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SUB-STATE SOLUTIONS AS EXPRESSIONS OF SELF-DETERMINATION

Føroyskt úrtak

Sjálvsavgerðarætturin í altjóðarætti er tengdur at hugtakinum um ríkið, men ikki er heilt greitt, hvussu sjálvsavgerðarætturin ávirkar tey verandi ríkini og rættin hjá einum fólki at stovna egið ríki ella at skipa seg sum sjálvstýrandi samfelag á annan hátt.

Sjálvsavgerðarætturin varð upprunaliga í hvussu er nýttur at máa grundarlagið undan tí praksis at taka nýggj landøki við hervaldi. Eftir seinna heimsbardaga fekk sjálvsavgerðarrætturin rættarligt innihald. Hetta hendi fyrst við ST-stovningarsáttmálanum frá 1945, men serliga við ST-aðalfundarsamtyktum 1514(XV) og 2625(XXV) frá ávikavist 1960 og 1970 og teimum tveimum ST-mannarættindasáttmálunum frá 1966.

Sjálvsavgerðarætturin verður býttur í tveir høvuðsflokkar, tann innara og tann ytra, alt eftir um fólkið kann inna sjálvræði sítt í verandi ríki, ella um neyðugt er at stovna egið ríki. Innan hesar karmar kann sjálvsavgerðarætturin aftur bólkast í fimm flokkar. Hesir snúgva seg serliga um rættin hjá fólki í einum verandi ríki til frælsi frá uppíblandi frá (fólki í) øðrum ríkjum, til rættin hjá einum fólki at koma til orðanna og fáa politiska ávirkan í tí ríki, tað livir í, og rættin hjá seinast nevnda fólki at stovna egið ríki, um talan er um hjálandaveldi ella aðra kúgan. Í seinasta førinum vil fólkið ikki hava ávirkan og koma til orðanna í verandi ríkisskipan og kann tí ikki vera nøkt við innara rættin til sjálvræði, men noyðist at bróta út, stovna egið ríki og harvið inna sín rætt til sjálvræði í ytra forminum.

Sjálvsavgerðarrætturin í innara forminum gevur ikki einum fólki nakað beinleiðis krav uppá heimastýri (autonomi) ella samveldi

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(føderalismu). Tó er greitt, at í tann mun sjálvsavgerðarætturin hevur nakra ávirkan á innaru rættarskipanina í einum ríki, má hann hava við sær, at hesin sjálvsavgerðarættur verjir eina heimastýrisskipan móti at fara aftur ella minka, í hvussu er um talan er um eitt serstakt fólk. Altjóðarættur tykist eisini at góðtaka einhvørja sjálvsavgerðarskipan, bert viðkomandi fólk hevur avgjørt sína skipan í sambandi við eina frælsa tilgongd.

Eindarríki hava leingi verið mett sum týdningarmesta slag av ríki. Eindarríki kunnu lýsast sum ríki, har alt lóggevandi vald er savnað hjá einum lóggeva. Dømi eru Svøríki og Noreg. Nú eru flestu evropeisku lond kortini ikki eindarríki heilt, tí ávís miðspjaðing er farin fram og heimastýrislíknandi skipanir hava ment seg, sum í Bretlandi og Italiu, ella tí londini eru samveldisríki, sum Týskland og Eysturríki.

Samveldisríki kunnu lýsast við tveimum serliga týdningarmiklum eyðkennum. Í fyrstu atløgu hevur samveldistingið tvær deildir. Onnur deildin umboðar alt ríkið sum eina heild, meðan hin deildin umboðar deilríkini sum javnsett og í hesum avmarkaða sambandi fullveldis eindir. Í aðru atløgu er samveldisríkið eyðkent við, at samveldis- ella miðveldismyndugleikarnir hava upptaldar heimildir, meðan deilríkini hava restina av valdinum. Hetta kemst av, at deilríkini vanliga meta seg hava upprunaliga fullveldið og tískil alt vald, sum ikki beinleiðis er avhendað samveldinum.

Um heimastýrisskipanir (autonomi) og miðspjaðing finst ongin verulig ástøði. Hetta er helst tí, at heimastýrisskipanir eru pragmatiskar loysnir í ítøkiligum málum, ið illa ber til at greina greitt og alment. Tó kann ein fyribils lýsing av heimastýrisskipanum vera, at heimastýrisskipanir venda samveldisskipanum á høvdið, tí umvent av samveldisskipanum er tað nú heimastýrið, sum hevur upptaldu heimildirnar, meðan miðveldið hevur restheimildirnar og tískil eisini upprunaliga fullveldið og tað vald, sum ikki beinleiðis er latið heimastýrinum. Kortini er eisini tann munur millum samveldis- og heimastýrisskipanir, at borgarar í heimastýrinum vanliga bara eru umboðaðir í samveldistinginum sum allir aðrir borgarar í samveldinum og tí ikki umboðandi heimastýrið sum serliga politiska eind. Heimastýrisskipanir kunnu tí eisini sigast at vera sløg av asymmetriskum íkastum til viðkomandi politisku skipanir.

Føroyska heimasstýrisskipanin er ikki grundlógarfest, eins og mangar aðrar heimastýrisskipanir. Tí kunnu miðveldismyndugleikarnir sambært donskum stjórnarrætti formliga eisini frítt afturkalla tær serligu heimildir, sum Føroyum eru givnar. Á henda hátt standa Føroyar ikki ovarliga sum heimastýrisfyrimynd. Kortini er tað so, at Føroyar í veruleikanum hava víðari heimildir. Hóast heimildirnar hjá heimastýrinum eru upptaldar, so minnir føroyska skipanin í veruleikanum – og tá hugsað verður um skipanina, har fólkatingslógir ikki uttan víðari verða almannakunngjørdar og fáa virknað í Føroyum – meira um skipan, har heimastýrið hevur restheimildirnar og harvið eitt slag av upprunaligum fullveldi.

Viðvíkjandi sjálvsavgerðarættinum, eru tiknar fleiri áhugaverdar avgerðir seinastu árini av bæði altjóða dómstólum, – nevndum og stjórnardómstólum. Hesar avgerðir benda á, at sjálvsavgerðarætturin ikki verður skiltur, sum ein rættur, ið gevur einum fólki rætt til at stovna sítt egna ríki, uttan so at fólkið er í eini hjálandastøðu ella er kúgað á annan hátt. Avgerðirnar í málunum Katanga móti Zaire hjá afrikonsku mannarættindanevndini frá 1992 og um spurningin um støðuna hjá Tatarstan og Quebec hjá stjórnardómstólinum og hægstarætti í ávikavist Russlandi í 1992 og Kanada í 1998 koma allar inn á henda spurning. Í øllum avgerðunum var komið fram til, at sjálvsavgerðarætturin ikki kann tulkast sum ein rættur, ið kann hava syndran av verandi ríkjum sum avleiðing. Er talan ikki um hjálendisstøðu ella kúgan annars, eigur margfaldi og liðiligi sjálvsavgerðarrætturin heldur at verða útintur innanfyri karmarnar av verandi ríkjum.

1. Introduction

Self-determination is connected to statehood, but the exact manner in which the right to self-determination should affect the existing States and areas that, without being States, form politically meaningful entities is an open question. The position of so-called sub-State entities, that is, entities which are not States in the strict meaning of the word, under the concept of self-determination is therefore a very interesting question, especially as many of the existing sub-State entities aspire for more self-determination than they currently have or wish to gain official recognition as entities that are entitled to self-determination.

