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On the voluntary re-definition of the status of a sub-state entity: The historical example of Finland and the moder example of Serbia and Montenegro

Føroyskt úrtak

Ymiskar gongdar leiðir eru hjá eini sjálvstýrandi (sub-State) politiskari eind, tá ræður um at skapa og lýsa støðuna av nýggjum. At velja politiska støðu, sum fulla sjálvstøðu ella sjálvstýri á lægri stigi, krevur eina fatan av teim mannagongdum, sum kunnu vera viðkomandi til tess at skapa eina serliga politiska støðu.

Henda grein fer at viðgera tvey lond á leiðini til sjálvræði. Fyrst snýr tað seg um støðu Finnlands í mun til russiskt yvirræði og tilgongdina, har landið menti seg frá at vera eitt sjálvstýrandi øki (autonomi) til eitt fult sjálvstøðugt ríki. Síðan verða Serbia og Montenegro viðgjørd í sambandi við ríkissamveldið, hesi bæði lond nýliga eru farin saman í, og endað verður við almennum hugleiðingum um støðu Føroya og stjórnarligar møguleikar.

Finnland var samanrunnin partur av kongaríkinum Svøríki heilt fram til kríggið í 1808-1809, ið hevði við sær, at russiski herurin hersetti landið. Hóast partur av Svøríki hevði Finnland kortini havt serliga støðu við m.ø. serstøkum dømandi og fyrisitandi løgdømi, eins og landið í 1581 fekk heitið sum svenskt stórhertugadømi. Hesi viðurskifti høvdu ávirkan á, at russar í 1809 ikki gjørdu Finnland til vanligan landspart í Russlandi. Heldur helt russiski sarurin, Alexander I, tað vera skilabetri og eftir umstøðunum eisini betri til at tryggja russiskt yvirræði, at Finnland varðveitti somu serligu støðu, sum landið í øldir hevði havt undir Svøríki. Endin varð, at russar góvu Finnlandi eina egna stjórnarskipan, ið var tann sama, sum landið frammanundan hevði havt sum partur av Svøríki. Hóast Finnland onga fráskilda støðu hevði úteftir, men var samanrunnin partur av russiska ríkinum, so var kortini talan um munandi innlendis sjálvræðið.

Afturfyri trúskapareið teirra gav Alexander I, sarur, finnlendingum lyfti um at stýra Finnlandi í samsvari við svenskar stjórnarlógir, tá fyrsti finski ríkisdagurin kom saman í 1809. Úrslitið varð ein sáttmáli millum sarin og ríkisdagin um eitt samveldi

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(realunión). Sarurin hevði tveir leiklutir undir hesi skipan: í Russlandi var hann einaveldisharri og keisari, og í Finnlandi var hann konstitutionellur monarkur, skýrdur stórhertugi í finsku stjórnarskipanini. Kortini var valdsmunurin ikki stórur í veruleikanum, tí finska stjórnarskipanin gav stórhertuganum mikið vald. Men prinsipielt hevði hetta týdning, m.a. á tann hátt, at sarurin nú boðaði frá, at Finnland var tjóð millum tjóðir, og landamarkið millum Finnland og russiska ríkið varð eisini á henda hátt tryggjað.

Í kjalarvørrinum á krígnum millum Russland og Japan í 1905 fekk Russland fyrstu skrivaðu stjórnarskipan sína í 1906, og har bleiv finska sjálvræðið (heimastýrið) nú staðfest. Eisini í 1906 fekk Finnland eina nýggja og meira nútímans stjórnarskipan (stýrisskipanarlóg).

