland, reveals the existence of a group of countries where the distribution of legislative competences is not arranged in a manner typical for a classical federation or for a regular autonomy arrangement. The emergence of double enumeration is a result from negotiations between the state and the sub-state levels, but in principle, such negotiation is an on-going feature of only Denmark and the Faroe Islands, while negotiations precede the creation of the constitutional provisions in Canada and Finland. In terms of rigidity and flexibility, the Finnish arrangement with respect to the Åland Islands appears to be the most rigid one, and in comparison, the Canadian arrangement with

respect to the provinces is only marginally less rigid, while flexibility characterizes the Danish arrangement with respect to the Faroe Islands.

The point with the double enumerations in all three countries is to create exclusive legislative competences where the two orders of government would always know when and at which instances they are competent to enact legislation. In Finland, the distribution of competences is purportedly established as a very strict one, almost as if the two spheres of legislative competences existed in watertight compartments, if an early Canadian characterization of double enumeration is allowed in a Finnish context. In Canada, the 150 year long practice with a double enumeration that has survived almost unamended has led, through interpretations of the Supreme Court, to a cohabitation of competences, while in Denmark, the model has recently been changed into a dynamic re-distribution of competences, where the sub-state entity is in a position to determine which of the competences the sub-state entity should hold, save for a short list of reserved competences for the national parliament. Therefore, the method used for the distribution of legislative powers ranged from amendment in Finland through judicial interpretation in Canada to political decision (by the sub-state entity) in Denmark. A general feature of the three systems of double enumeration is that they lack any general supremacy clause or preemption doctrine. However, the three constitutional orders have varying techniques for reacting to "unexpected" competence issues not resolved on the basis of a reading of the double enumerations. In Finland, each list of enumeration is supplemented by an extension clause for implementing underlying principles of each list, while in Canada, there is some limited paramountcy as a last resort, coupled with a limited p.o.g.g. power that may give some leverage to the federal level, but without disturbing the general order of double enumeration. In Denmark, however, the resolution of "unexpected" situations is somewhat confusing, but the flexible political decision-making by the legislature of the Faroe Islands could probably function as an instance of final resort.

The manner in which the normative competence control is fashioned may range between symmetrical and asymmetrical. Competence control is symmetrical in Canada, where the enactments of both the federal legislature as well as the provincial legislatures can become objects of competence control. In Finland, competence control is asymmetrical, because there is a systematic control of competence only of the enactments of the Legislative Assembly of the Åland Islands, not of the Parliament of Finland. In Denmark, the system is perhaps somewhat unclear, but it appears that the competence control would be asymmetrical in a manner similar to the Finnish one, although the system

of competence control as established on the basis of the 1948 Home Rule Act has not been used even once. The above account also suggests that normative competence control can be either systematic or unsystematic. In Canada, the competence control is unsystematic for the reason that all legislative enactments at the federal level and provincial level do not undergo competence control, but only those legislative enactments that are brought to the judicial system by way of individual applications. In Finland, the situation is the opposite as concerns the legislation enacted by the Legislative Assembly of the Åland Islands, because all pieces of law enacted by the Legislative Assembly undergo a competence examination by the Åland Delegation, and if a problem is detected or indicated, the matter is dealt with by the Supreme Court of Finland, pending the possible exercise of (partial) veto by the President of Finland. In Denmark, competence control has in practice been non-existent, but would appear to be unsystematic, because not all legislation would be examined as to breach of competence, but only such pieces of law of the Faroe Islands where breach of competence is indicated (which has not happened so far, at least formally within the established system of competence control).

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