In the context of international law, the position of the people is encapsulated in the concept of self-determination and its two sub-categories, external and internal self-determination. The former refers to the existence of a State as a sovereign subject of public international law and is widely recognised as a peremptory norm of international law. The latter is used to refer to sovereign states in a number of ways, for instance, in the sense that the population determines by means of elections the composition of its government. It may also refer to different autonomy or sub-state arrangements within the borders of sovereign states and even to the freedom for a minority from oppression by the central government.

The doctrine of self-determination was at least originally used to undermine the right of acquisition of territories by means of conquest, which seldom paid any attention to the interests of the people living in the territory in question. The idea was first built in to Article 1, Sub-section 2, of the Charter of the United Nations as well as in Article 55 of the same Charter and developed, for instance, by Resolution 1514(XV) of the United Nations General Assembly in 1960 that includes a Declaration on the Granting of Independence to Colonial Countries and Peoples. Sub-section 2 of the Declaration affirmed that *all* peoples have the right to self-determination, on the basis of which they freely determine their political status and freely pursue their economic, social and cultural development. The categories of self-determination for non-self-governing territories identified in this resolution focusing on colonial relationships were three: a) emergence as a sovereign independent State; b) free association with an independent State; or c) integration with an independent State.

The forcefulness of the principle of self-determination was boosted by the inclusion of self-determination in common Article 1 of the 1966 UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. According to that Article, *all* peoples, not only those under colonial domination, have the right of self-determination, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development. The two Covenants clearly state the existence of the concept of self-determination as a right under public international law. It is also a permanent and continuous right for peoples and it can be activated

also after it has been exercised for the first time. It seems as if it were considered a collective right that can be viewed as a precondition for the realisation of most other human rights.[1]

The realisation of the right of self-determination has consequences both at the level of international law and national law. A number of different situations are conceivable. *First*, a people in an established State shall not be subjugated by another State (non-interference and territorial integrity). This is actually an understanding of self-determination that relates to the principle of the sovereignty of State and protects State sovereignty. *Second*, if there is a subjugated people, it shall have the right to free itself and become independent. This was especially the case with colonies after World War II and relates to decolonisation. *Third*, a people's right to self-determination can be understood as a right of (a certain part of) the population to choose the State under which authority they live. This was a common concept with respect to territorial changes after World War I and, it should be stressed, concerned almost exclusively areas inhabited by a minority population. In most cases, its purpose was to facilitate the integration of a minority population in one country into the population of the kin-State. As sub-categories of territorial self-determination may be mentioned the possibilities of the population to attain autonomy, and perhaps even the option of secession. *Fourth*, there seems to exist a right of a people to create, and perhaps re-create, their own political system, a right which is more or less overlapping with the concept of the *pouvoir constituant*.[2] *Fifth*, self-determination is in conjunction with Article 25 of the UN Covenant on Civil and Political Rights often referred to as the right of the people to participate in government and determine the content of policies. In this perspective, self-determination implies a right to such a government which is representative of the population.

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1 Concerning common Article 1, see Manfred Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary*. Kehl, Strasbroug, Arlington: Engel, 1993, pp. 5-25; Human Rights Committee, General Comment 12, Article 1 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 12 (1994).

2 On the terms constituent powers (*pouvoir constituant*) and amending powers (*pouvoir constitué*), see Suksi, Markku, 'On mechanisms of decision-making in the creation (and the re-creation) of states – with special reference to the relationship between the right to self-determination, the sovereignty of the people and the pouvoir constituant', in *Tidsskrift for Rettsvitenskap* 3/97, pp. 426-459.

The first and the second category relate to external self-determination, while the fourth and the fifth category mainly denote internal self-determination in its various manifestations.[3] The fourth and the fifth category also conform with the main interpretation of the exercise of self-determination in a post-colonial situation, which is that the reference to the right of self-determination of all peoples is a reference to the *total populations* of the *existing States* regardless of their internal ethnic composition. The third category may be viewed as a special or perhaps as an intermediate case. The third, fourth and fifth categories are particularly relevant for national constitutional law and necessitate substantial legislative action at that level.

Against this background, the following issues can be raised: What is the interface between internal self-determination and constitutional provisions concerning sub-State entities? How are the legal interpretations concerning the alteration of the constitutional position of sub-State entities framed? What kind of mechanisms are there for the realisation of self-determination for sub-State entities?

2. Options for Constitutional Solutions

After the adoption of common Article 1 in the two U.N. human rights covenants, the right of self-determination is a general human right not only applicable in colonial situations. The legal environment in relation to the concept of self-determination has thus changed, and in this respect, common Article 1 marks a new starting point in 1966. The practical content of the right of self-determination, nevertheless, remained unclear. The UN Declaration on Friendly Relations of 1970[4] recalled the existence of the concept of self-determination and, more importantly, accounted for the modes of implementing the right of self-determination by a people. These modes are:

a) the establishment of a sovereign and independent State;
b) the free association or integration with an independent State; and
c) the emergence into any other political status freely determined by a people.

[3] See also Suksi, Markku, *Bringing in the People – a Comparison of Constitutional Forms and Practices of the Referendum*. Dordrecht: Martinus Nijhoff Publishers, 1993, p. 236 f.
[4] G.A.Res. 2625(XXV).

The Friendly Relations Declaration can be viewed as an operationalisation of common Article 1. Categories a) and b) are familiar from the above-mentioned G.A.Resolution 1541 of 1960 and can be understood as re-statements, but the Friendly Relations Declaration contains a new category, letter c), which spells out the possibility of creating such modes of self-determination not covered by categories a) and b).

Hence self-determination is still, in line with the post-World War I situation, a determination of sovereignty over people under certain forms. However, self-determination is now a broader legal concept than before World War II. It is not only designed for a minority so that it can choose the sovereignty under which it will live, but it is designed so as to make possible the creation of a new State or sovereign for the population on the one hand and the integration of the population into an existing State or sovereign on the other.[5] In so far as the exercise of self-determination is a determination of under which law, that is, under which sovereignty, a people will live, then the constitutional devolution of legislative powers to sub-State entities is simultaneously a limited devolution of both sovereignty and self-determination to such an entity. It is submitted here that the concept

[5] In this context, see *Case concerning the Northern Cameroons* (*Cameroon v. United Kingdom*), Preliminary Objections, Judgment of 2 December 1963, I.C.J. Reports 1963, p. 15, at 28. The German colony of Kamerun was, in the aftermath of World War I, placed under the League of Nation mandates system, with France and Britain as administrators of each part of Cameroon. After World War II, Cameroon was made a Trust Territory of the United Nations. The French part declared independence on 1 January 1960. In the British part, a referendum (or plebiscite, as the vote was called) was organised in February 1961. As a result of the referendum, the northern part of the Trust Territory under British administration chose to join the Federation of Nigeria, while the southern part chose to join the formerly French part of Cameroon. This union resulted in the creation of the Federal Republic of Cameroon on 1 October 1961. In the case before the ICJ, three years before the adoption of the two U.N. Covenants on human rights, the ICJ commented the fact that only two substantial and mutually exclusive alternatives were presented to the voters. "The Court cannot blind its eyes to the indisputable fact that if the result of the plebiscite in the Northern Cameroons had not favoured joining the Federation of Nigeria, it would have favoured joining the Republic of Cameroon. No third choice was presented in the questions framed by the General Assembly and no other alternative was contemporaneously discussed." It is possible that the ICJ considered independence of the Northern Cameroons as a third conceivable alternative for the people in the referendum, on the top of the two alternatives which could be understood as "free association or integration with an independent State. Independence was the primary objective of Resolution 1514(XV) of the United Nations General Assembly in 1960 that includes a Declaration on the Granting of Independence to Colonial Countries and Peoples.

of self-determination exists parallel to sovereignty and that the culmination of both self-determination, especially in its internal form, and sovereignty in its internal form is the exercise of the highest decision-making authority over a certain territory. The aim is to create a government which is capable of representing the whole population of the State in one way or the other.