Tá russiska kollveltingin var veruleiki í 1917 og valdið hjá sarinum latið eini russiskari bráfeingisstjórn, kom Finnland at standa eftir uttan nakran stórhertuga. Bráfeingisstjórnin helt seg helst hava sama vald sum stórhertugin og harvið hægsta vald yvir Finnlandi. Orsakað av ruðuleikanum í Russlandi vildi finnar, tá ið høvi beyðst, hava hægsta valdið flutt til ein heimligan stovn, helst ríkisdagin. Fyrsta royndin miseydnaðist, tí russiska bráfeingisstjórnin vildi ikki staðfesta sokallaðu heimildarlógina frá 1917. Í staðin sendi bráfeingisstjórnin finska tingið til hús og skrivaði út nýval. Nýggja tingið, sum kom saman á heysti í 1917, hevði nú mist meirilutan av vinstarhallum, og meirilutin var burtur fyri at staðfesta eina nýggja stjórnarskipan, sum tók valdið yvir Finnlandi aftur frá russum. Seinna royndin at slíta Finnland frá russum eydnaðist í mánaðunum november-desember 1917, tá greiður meiriluti av finska tinginum (ríkisdegnum) gjørdi av, at tingið fyribils sjálvt skuldi hava tær heimildir, sum fyrr lógu hjá sari og stórhertuga. Henda avgerð verður mett sum ein de facto loysing frá Russlandi, og formliga frælsisyvirlýsingin varð samtykt nakrar vikur seinni.

Helst av opportunistiskum orsøkum valdi nýggja sosialistiska stjórnin í Soviet-Russlandi at viðurkenna finska fullveldið. Henda viðurkenning varð eisini staðfest í nýggju stjórnarskipanini fyri Soviet-Russland í 1918.

Í 1918 kom innara sjálvræði Finnlands at verða hótt av tí borgarakríggi, sum herjaði landið eitt skifti. Tá lýðveldissinnaðu sosialistarnir eftir borgarakríggið vóru settir uttan fyri ávirkan, varð fyrst gjørd ein roynd at seta á stovn eitt slag av monarki, men eftir at tað miseydnaðist bar til í 1919 at fáa eitt kompromis um eina lýðveldisskipan, ið kortini samstundis var sjónliga merkt av monarkisku hugsjónini.

Víðgongdu politisku broytingarnar, Finnland fór í gjøgnum í 1906 og 1919, hildu seg tó formliga innanfyri karmarnar av verandi stjórnarskipan, og talan var tí ikki formliga um kollvelting. Sokallað legalisma hevur verið ráðandi í Finnlandi, har oftast hevur verið roynt at legitimera og grundgeva størri broytingar við at siga tær

vera í samsvari við longu verandi skipan. Tískil er finskur stjornarrættur í stóran mun merktur av framhaldi heldur enn av knøppum broytingum. Sum dømi kann nevnast, at stovnsetanin av finska fullveldisríkinum umsitingarliga einans førdi við sær, at verju- og uttanríkisráð mátti stovnast aftrat ráðunum, sum longu vóru frammanundan. Á henda hátt kann Finnland eisini samanberast við norðurlondini Noreg og Ísland, ið hava verið gjøgnum eina líknandi menning.

Nýggjari dømi um endurskoðan av samveldisskipan er sundurlagingin av jugoslaviska samveldisríkinum. Av ótta fyri, at fullkomin upploysn vildi elva til meira stríð á Balkan, royndi m.a. evropeiska samveldið at hjálpa til við fáa seinastu jugoslavisku deilríkini, Serbia og Montenegro, at ganga saman í nýggjan felagsskap. Úrslitið var, at eitt ríkjasamband (konføderatión) bleiv stovnað millum Serbia og Montenegro, sum skuldi koma í staðin fyri gamla samveldisríkið. Hetta ríkjasamband setur Serbia og Montenegro sum javnbjóðis partar, umframt at sjálvstýrandi økini í Serbia fáa serstøðu.

Ríkjasambandið millum Serbia og Montenegro er eisini áhugavert á tann hátt, at henda skipan er stovnað í samsvari við broytingarásetingina í samveldisstjórnarskipanini (grundlógini) fyri fyrrverandi jugoslaviska samveldisríkið (forbundsstatin) frá 1992. Á tann hátt er eisini í hesum føri, formliga í hvussu er, meira talan um framhald enn stjórnarrættarligt brot ella kollvelting. Samstundis kann ríkjasambandið verða roknað sum dømi um, at fólkið í hesum politisku eindum hevur útint sín altjóða sjálvsavgerðarætt eftir leiðini „ein og hvør politisk støða frítt samtykt av fólkinum" heldur enn fulla sjálvstøðu, frælsan felagsskap ella integratión.