Therefore, just as law-making powers of sub-State entities such as autonomies are a devolved part of the internal sovereignty of the country in question, the law-making powers of sub-State entities such as autonomies may constitute a devolved part of the internal self-determination of a country. Hence exclusive law-making powers granted to a sub-State entity can be viewed as constituting a share in the internal self-determination of that State. This conclusion would, however, be valid under international law only in so far as devolution has concerned peoples or at least certain distinct groups or populations. It is thus possible that a sub-State entity such as an autonomy arrangement becomes, if it is accepted by the population or the group in question either through their representatives or directly through the referendum or through long-time practical acceptance, an exponent of their self-determination and wins legitimacy under international law so as to be protected under international law. Such protection under international law would involve a prohibition of the weakening of the autonomy arrangement against the will of the population concerned.

International law is, however, careful in pointing out that the exercise of the right of self-determination shall not be disruptive of the territorial integrity of the existing States. At a European level, this is sustained by the principles contained in the various OSCE principles adopted by the participating States. According to public international law and under certain conditions provided therein, the Security Council of the UN is the only body that can authorise such actions by the international community or by third States that would violate the sovereignty of a State and its territorial integrity.

The constitutional consequences of the realisation of these categories of self-determination are manifold. The establishment of a sovereign and independent State means that an exercise of self-determination takes place. Apparently, this instance or moment of self-determination

is simultaneously of a pre-constitutional character and can be described in terms of the *pouvoir constituant*, which may contain in itself the adoption of a constitution for the new State or result as a consequence in another constitutional action at which the constitution is adopted either by means of a referendum or through an elected assembly or, as will be explored below, by some other means. This parallellism between the exercise of self-determination to create a new State and the exercise of the *pouvoir constituant* is necessarily not a feature that has drawn much attention from the international community.

Whereas international law grants the right of self-determination and is interested in its realisation, it has had very little to say about the next step, that is, about what should take place after the exercise of self-determination. How should the new State be organised? Should its method of governance be democratic or representative of its population? Evidently, if the exercise of self-determination is democratic according to the UN criteria, it could be assumed that the emerging State, too, will be democratic. However, a more legal link to the participation of the people in a democratic manner is established if common Article 1 is read together with Article 25 in the CCPR, which further on involves at least the adjacent political rights of expression, association and assembly as well as equality and non-discrimination. Hence human rights law can today be interpreted so as to require the enactment of the first constitution of a new State with at least those human rights that have been established in legally binding international covenants. During the past decade, the international community has, in fact, been involved in the State-creation processes in a number of places.[6]

What would paragraph b) of the Friendly Relations Declaration mean in constitutional terms, that is, what is implied by the possibility of a people to free association or integration with an independent State? Firstly, it would seem to mean that there exist two different entities, a people that wants to associate or integrate with an existing

[6] The UN was very active in Namibia and the international community is also actively involved in Bosnia and Herzegovina through the Dayton Agreement, which created the country as a federal State with a number of institutions that have been designed against the background of democratic concepts. The existence of sub-state entities or units of governance that have their own and exclusive legislative powers is one part of the Bosnian solution.

State and a State that is willing to receive such a people. Secondly, in harmony with Principles VII-IX of UN General Assembly Resolution 1541(XV) of 1960 on the Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, that is, principles concerning Non-Self-Governing Territories, it seems that association with an independent State implies a confederal or at least a loose federal constitutional setting in which the associated territory retains the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people. Such a people shall continue to have the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes, a freedom that may actually amount to a right of secession or lead in the other direction, towards various forms of closer relationship with the "receiving" State. The constitution of the confederation should probably contain a provision establishing the right of secession. Integration is clearly more far-reaching and may even be interpreted as the creation of a unitary State, because the peoples of both territories should, according to these Principles, have equal status and rights of citizenship and equal guarantees of fundamental rights without any distinction or discrimination. Both peoples should, according to the Principles, have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.[7] Representative government and effective participation are hence the objectives of international human rights law.[8]

[7] The requirement of effective participation was in 1992 introduced in the U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (G.A.Res. 47/135(1992)). Article 2.2. of the Declaration emphasises the right of the persons belonging to minorities to participate effectively in cultural, religious, social, economic and public life, while Article 2.3. stipulates that persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.

[8] It is in this respect interesting to point out that General Recommendation No. 21 of the CERD Committee (U.N.Doc. CERD/48/Misc. 6/Rev. 2/1996) distinguishes between internal and external self-determination of peoples and holds that there exists a link between internal self-determination and the right of every citizen to take part in the conduct of public affairs at any level, as referred to in Article 5(c) of the CERD. In its General Comment on Article 25, Par. 2, of the CCPR, the U.N. Human Rights Committee makes a somewhat similar connection between Common Article 1 and Article 25 of the CCPR (U.N.Doc. CCPR/C/21/Rev. 1/Add. 7(1996)).

Between these extremes that could be chosen by a people in the exercise of their self-determination, that is, an independent State on the one hand and a unitary State on the other, there seems to remain a sphere of constitutional options that are covered by point c) in the Declaration on Friendly Relations, namely the emergence into any other political status freely determined by a people. This is a position that could cover all constitutional solutions ranging from a federation through various kinds of autonomy arrangements and arrangements of devolution to cultural autonomy. However, there does not seem to exist much guidance at the level of international law as to what kind of institutional arrangements point c) exactly covers. This is not surprising, because public international law normally leaves the organisation of the national administration at the discretion of the State and establishes in the best of situations only principles that should be implemented by the national administrations, which is quite different than the requirements in human rights law concerning, for instance, courts of law.

The conclusion is, however, that public international law can, under the right of self-determination, tolerate almost any institutional arrangement at the sub-state level, provided that the people concerned has determined its status in a free process. Concerning the term "autonomy", we can probably still agree with the view of Hannum and Lillich, according to which autonomy could be viewed as "a relative term which describes the extent or degree of independence of a particular entity, rather than defining a particular level of independence which can be designated as reaching the status of 'autonomy'".[9]

However, it should be kept in mind that no explicit right to autonomy or to federalism is created at the level of international law. To the extent the right of self-determination has any effect at all for the internal legal orders of States, it may imply that a sub-State arrangement, for instance, an autonomy, is protected under that right, provided that the beneficiary of the arrangement is a distinct people. This may be the case in respect of the *Gagauz* in Moldova, a group

[9] Hannum, Hurst & Lillich, Richard B., 'The Concept of Autonomy in International Law', in Yoram Dinstein (ed.), *Models of Autonomy*. New Brunswick, London: Transaction Books, 1981, p. 249.

which is recognised in national law as a people and which has an autonomy arrangement of its own. In other respects, the institutional solution is entirely in the hands of the constitution-maker of the State. This does not preclude the possibility that a State agrees in a special treaty to create a sub-State entity. Such a deal was stricken between Italy and Austria in Paris Peace Treaty of 1946, in which Italy agreed to "grant autonomy coupled with measures for the cultural identity of the German-speaking minority"[10] for South Tyrol.

In Kosovo, the ethnically Albanian part of the population was denied both representative government and effective participation through the actions that started in 1989. At the moment, the international community is in the process of designing legal mechanisms through which Kosovo could re-emerge as a part of the State Union of Serbia and Montenegro. According to U.N. Security Council Resolution 1244(1999) of 10 June 1999, the aim of the international community is to promote "the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo," taking full account of annex 2 in the Resolution and of the Rambouillet accords (S/1999/648). Annex 2, in turn, starts "[a] political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of UCK, the armed movement in Kosovo. Negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions". A sub-State solution inside the borders of the current Serbia and Montenegro is clearly preferred by the Security Council of the United Nations.

3. Conceptualisation of the Constitutional Options (Unitary State – Autonomy – Federation) for Sub-State Entities

The unitary State has long been regarded as the principal form of State. A unitary State is a State in which all legislative powers are vested in one legislature at the national level and in which no delegation of exclusive legislative powers or even significant devolu-

[10] Schreuer, C., 'Autonomy in South Tyrol', in Yoram Dinstein (ed.), *Models of Autonomy*. New Brunswick and London: Transaction Books, 1981, pp. 53-65.

tion of specifically delineated regulative powers exist. In Europe, for instance, Sweden and Norway could be mentioned as examples of unitary States.

However, at the moment, more than half of the countries in Europe are not totally unitary States, because they display features of devolution of regulative powers or of delegation of legislative powers either to self-governing regions or autonomous territories (e.g., Great Britain and Italy) and because a number of them are federal States (e.g., Germany and Austria). Hence the polities are much more varied than one might think at a quick glance, and they provide evidence of human inventiveness through the different forms of sub-State entities.

A core definition of a federation can contain two different elements.[11] Firstly, the federal legislative body is organised so as to provide for equal representation of the constituent states of the federation in one chamber of the legislature, while the other chamber is normally directly elected by the inhabitants of the constituent states in a way which guarantees the proportional representation of the population in the federal legislature. Hence the "upper house" displays a symmetry by granting an equal number of seats to all constituent states, while seats in the "lower house" are distributed according to the number of inhabitants in the several states.

Secondly, in a federation, the federal legislature and the central authorities have enumerated powers, which means that they are in the possession of special competencies or certain specified functions that, at least in theory, have been transferred to the federation by the constituent states. The latter, in turn, remain in the possession of the residual competencies, which allows the characterisation of the basis of their powers as a general competence. Hence the constituent states are empowered to deal with all the matters which are not explicitly reserved to the federal level. The idea underpinning the distribution of powers between the federal level and the state level and actually the whole definition of the federation is that the

[11] See also Sergio Bartole, 'Regionalism and Federalism in the Italian Constitutional Experience', in Markku Suksi (ed.), *Autonomy – Applications and Implications*. Dordrecht: Kluwer Law International, 1998, pp. 173-193.

constituent states have retained at least some traces of their original sovereignty, albeit in a way profoundly circumscribed by the federation. For instance, the amendment of the federal constitution would, as a general rule, require the participation and consent of the constituent states. (In a confederation, the constituent States would retain a much more substantial part of their sovereignty.) In Europe, the following countries can be described as federations: Germany, Switzerland, and Austria as well as Russia and perhaps Belgium. The latter two, however, display certain features that modify their federalism. Nevertheless, federalism is normally a fairly symmetrical mode of organisation.

There does not exist any solid theory about autonomy or devolution, perhaps because autonomy arrangements are often very pragmatic *ac hoc* solutions that escape generalisations. However, if a provisional definition of autonomy were to be developed, the relationships between the central level and the sub-State level would be turned upside down. Firstly, the legislative body of the State would normally not consist of any organ which would incorporate the official representation of the sub-State entity, although the inhabitants of an autonomous region might be granted a certain number of seats in the legislative body filled by means of elections in that particular constituency. Hence at the same time as the inhabitants of the autonomous territory have the right to elect their own self-governing bodies they participate in national elections on an equal basis with the other citizens of the State.

Secondly, as concerns the powers held by the autonomous sub-State entity, the legislative powers would be enumerated and specified so that a special competence is created for the sub-State entity in certain fields, while the central government and the legislature of the State would at least in principle retain the general legislative competence or the residual powers. The idea underpinning this characterisation is that the sub-State entities do not possess any original sovereignty: they are constitutionally created and defined entities entrusted with powers transferred to them by the central state bodies. Such autonomies would normally not have any great influence in, for instance, amendments to the national constitution, at least not in cases that do not affect the autonomy arrangement. The issue of legislative powers

is crucial for the understanding of autonomies and their functioning. These powers constitute, at the level of the State, the core of the internal sovereignty of the State. Making laws is equal to the effective exercise of power over the territory of a State. In states where autonomies exist, a share of that internal sovereignty may have been devolved under the constitution of the country in such a way that both the legislature of the State and the legislature of the autonomous entity have exclusive legislative powers even in relation to each other, although they may also have concurring jurisdictions.

In Europe, at least the following countries create varying degrees of autonomy in their legal orders: Finland, Denmark, Great Britain, France, Spain, Portugal, Italy, Ukraine and Moldova. Not all of these entities are created as exclusive legislative jurisdictions, but remain as jurisdictions with a certain measure of regulative powers. At least in Spain, where Article 2 of the Constitution formulates a right to autonomy, the "autonomisation" of the country is so far-reaching that it approaches a federal arrangement.

Autonomy arrangements introduce an asymmetrical element in the governance of the country. This is the case, for instance, in respect of the United Kingdom, where three distinct territories, Scotland, Wales and Northern Ireland, display a varying degree of devolution organised in form of self-government. The Northern Ireland arrangement, agreed upon in April 1998 between the parties to the conflict and the United Kingdom and the Republic of Ireland, was brought into force through an Act of the Parliament of England on 2 December 1999, but is again suspended. The arrangement is actually to a certain extent a re-introduction of self-government of the kind that existed between 1921 and 1972. The significant feature of the British devolution is, however, that the law-making powers vested in the popularly elected assemblies of Scotland and Northern Ireland should conform to the Acts of the English Parliament according to the principle of the sovereignty of Parliament. Hence, in the absence of a formal written constitution, there exist no such exclusive legislative powers in the UK which would be independent of the legislative powers of the Parliament of England. It should nevertheless be remembered that at least some of the States that contain autonomy arrangements define themselves as unitary States.

In respect of the Faroe Islands, it can be said that the special representation of the Faroe Islands in the Danish parliament introduces a weak federal feature in the Danish constitutional setting. However, this special representation is incorporated as an element of the uni-cameral parlament and does not therefore as such fit in the theory of federalism. The devolution scheme, again, is more clearly in harmony with the theory of autonomy sketched above, because it creates an enumeration of powers granted to the Faroe Islands and leaves the central government in the possession of residual powers. In reality, however, the powers of the Faroe Islands not to promulgate Danish Acts of Parliament for general application in the area of the Faroe Islands is, in practice, approaching the possession of residual powers by the Faroe Islands.

Jurisdiction of a legislative or a regulative kind has, as indicated above, been created in sub-State entities in many countries, and the results of such activities have produced a number of federal states and states with autonomies. The powers accorded to the sub-State entities are of a varying character and vary from case to case according to the specificities of the aims to be achieved displayed by the arrangement. The various sub-State arrangements do not seem to follow any general pattern. For instance, the minority protection component is not present in all the sub-State arrangements, not even in all of the autonomy arrangements. The variation in the creation of the arrangements is particularly interesting in respect to the norm-hierarchical level at which any sub-State arrangement is established. The combined variation in the powers of the sub-State entities and the level of legislation is illustrated in Table 1, *infra*.