Ríkjasambandið millum Serbia og Montenegro verður kallað ríkjasamband (konføderatión), men ávís viðurskifti gera, at henda lýsing er eitt sindur trupul at halda fast við. Sum dømi hevur samveldistingið bara eina deild, og beinleiðis val er til tingið. Á henda hátt verða Serbia og Montenegro ikki umboðað sum politiskar eindir, men heldur verður fólkið í báðum ríkjunum samlað umboðað í tinginum. Kortini eru eyðkenni, ið minna um eitt ríkjasamband, sum eitt nú, at ríkjasambandið hevur ásettu heimildirnar, meðan Serbia og Montenegro hvør sær hava restheimildirnar. Hartil hava londini bæði sambært stovnandi samveldisskjalinum rætt til einsíðugt at melda seg úr samveldinum.

Hvat kann so sigast um møguleikarnar fyri at broyta stjórnarrættarligu støðu Føroya? Fyrr hevur verið skotið upp, at Føroyar skipa seg í frælsan felagsskap við Danmark. Men slík ætlan hevur teir trupulleikar við sær, at fyribrigdið frælsur felagsskapur serliga vendir sær móti eindum, ið loysa frá sjálvstøðugum londum og leggja seg upp at sjálvstøðugum londum – Danmark í hesum føri – ella sjálvstøðugum londum, sum ætla at broyta støðu, sleppa síni sjálvstøðugu støðu og fara saman við sjálvstøðugum landi. Hetta hevði havt við sær, at Føroyar í minsta lagi eina stund mátti verið sjálvstøðugt land fyri at kunna gera avtalu um frælsan felagsskap

við Danmark. Annar háttur at betra um stjórnarrættarligu støðu Føroya kundi verið, at danska stjórnarskipanin (grundlógin) varð broytt, so føroyskt sjálvræði bleiv lyft upp á hægri stig og tryggjað har. Tá vildu Føroyar verið viðurkendar sum serlig stjórnarrættarlig eind, eins og ein viðurkenning av Føroya fólki kundi verið nádd, samstundis sum møguleiki verður at koma sær undan meira ella minni umstrídda loysingarspurninginum.

1. Introduction

The re-definition of the status of a sub-State entity can assume a variety of alternative paths. The concept of "emergence" into a political status, be it independence or sub-State existence, requires an understanding of the procedures that may be involved for creating a certain political status. The starting point is that such re-definition is, at least in the event it will lead into secession, carried out in a process which brings about an agreement of some kind and that – if the outcome is the creation of an independent State – the secession is voluntarily granted by the State which is losing territory.

It is evident that all the possible options in this category of self-determination involve national constitutional procedures and lead to the creation of, for instance, special legislation that outlines the status of the sub-State entity and defines the powers of that entity. For the confederal arrangement and especially for an arrangement establishing a free association with a State, one could think of the possibility of treaty arrangements between the area in question and the State. In the context of free association, the UN Declaration on Friendly Relations of 1970[2] identifies as one mode of implementing the right of self-determination by a people the free association or integration with an independent State, something that would seem to presuppose such a treaty arrangement.

For instance, in the case of Bosnia, the Dayton Peace Agreement, the official name of which is General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, a complex collection of documents, was brokered under the supervision of the so-called Contact Group.[3] The different parts of Bosnia were not, as such, States or subjects of international law, but rather areas of support for the warring groupings inside the borders of Bosnia. At the point of initialling the Agreement (at Dayton on 21 November 1995) and the signature of the Agreement (at Paris on 14 December 1995), the Agreement was seen as a treaty between three of the five successor states to the Socialist Federal Republic of Yugoslavia: 1) the Bosnia and Herzegovina Republic, 2) the Federal Republic of Yugoslavia and 3) the Republic of Croatia. With reference to the concept of State succession in the context of the disintegration of the former Yugoslavia, it can be said that these three States were in the possession of subjectivity under

[2] G.A.Res. 2625(XXV).