It is possible to conclude on the basis of the dimensions in the Table that all constituent states in the European federations can be placed in Section I of the Table. Furthermore, it is possible to conclude that at least those autonomies that have been placed in Section I are autonomies proper. These entities are organised on the basis of the national constitutions of their respective "host-countries". Here, special jurisdictions involving exclusive law-making powers have been created for them against the background of the national constitutions. The material fields of activity they possess vary a lot, but because they are entitled to make laws of their own, they exist within the

Table 1. Vairous autonomy positions

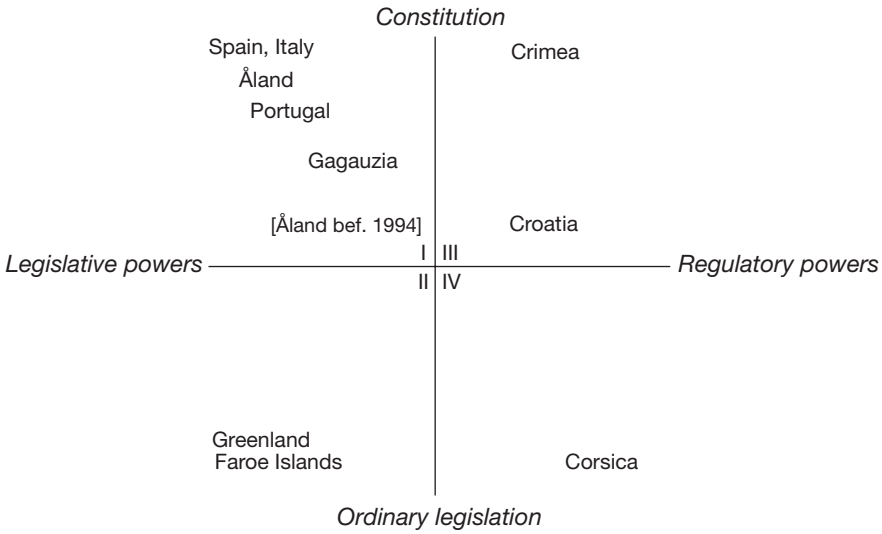

Table 1.: The constitutional variations of sub-State entities in Europe[12]

ambit of Article 3 of the First Protocol to the European Convention on Human Rights (free elections at reasonable intervals by secret ballot). They may also, on the basis of their legislative powers, be able to enact such restrictions to the rights and freedoms guaranteed by the ECHR which are allowed by the various Articles of the European Convention.

Entities in Section II of the Table lack the formal constitutional delegation of law-making powers, but they nevertheless make their own laws, in this case on the basis of ordinary legislation adopted by the parliament of the State. From a formal point of view it could perhaps be possible to exclude them from autonomies proper, but the powers they exercise in spite of this make them, for all practical purposes, autonomies. The Faroe Islands are, together with Greenland, placed in Section II of the Table. In doing so, it is recognised that the Faroe Islands have law-making powers. However, those powers are not established at the level of the Danish constitution, but rather at

[12] Markku Suksi, 'On the Entrenchment of Autonomy', in Markku Suksi (ed.), *Autonomy – Applications and Implications*. Dordrecht: Kluwer Law International, 1998, p. 169.

the level of ordinary legislation. From a purely technical point of view this means that the Danish parliament could, by way of simple majority, decide to repeal the act concerning self-government for the Faroe Islands. The legal debate concerning this has claimed the contrary and maintained that there exists a relationship of a higher order between the Danish State and the self-government of Faroe Islands. It is, nonetheless, debatable whether the self-government of the Faroe Islands constitutes such constitutionally defined devolution of legislative powers that would make Article 3 of the First Protocol to the ECHR applicable on the arrangement on the Faroe Islands. From the perspective of the individual and also from the point of view of the recognition of the sub-State entity under the ECHR, this would be preferable, while it may, from a more technical point of view, be somewhat difficult.

Although the entities in Section III have a certain constitutional basis, it would, however, seem as if their powers were of a non-legislative kind, limited to regulative or administrative jurisdiction and subordinated to ordinary legislative powers of the country concerned. Here the use of the term "autonomy" could already be qualified. Section IV represents cases, which perhaps should not be discussed in terms of autonomy, but rather as special administrative regions.

It was already concluded above, that the entities in Section I of the Table are relevant at least under Article 3 of the First Protocol to the ECHR. Hence the European human rights system probably does not protect such entities, but at least covers them. However, the Council of Europe seems to treat all these entities as possible expressions of self-government of a higher order, as is evident, for instance, on the basis of the Draft European Charter of Regional Self-Government, which has been drawn up under the auspices of the Congress of the Local and Regional Authorities in Europe. The Draft Charter is currently dealt with in the Committee of Ministers with a view of concluding a binding Charter. What self-government means, albeit at a local government level, within the framework of the Council of Europe is perhaps best expounded by the European Charter of Local Self-Government of 1985. According to Article 3.1. of the Charter, local self-government denotes the right and the ability of

local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population. In this context, self-government implies, *inter alia*, elected assemblies, meaningful powers, safeguarded territorial boundaries of local government, and adequate financial resources of which at least a part derive from locally determined taxes and charges.

4. Legal Interpretations Involving Self-Determination

4.1. Background and Self-Determination for Katanga

The article started from the field of self-determination and deals in practice with the relationship between the recurrent claim of self-determination on the one hand and the principles of sovereignty of State and territorial integrity on the other. It seems as if the concept of ”any other political status” found in the Friendly Relations Declaration were trying to identify a ”middle ground” between independence and integration. Any other political status could hence be understood as a description of separate existencies within a State. Such forms could include confederal, federal and autonomy arrangements, possibly even some arrangements involving more elaborate self-government. Hence the frame of self-determination found at the level of international law would translate itself into more specific institutional forms at the level of national constitutional law.

In this context, the case of *Katangese Peoples' Congress vs. Zaire* is illuminating.[13] In a communication involving a claim of denial of self-determination, the president of the Katangese Peoples' Congress requested the African Commission on Human and Peoples' Rights to recognise, *inter alia*, the independence of Katanga under Article 20(1) of the African Charter on Human and Peoples' Rights. According to the provision:

> ”All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.”

[13] *Katangese Peoples' Congress vs. Zaire*, African Comm. Hum. & Peoples' Rights, Comm. No. 75/92 (not dated).

The African Commission started by concluding that all peoples have a right to self-determination but that there may be controversy as to the definition of peoples and the content of the right. It also concluded that the issue in the case is not self-determination for all Zaireoise as a people, but specifically for the Katangese. The African Commission held that it was not relevant in this context whether the Katangese consist of one or more ethnic groups. It also held that there is no evidence that the people of Katanga would have been denied the right to participate in Government as guaranteed by Article 13(1) of the African Charter, nor concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called into question. Gross violations of the rights of the Katangese could perhaps have resulted in such doubt, but this was not the claim. Hence the African Commission reached the conclusion that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire. Therefore, the wish of Katanga to gain independence had no merit under the African Charter.

In this decision by the African Commission, it is possible to see the two extreme variations of self-determination, namely self-determination in the form of the existing State, Zaire, protected by the principles of sovereignty and territorial integrity on the one hand and self-determination in the form of independence for a part of that State, Katanga, on the basis of a perception of separatedness of some sort on the other. What is interesting is that the decision of the African Commission did not only state the existence of the two extremes, the self-determination of Zaire and the possibility of independence. In turning down the communication, the African Commission held that self-determination can be exercised in any of the following ways: "independence, selfgovernment, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognisant of other recognised principles such as sovereignty and territorial integrity".

In this listing of institutional options, the African Commission takes note of the two extreme points of self-determination, unitarism on the one hand and indepencence on the other. In addition, the African

Commission recognises the existence of other forms of self-determination, such as selfgovernment, local government, federalism and confederalism as well as any other form of relations. Evidently, these forms of self-determination are such which can be created inside an existing State. At least in so far as these forms of self-determination imply law-making powers at a sub-national level, it would be possible to speak about internal self-determination. This would be the case concerning federalism and confederalism as well as for such autonomy arrangements which fall into the category of "any other form of relations". The middle ground indentified by the African Commission is hence relevant for elaborating the contents of "any other political status" in the meaning of the Friendly Relations Declaration.

It may be difficult to estimate the general value of the pronouncement by the African Commission in a single case. The case was tried under the African Charter and the facts are specific to Zaire and Katanga. However, the case is interesting and somewhat similar situations may exist elsewhere in the world. To exemplify this position further, an examination of some legal pronouncements will be made below, such as the Russian Tatarstan case from 1992 and the Canadian Quebec case from 1998, in which the two courts tried both the international law dimension including self-determination and the national law dimension relative to the constitution.

4.2. Tatarstan

The Russian Federation is today and was also before the enactment of the 1993 Constitution a federal State. What the reference to self-determination in the Russian Constitution could mean is perhaps illustrated by the so-called Tatarstan case from the first Constitutional Court of Russia,[14] handed down before the enactment of the 1993 Constitution. Here, the national level is perhaps illuminating as concerns judicial interpretations that relate to self-determination and constitution-making. It must be remembered when reading this decision that the Constitution of 1993 had not yet been adopted when the decision was handed down by the court.

A referendum was planned for 21 March 1992 in the Autonomous Republic of Tatarstan within the Russian Federation on the following

[14] Decision no. 671 of 13 March 1992 by the Constitutional Court of the Russian Federation

question: "Do you agree that the Tatarstan Republic is a sovereign state and a party to international law, basing its relations with the Russian Federation and other republics and states on treaties between equal partners? Yes or no?" The Constitutional Court of the Russian Federation ruled, *inter alia,* that the the Referendum Law of Tatarstan conformed to the Constitution of the Russian Federation. However, the referendum itself was held to be unconstitutional under Articles 70, 71, and 78 of the Constitution of the Russian Federation with respect to that part of the question which considered Tatarstan a subject of international law and which stated that the relations between Tatarstan and the Russian Federation, other republics, and States were based on treaties between equal partners. The reason for its unconstitutionality was the unilateral alteration of the national and governmental structure of the Russian Federation, which would have meant that Tatarstan did not belong to the Federation. By submitting the definition of the position of the republic to a referendum, the Supreme Council of Tatarstan had tried to make it into a norm of the highest order, approved by the people. Therefore the measure was not only of an implementing character in relation to the Declaration of Sovereignty issued by Tatarstan on 30 August 1990, but also a normative issuance which would determine the direction and content of the legislative process. In this respect, the Court seemed to understand the referendum as an exercise of the *pouvoir constituant* of some kind (although it was not entirely an instance of constitution-making) and of the right of self-determination,[15] but considered such a possibility as pre-empted under the 1978 Russian Constitution at least to the extent it might involve a unilateral secession. The Court also raised objections concerning the unclear formulation of the question.

However, the argumentation of the Court was not only based on the (extensively amended) 1978 Constitution of the Russian Federation, but also involved considerations of international law. The Court stated that Tatarstan had the right to submit a question on its constitutional status to the people, because this right followed from

[15] Such an understanding is not too far-fetched against the background of, for instance, the fact that the territory concerned was conquered by the Russians in 1552, the fact that half of its population consists of ethnic Tatars, and the fact that there does seem to exist a certain "national sentiment" in Tatarstan.

the people's right of self-determination. This right was guaranteed domestically as well as internationally. As to the latter, the Court referred to common Article 1 of the Covenants of 1966, ratified by the Supreme Soviet of the USSR on 18 September 1973, to the UN Declaration on Friendly Relations, to Article 29 of the Universal Declaration of Human Rights, to the UN General Assembly Resolution 41/117(1987) on the Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights, and to the CSCE commitments Russia had taken upon itself (Helsinki 1975, Vienna 1986, Copenhagen 1990, "and other documents of international law"). The Court viewed the international documents as emphasizing that the right of self-determination should not be invoked for the purpose of disrupting the unity of a state and a nation. Hence without denying the people's right of self-determination, which could be realized by means of a legal act of will, such as the referendum, the Court concluded that two elements of international law, namely the requirement of territorial unity and the observance of human rights,[16] did limit the right of self-determination. Therefore, and because the Constitution of the Russian Federation did not contain any right of secession for a republic, Tatarstan's attempt to acquire more self-determination than the Republic already had was considered impermissible.

This decision seems to indicate that, at least according to the former Constitutional Court of Russia, the *pouvoir constituant,* especially when understood as an equivalent to the right to self-determination, is to some extent limited by international law.

The chaotic situation in Russia at the time of the decision is illustrated by the fact that the decision of the Constitutional Court had no effect in Tatarstan: the referendum was held on 21 March 1992 according to the plans that had been declared unconstitutional by the Court, and

[16] Territorial integrity is a notion which has been used, for instance, in the Declaration on Friendly Relations, *supra,* but the notion of human rights as limiting self-determination may be somewhat confusing: normally, a better realization of human rights is sought by means of self-determination. However, in this case the reference to human rights might be understood as the human rights of the Russian population in the territory declaring independence. This reading of the decision could make sense against the background of the often negative experiences that the Russians forming ethnic minorities in territories of the former Soviet Union have got when these territories have declared themselves independent and tried to cut the ties to Moscow.

in the referendum, a clear majority of the voters answered the above question in the affirmative. After the vote the legislature of the Republic of Tatarstan adopted and declared a new Constitution in accordance with the result of the referendum and thus tried to give effect to the notion of the *pouvoir constituant*. However, despite the popular decision and the new Constitution, Tatarstan found no ways to assert its "independence": it has since claimed to be a sovereign State that has voluntarily joined the Russian Federation and that it consequently is free to leave the Federation at any time, but the Republic was nevertheless included as one of the Subjects of the Federation in Article 65 of the 1993 Constitution of the Russian Federation, and finally on 15 February 1994, the Republic of Tatarstan signed a formal Agreement of Federation with Russia,[17] which guarantees to Tatarstan a better position in the Federation, for instance, concerning economic decision-making than the other subjects of the Federation generally speaking have and which excludes unilateral changes to or cancellation of the Treaty. Tatarstan has kept its own Constitution (which it has the right to under the 1993 Constitution of the Russian Federation) and claims to have associated itself with Russia, but not to have acceded to or integrated itself with the same. Perhaps the Tatarstanian reference to association with the Russian Federation should, according to the interpretation of Tatarstan, be understood as free association in terms of the Friendly Relations Declaration (see above). This is, however, not necessarily the interpretation of the Russian Federation.

4.3. Quebec

A somewhat similar situation arose in Canada when the Province of Quebec asserted its wish to secede from the Canadian federation and to achieve statehood at the international level. In the so-called *Secession Reference*,[18] the Supreme Court of Canada was presented

[17] Treaty between the Russian Federation and the Republic of Tatarstan "On Delimitation of Jurisdictional Subjects and Mutual Delegation of Authority between the State Bodies of the Russian Federation and the State Bodies of the Republic of Tatarstan", at http://mirror-kcn.unece.org/tatarstan/agree.htm. On the same day, 15 February 1994, an agreement was concluded between the Government of the Russian Federation and the Government of the Republic of Tatarstan "On Delimitation of Authority in the Sphere of Foreign Economic Relations", which defines the spheres of joint jurisdiction in this area and also the sphere of the exclusive jurisdiction of Tatarstan in the area of foreign economic relations.

[18] *Reference Re Secession of Quebec* (20 August 1998), No. 25506 (S.C.C.).

in 1996 with three hypothetical questions to be resolved in the Court's advisory capacity, of which it deemed necessary to answer two: 1) Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally (that is, would Quebec be able to effectuate secession without prior negotiations with the other provinces and the federal government)?, and 2) Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally. The second question was specified by asking whether there is a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? Hence the Supreme Court of Canada tried both the domestic and the international law applicable to the case, and within those spheres, it reviewed the prescriptions of constitutional law on the one hand and the right to self-determination on the other.