[3] For the Dayton Peace Agreement, see *ILM* 1/1996 with an introductory note.

international law. In addition, the Agreement was witnessed by the five members of the Contact Group, that is, the United States, the Russian Federation, France, Germany and the United Kingdom.

The Annexes, however, were fashioned in the form of agreements between three different parties, namely a) the Bosnia and Herzegovina Republic, which would continue as "Bosnia and Herzegovina" and have subjectivity under international law, b) the Federation of Bosnia and Herzegovina, which is one of the so-called entities constituting Bosnia and Herzegovina, and c) the Republika Srpska, which is the other entity. In addition, the Annexes were endorsed by the Republic of Croatia and the Federal Republic of Yugoslavia. Under the special circumstances at hand, the creation of an agreement under international law was deemed to be necessary. However, it would be difficult to explain how the two entities of the State Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska, were in a position to sign agreements that became annexes to the Dayton Peace Agreement. The different parts of Bosnia were involved in a war which was not to be considered as a purely internal conflict, but as a conflict that necessitated international action.

The legal difficulty is how to contain the conflict by obligations that reach also to a level which is below the level of the successor States. One explanation that could be available is that the two entities, the Federation of Bosnia and Herzegovina and the Republika Srpska, left their existence as sub-State entities and emerged, for a short moment, as subjects of international law (perhaps even as States proper) only for the purpose of signing the agreements, and reverted back to their sub-State existence immediately after the signing of the agreements.[4] In that latter existence, after the signing of the agreements, the two entities would be bound by the constitutional arrangement they just signed and which sets up the constitution of the State in which they exist, including the relationship between the two sub-State entities with the central government. In this way, the different entities become bound by a treaty arrangement which has significance also at the level of international law. At the same time, the mechanism used indicates that a constituent function (*pouvoir constituant*) relating to the enactment of a constitution for a new State may be exercised at the international level by way of treaty arrangements. In this respect, it is possible to discuss how well this method of constitution-making fits the idea of self-determination of a people.

This article will not, however, deal with the issue of Bosnia, but with two other situations. The first one is the historical situation in which Finland developed from an autonomous sub-State entity to an independent State. The second one is the

[4] See Paola Gaeta, 'The Dayton Agreements and International Law', in 7 *European Journal of International Law*, No. 2(1996), p. 160 f.

current situation in which the state union of Serbia and Montenegro in fact contains the possibility of a constitutionally controlled development of each of the two constituent parts of the state union into independence as separate States. These situations differ from Bosnia in that they have not been produced on the basis of treaty negotiations at the international level, but are instead products of more internal processes. Both processes could be understood as examples of voluntary secession, the first one an example of a secession that took place, the second one as an example of an option for secession. The modest question for this article is the following: how could voluntary secession be brought about?

From a Nordic point of view, it admittedly would be possible to include also Norway and Iceland in this exposé, because they could be relevant examples in this context. However, because the mechanisms that led to the creation of Norway and Iceland are fairly well-known in the Faroe Islands, they will not be dealt with in this article. It is nonetheless possible to speculate in the field of Nordic State-building and to perhaps present a somewhat controversial claim that the most common method of creation of States in the Nordic area has been by secession: Norway, Finland and Iceland have emerged as independent States by way of secession from their "mother-countries". The other two States, Denmark and Sweden, are "historic" States that have always existed internationally, although their internal constitutional development may have been turbulent.

This exposé lacks footnote references, partly for reasons of space, partly because the information is of a general nature and can be accessed, in the case of Finland, for instance, through literature on Finnish history,[5] and in the case of Serbia and Montenegro through the Constitutional Charter of the State Union of Serbia and Montenegro.