The secession issue is domestically regulated on the basis of the Constitution Act, 1982, which establishes four fundamental organising principles relevant to the issue, namely federalism, democracy, constitutionalism and the rule of law, and respect for minorities (for instance, Paras. 148 and 149), which all work in symbiosis. By looking into all these elements instead of only the procedural issues, the Court developed a holistic approach to the legal problem. The Court concluded that in a federal system of government, such as the Canadian, political power is shared by two orders of government: the federal government on the one hand and the provinces on the other, where both levels are essentially representative and based on popular franchise. This arrangement delivers the consent of the governed. Each level is assigned respective spheres of jurisdiction by the Constitution. Federalism is a central organisational theme of the Constitution, whilst it at the same time is a political and legal response to underlying social and political realities. Democracy, again, is a basic structure of the Canadian Constitution and means the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels.

Taken together, democracy and federalism may then, at least in Canada, mean that there can exist different and equally legitimate

majorities in different provinces and territories and at the federal level. However, democracy is not just majority rule: the opinions of those affected must also be taken into account, and democracy actually accommodates cultural and group identities. Moreover, democracy is not just a matter of procedure, but is fundamentally connected to substantive goals, such as the promotion of self-government. This can be viewed as a requirement of a continuous process of discussion, expressed by the Constitution Act, 1982, as a right of each participant in the federal arrangement to initiate constitutional change. The Court also pointed out that this right imposes a corresponding duty on the other participants in the federal arrangement to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces.

Against this background of constitutionalism and the mutual rights and duties under the Constitution, the purportedly original popular sovereignty held by the constituent Provinces in the federal arrangement can not revert back to a Province where "the people" in their exercise of their popular sovereignty could decide to secede by majority vote alone. The commitment to the federal arrangement can not be extinguished by a unilateral act of will. Hence it would not be possible to legitimately circumvent the Constitution by resort to a majority vote in a province-wide referendum, although the holding of such a referendum can well be understood as a legitimate expression of the will of that particular part of the whole population. Constitutional rules, such as the participation of one Province in the constitutional arrangement, can be amended, but only through a process of negotiation which, ensures that there is an opportunity for the constitutionally defined rights of all parties to be respected and reconciled. The wish of a Province to effectuate secession from Canada was therefore deemed to establish a duty to negotiate with other participants to the constitutional process and to require an amendment to the Constitution. Secession could not be effectuated by Quebec without prior negotiations with the other provinces and the federal government: such an amendment must be negotiated in the light of the same constitutional principles that gave rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.

The referendum issue is of some interest in this context. The Court concluded that the referendum, which is the first step of secession, was not at issue, but the final act of purported unilateral secession. However, because the clear expression of democratic will in a referendum in the province of Quebec was viewed as the supposed juridical basis of such an act, the Court felt itself compelled to examine the possible juridical impact of such a referendum on the functioning of the Canadian Constitution and on the claimed legality of a unilateral act of secession. The Court pointed out that the Constitution of Canada does not itself address the use of the referendum procedure. Hence at the federal level, such a provincial referendum could be mainly of an advisory character, although it could be considered compelling evidence of the wishes of the population of a province and would lead the representatives of the people in the amendment negotiations. The Court concluded that the results of a referendum have no direct role or legal effect in the constitutional scheme of Canada.

However, the Court was of the opinion that such a referendum undoubtedly could provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion. In fact, the principle of democracy embedded in the Constitution "would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession" (Para. 87). Such a referendum would, according to the Court, carry some weight: it would confer legitimacy on the efforts of the government of Quebec to initiate the amendment procedure of the Constitution in order to secede by constitutional means.

The Court also referred to some qualitative elements of such a referendum results, if they would be taken as an expression of the democratic will of a population: the resolution must be supported by a "clear" majority, which means that the referendum result must be free of ambiguity both in terms of the question asked and in terms of the support it achieves. Such a clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would, as a legal con-

sequence, give rise to a reciprocal obligation on all parties to the federal arrangement to negotiate constitutional changes to respond to that desire. Hence the provinces and the federal government would have to enter into negotiations and conduct them in accordance with the underlying constitutional principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities.

In conclusion concerning the constitutional aspects, although "a sovereign people exercises its right to self-government through the democratic process" (Para 64), the Court was of the opinion that under domestic constitutional law, "Quebec could not purport to invoke a right of self-determination so as to dictate the terms of a proposed secession to the other parties: that would be no negotiation at all" (Para. 91). At the same time, "the rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long and in doing so, Quebec respects the rights of others" (Paras. 92 and 151). The solution to the problem is a middle way, the duty to negotiate an amendment in a situation in which none of the majorities, expressed either through the referendum or through the representatives of the populations, either that of the province or that of the federation, is allowed to trump each other (Paras. 93 and 150). On the contrary, the aim would be to reconcile "various rights and obligations by negotiation between two legitimate majorities, namely the majority of the population of Quebec and that of Canada as a whole" (Para. 152). "Our democratic constitution necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change." (Para. 150) However, the Court refrained from pointing out the procedure towards such settlement.

After the examination of the national law especially at the federal constitutional level, the Court moved on to consider the level of international law and especially the right to self-determination. The Court stated at the outset that "it is clear that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their parent state" (Para. 111). General international law was found not to contain any right to

unilateral secession or any express denial of such a right. However, the Court found that such a denial is, to some extent "implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or a colonial people" (Para. 112).[19]

The Court went on to review the international instruments that mention the right to self-determination, starting from Articles 1(2) and 55 of the Charter of the United Nations and common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and arriving through the Declaration on Friendly Relations (G.A. Res. 2625/XXV(1970)) to the Vienna Declaration and Programme of Action and the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations (G.A. Res. 50/6 (1995)) to Part VIII of the Final Act of the Conference on Security and Co-operation in Europe. Hence the Supreme Court of Canada went through a similar set of international documents, both hard law and soft law, as the Russian Constitutional Court, above, and arrived at the conclusion that the right to self-determination will normally be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states (Paras. 127-131).

Hence the right to self-determination of a people is normally fulfilled through internal self-determination, within the framework of an existing state (Para. 126). In the exceptional circumstances where this is not possible, a right to secession may arise (Para. 122) and lead to the creation of external self-determination as defined in the Friendly Relations Declaration (Para. 126), above. Such a situation could be at hand when a people is blocked from the meaningful exercise of its internal right to self-determination, for instance, when the government of the state does not represent the whole people on the territory without distinction of any kind. In a situation of that

[19] The Court felt that the precise meaning of the term "people" remains somewhat uncertain. A people may thus include only a portion of the population of an existing state, not necessarily the entirety of a state's population (Paras. 123 and 124). It was not, however, according to the Court necessary to decide the "people" issue (Para. 154).

kind, the ability of a people to exercise its right to self-determination is being totally frustrated. (Paras. 134, 135, 154). In the circumstances at hand in Quebec, the population is expected to achieve its self-determination within the framework of their existing State (Para. 154). According to the Court, this is not the case in the context of Quebec: the population of Quebec is not under colonial rule, it is not oppressed and it is not denied access to government (Para 138). Hence it does not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.