2. An Historical Example: Finland between 1808 and 1920

Finland was an integral part of the Kingdom of Sweden until the war of 1808-1809, which resulted in the conquest of the current territory of Finland by the Russian army. Although Finland had been an integral part of Sweden, there existed certain features in this eastern portion of the kingdom which facilitated the development of a more distinct political entity, such as geographical separateness from the Western half of the kingdom, a population whose majority spoke another language than the main language of Sweden, and a slowly developing historical consciousness of oneself. In addition, Finland including the Åland Islands had from the beginning been identified as a part of the Kingdom of Sweden with own judicial and administrative jurisdictions, one of them being the naming of Finland in 1581 as a Grand Duchy in Sweden, a measure which as such had no great practical importance, and another that Finland from the middle ages was a diocese.

[5] See, e.g., Antero Jyränki, *Lakien laki*. Helsinki: Lakimiesliiton kustannus, 1989, pp. 403-545, and works mentioned therein.

These features, in combination with, for instance, the Swedish legal and administrative traditions, may be one reason why Finland was not united with the Russian Empire in 1809 as a regular province of the Empire, which would have been the normal procedure. The Russian Czar Alexander I felt that it might be unwise to take away from the Finns those rights they had enjoyed during centuries. Because Russia was at the same time threatened by war against Austria and troops were needed in Central Europe, Finland had to be pacified by other methods than military and loyalty towards Russia had to be secured. It is also often maintained that the Russian Czar wanted to utilise Finland as a laboratory of some sort in order to find out what forms of government that could be suitable for territories that are laid under Russian rule.

The result of these circumstances was that the autocratic Russian Czar, as such unlimited by any formal constitution, established his sovereignty over Finland and its population and granted Finland a constitution of its own by declaring that in Finland, the Swedish laws would be upheld. This Constitution would be for the Grand Duchy of Finland and was the same as the one that had been in force in Sweden by the time Finland was separated from Sweden. Hence the constitutional documents for the Autonomous Grand Duchy of Finland were the 1772 Form of Government (Constitution) Act and the 1789 Letter of Unity and Guarantee. As concerns other pieces of law, the codification of laws of 1734 continued to remain in force in Finland.

This measure of the Czar created Finland as a separate state-entity in the meaning of state law, but not in the meaning of international law. Externally, the Russian Empire formed the entity to which Finland belonged. Hence Finland was not externally sovereign, but an autonomous and internally relatively sovereign entity the independence of which was limited to its own internal matters. Under the 1809 constitutional arrangement, Finland even had a representative institution of its own, a Diet consisting of four Estates, which, however, did not convene between its first session in 1809 and 1863.

At the first Diet in March 1809, Czar Alexander I gave a Guarantee that he would govern Finland in compliance with the Swedish constitutional laws. Thereafter the Finnish representatives of the four Estates gave their oath of allegiance to Alexander. This mutual act is a concept that had been widely used in Europe and practised in Sweden, too, before 1809, but its legal status was rather unclear. It was originally regarded as a contract between the Emperor and the Estates and was characterised by the contemporaries as a *pactum subiectionis* or *pactum constitutionis* of some kind between two parties that led to the creation of a "*Realunion*" between Finland and Russia. Later on, other and diverging opinions about the true character of the commitment were expressed, as well. Anyway, in 1809, the Russian Czar exercised constituent powers of some sort (*pouvoir constituant*) in creating the separate constitutional and legal order of Finland.

Under this constitutional arrangement, Alexander I had in principle two roles: he was an absolute ruler and monarch in Russia, but a constitutional monarch in Finland. He even assumed the title of Grand Duke of Finland, a measure that may be viewed as binding Alexander I even more firmly to the 1772 Constitution. The subsequent Russian Czars affirmed this arrangement in the beginning of their reign and the first Russian Constitution of 1906 codified it. The constitution of the autonomous Finland was, in practice, not very different from the Russian autocratic rule because it placed wide powers in the hands of the Grand Duke. The result of the arrangement was, however, that Alexander I declared that Finland now had been elevated to a nation among the nations, that a geographical boundary was upheld between the territory of Finland on the one hand and the territory of Russia on the other delineating the jurisdiction of Finland, and that a Finnish citizenship started to emerge to which certain legal rights were connected. For instance, positions in the central governmental body in Finland were reserved to Finnish citizens.