The Court did not rule out the possibility of *de facto* secession as a result of a unilateral and unconstitutional declaration of independence (Para. 106), but felt that it was prevented from ruling on such an uncertain extra-legal future contingency. The ultimate success of such secession would, according to the Court, be dependent on effective control of a territory and recognition by the international community (for instance, Para. 142) and also to some extent on the recognition of other States of such secession. However, the Court rejected the existence of such a legal category as violating the rule of law (Para 108). It also felt that recognition by other states of secession would not provide even any retroactive justification for the act of secession, either under the Constitution of Canada or under international law (Para. 155). In fact, the Court was of the opinion that a unilateral secession on an illegal basis might prevent the established States and the international community from recognising the independence of Quebec (Paras. 103, 143).

5. Conclusions

This article suggests that self-determination can imply self-government both at the State and at the sub-State level. In so far as self-determination is created against the background of international law, it should also at a sub-State level produce an institutional arrangement which acquires a share in the totality of internal self-determination of the State in question. To this end, elaborate constitutional mechanisms are required for the creation of a devolved share of exclusive legislative powers in the sub-State entity, which may be a constituent state of a federation or an autonomous territory.

In so far as the final solution is modelled against the background of self-determination it may be worth pointing out that self-determin-

ation seems to assume peace. It is also evident that international law without difficulty accepts voluntary secession, but it may require that the population concerned is consulted either directly by the referendum or indirectly through elections. Unilateral secession from an existing State is not supported by international law except in some very special circumstances that, against the background of the situations in places like Kosovo and Chechnya, are unlikely to materialise. The cases presented above indicate that a unilateral secession can not be justified even with a referendum. In addition, the Quebec case contains the prediction that the international community would not look very favourably at a "Wannabe-State" which has chosen to secede unilaterally.

A demand of self-determination by a part of a country which does not lead to a voluntary grant of secession by the State concerned would thus not involve independence as an option. Instead, the solutions should be looked for among the other options identified in the Friendly Relations Declaration of 1970, which are either free association or integration on the one hand or emergence into any other political status freely chosen by a people on the other. Especially the latter option, emergence into any other political status, seems to lead into the creation of sub-State entities of different kind. These could, at least in so far as they exercise law-making powers that have been devolved to them under the constitution of the State in question, be expressions of internal self-determination and constitute a share in the total self-determination of the State in question. To access the status of free association may be more complicated, because such a move might require independence as a precondition.

Emergence into any other political status is hence essentially a constitutional consideration. In fact, according to the existing research, the internal conditions for the sub-State entity or autonomy arrangement nevertheless seem more important than the external. Hence the emphasis on constitutional and political solutions at the national level is important. The cases of Katanga, Tatarstan and Quebec offer many pieces of valuable information about institutional and constitutional design. The internal dimension may also be more important than the international in terms of the possible breaking up of sub-State or autonomy arrangements. The Tatarstan and Quebec cases suggest on their part that situations of change may open a window of

opportunity for a development of the constitutional position of a sub-State entity. Such development would, against the background of this article, follow the constitutionally established steps and might also involve an agreement of some sort. However, under current legal thinking, unilateral secession does not seem an option. Instead, the development of the position of a sub-State entity is supposed to take place under the forms established in the constitution of the State.

One of the concerns in the Faroese constitutional setting is the normative position of the Act concerning self-government, which at least formally speaking, even if not in reality, would boil down to a possibility that the Act concerning self-government is repealed in the same order it was adopted. This durability issue may, especially in its internal form, translate itself to the method of entrenchment, which the sub-State arrangement is subject to. With entrenchment is meant various legal guarantees for the permanency of the arrangement. It is possible to distinguish between at least six forms of entrenchment.[20] Firstly, there may exist a *general entrenchment*, which means that the sub-State arrangement is established in the national constitution. A *semi-general entrenchment* can be distinguished in situations where the sub-State arrangement is originally created in an organic law under the constitution of the country. Secondly, it is possible to distinguish *a regional entrenchment*, which means that a separate regional reaction through the representative assembly of the sub-State entity or through a regional referendum is envisaged whenever the legislation concerning the sub-State arrangement is being amended. Thirdly, a *special entrenchment* exists in situations in which the statute outlining the more practical modalities attached to the sub-State can be amended only according to a special amendment rule that complicates the amendment of the statute. Fourthly, an *international entrenchment* may come about in situations in which the international community guarantees a sub-State arrangement in the creation of which it perhaps has participated. Fifthly, a *treaty-based entrenchment* is present when, for instance, two States agree in a formal treaty that one of them creates a sub-State arrangement for a minority in its territory. Sixthly, it is possible to envision an *entrench-*

[20] Markku Suksi, 'On the Entrenchment of Autonomy', in Markku Suksi, *Autonomy – Applications and Implications*. Dordrecht: Kluwer Law International, 1998, p. 170 f.

ment under the right of self-determination, which could protect existing sub-State arrangements against weakenings against the will of the population, provided that the beneficiaries of the arrangement could be characterised as a people.

To take an example, the Åland Islands case involves at least the general, regional, special and international forms of entrenchment and is a pointer to the direction that elaborate and overlapping methods of entrenchment may create stability for the arrangement.

The position of the Faroe Islands in respect of the six categories of entrenchment is interesting: it could be argued that only the sixth form of entrenchment, that of entrenchment under the right of self-determination and perhaps also the second form, that of regional entrenchment, would be present in the case of the Faroe Islands. The former would be dependent on the fact that the inhabitants of the Faroe Islands may be regarded as a people, the latter on an interpretation that the alteration of the Act on self-government might have to be accepted also by the Faroese assembly.

The weak entrenchment situation leaves the Faroese arrangement in a somewhat disturbing limbo, and if the way forward is constitutional development as a sub-State entity in Denmark under a ”federacy” arrangement of some kind, attention should probably be paid to the entrenchment issue. In this respect, it could perhaps be possible to include in the Danish Constitution a general provision similar to the one concerning the Åland Islands in Article 120[21] of the Constitution of Finland, as supplemented by Article 75[22] of the Constitution of Finland. Such provisions in the greater constitutional system make possible that a separate constitutional existence is recognised to the sub-State entity. If the Danish Constitution contained, for instance, a provision such as ”The Faroe Islands shall be governed under special legislation adopted in the manner specified in that legislation”, many

[21] “The Åland Islands have self-government in accordance with what is specifically stipulated in the Act on the Autonomy of Åland.”

[22] “1. The legislative procedure for the Act on the Autonomy of Åland and the Act on the Right to Acquire Real Estate in the Åland Islands is governed by the specific provisions in those Acts. 2. The right of the Legislative Assembly of the Åland Islands to submit proposals and the enactment of Acts passed by the Legislative Assembly of Åland are governed by the provisions in the Act on the Autonomy of Åland.”

protective entrenchment dimensions could be built into the legislation at the same time as the normative level of that special legislation could be elevated. Such a constitutional amendment would also clarify the position of the Faroe Islands in relation to Article 3 of the First Protocol to the European Convention on Human Rights and place the Faroe Islands in Section I of the comparative Table presented above (see Table 1, above).

The Tatarstan and Quebec cases, in turn, are pointers in the direction that entrenchment may be important also for the State so that no unilateral changes in the status of the sub-State entity can take place and lead to the disruption of the territorial unity of the State. Instead, there seems to exist a duty to negotiate and to give effect to possible changes on the basis of mutual agreement. In fact, in the two legal cases presented above, the domestic courts relied heavily on the existence of a norm under international law that protects the territorial integrity of an established State. This was also the position of the African Commission on Human Rights and Peoples' Rights in the case concerning Katanga. This, too, is the message of Security Council Resolution 1244(1999) concerning Kosovo. The concept of self-determination therefore works in two directions: at the same time as it may affect the situation of a population or a people within an existing State, self-determination also gives assurance to the State concerning its territorial integrity and the permanency of the arrangement.