After the convening of the Diet in 1863, a new Rules of Procedure of Diet (Constitution) Act was enacted in 1869. When ratifying the new Rules of Procedure, the Czar recognised the old constitutional documents of 1772 and 1789 as valid law. The Rules of Procedure contained a provision of importance from the point of view of principle: according to Article 1, the Diet represented the people of Finland.

The war with Japan left the Russian Empire in a weakened position and led to certain political concessions because of claims of especially Socialists to convene a constituent assembly to enact a constitution. No such assembly was convened, but the Russian Czar gave the first written Constitution of Russia in 1906. In Article 2 of that Constitution it was explicitly established that the Grand Duchy of Finland, which would be an inseparable part of the Russian Empire, will be governed by its own institutions on the basis of special legislation. Here the existence of Finland as an autonomous part of Russia got a constitutional affirmation. Also in 1906, much on the basis of domestic demands in Finland, a new Rules of Procedure of Diet (Constitution) Act was passed by the Diet and ratified by the Grand Duke. The new Rules of Procedure (Constitution) Act abolished the old Diet based on the four Estates and replaced it with a new Diet, or rather Parliament, which was unicameral and elected on the basis of the principles of universal suffrage (even for women) and equality of the vote, following the method of proportional representation.

The reform of political representation in 1906 abolished one of the oldest institutions of representation and introduced instead something which at the moment was among the most modern in the whole world. In addition, a fundamental law concerning civic freedoms was enacted. On the basis of this constitu-

tional Act, freedom of expression, freedom of assembly and freedom of association would be guaranteed by law. However, the modernisation that took place in 1906 did not mean that a completely modern legislative power was created: it was still the Grand Duke who, under the 1772 Constitution, would have to ratify any piece of law before it would enter into force as an Act. Nor did the modernisation contain express provisions concerning parliamentarism, that is, concerning the political responsibility of the central government organ, in the Finnish case the Senate, before the parliament.

World War I created massive difficulties in Russia and in March 1917, the chaos led to a revolution which left Finland without a Grand Duke. The powers of the Czar were transferred to the Interim Government of Russia, and it seems that at least the Interim Government itself felt it was in control of the powers of the Grand Duke, as well, and therefore of the highest powers in relation to Finland. Because of the chaotic situation in Russia, considerations emerged in Finland with a view to shifting the highest powers to a domestic body, most likely the parliament, at a suitable juncture. The first attempt was not successful: the so-called law on authority of 1917 was not ratified by the Interim Government of Russia. Instead, the Interim Government dissolved the parliament, which at that point had a Leftist majority, in the summer and ordered new elections to take place.

The new parliament convened in the fall of 1917 and had, as a result of the elections, a non-Socialist majority. This majority was reluctant to declare the parliament a constitutional assembly with the purpose of enacting a constitution for Finland in a free manner. This would probably have been an option for the Social democrats. One of the grounds for not doing so was that the revolution was taking place in Russia, not in Finland. The argument maintained that Finland already had an ultra-democratic system of decision-making and that a more direct expression of the opinion of the voters would be only by means of the referendum. The argument was aware of the theory of the constituent power (*pouvoir constituant*) and added that in such an assembly, decisions would perhaps be made in haste on the basis of simple majority.

The idea to cut the ties with Russia did, nevertheless, keep its topicality, and the second attempt, made in November – December 1917, was successful. On 15 November 1917, the parliament decided by 127 votes against 68 to exercise by itself, for the time being, the authority that according to the then valid legal provisions had belonged to the Czar and Grand Duke. This was a *de facto* declaration of independence and perhaps also a *de facto* break of constitutional continuity, although there was reluctance to admit this and instead a tendency to refer to established constitutional modalities and a reliance on constitutional legalism. The formal Declaration of Independence was adopted by the parliament

on 6 December 1917 by a vote of 100 to 88. From this point, the work for a reform of the constitution started with the aim of replacing the 1772 Form of Government (Constitution) Act.

At this juncture, it was considered necessary that a political entity aspiring at the status of a State be recognised as a State by other sovereign States before the new entity can function as a sovereign State. After the initial recognition had been obtained from the Socialist Government of Soviet-Russia through Lenin himself, also other countries started to recognise Finland as a sovereign country. External sovereignty can be said to have entered at the end of 1917 or immediately in the beginning of 1918. However, the recognition of the Soviet-Russian government was not the only instance of Russian recognition. In addition, a recognition of Finnish independence was included in Article 6 of the 1918 Constitution of Soviet-Russia. The Article is very special and rare in that it expressly recognises secession by saying that the Third All-Union Council Meeting welcomes the policy of the Council of the People's Commissars to announce the complete independence of Finland.

There may exist a number of reasons for this recognition of Finnish independence. One of them could be that there may have existed a wish to formally dissolve the connection to Article 2 in the 1906 Russian Constitution. Another explanation may be that there was a measure of political opportunism in the recognition of secession: it was in line with the principle of national self-determination promoted by the Socialists in Russia, and it is known that Lenin and Stalin in fact expected a referendum to take place in Finland. Probably the underlying idea was that there would be a speedy re-integration of Finland with Soviet-Russia. No referendum was ever organised in Finland, which probably was a surprise for Lenin and Stalin, but the process of independence in Finland was carried out completely through representative institutions.

In the beginning of 1918, the internal sovereignty of Finland was threatened by a civil war between the Whites and the Reds. The government of the White Finland declared itself the legal possessor of governmental powers and eventually won the war. After the civil war, the preparations for a new Form of Government (Constitution) Act continued. Before the civil war, the plan had been to create a republican form of government, but after the war, with the Socialists banned from parliamentary work, the plan was changed into a monarchical form of government. In fact, the 1772 Form of Government (Constitution) Act required a monarch, so the parliament proceeded to elect one. In this context, political opportunism related to the strong position of Germany led to the election of a king from among the princely houses in Germany. However, the elected king abdicated after the collapse of Germany in the Fall of 1918 without ever visiting Finland. Parliamentary elections in the Fall of 1918 led to a republican composition, whereupon the

preparations for a new Form of Government (Constitution) Act were continued in a republican spirit. The republican Form of Government (Constitution) Act was ratified by the Interim Caretaker in July 1919, which ended the process of constitutional reform that had commenced after the middle of the 19th century. Because of the difficult choice between monarchy and republic, the compromise that was struck can be seen as a *de facto* unification of both: the president was furnished with broad, almost monarchical powers.

The radical constitutional changes, that is, the enactment of the 1906 parliamentary reform and the 1919 Form of Government (Constitution) Act, could formally speaking be realised in the order prescribed in the preceding constitutional documents. The changes were not effectuated through a revolutionary upheaval of the whole society, which would, at the time, have been a normal reason for the reform of the constitution. The attempt at such a revolutionary upheaval through the civil war probably resulted in a strengthened legalism at the constitutional level. During the period after 1809, a tradition of governance through own institutions had developed in Finland, and the constitutional changes were, at least in theory, fairly peaceful processes that led to democratisation because of impulses from the surrounding world. Eventually, events outside Finland, that is, the collapse of the Russian Empire, led to a window of opportunity for independence. The window of opportunity could be used because a successor to the former Empire voluntarily recognised the independence of the country. It is another matter that in that state of things, Russia would probably not have had military or political resources to control the territory of Finland.

If the Finnish situation in 1917 is considered together with the Norwegian split from the personal union with Sweden in 1905 and the independence of Iceland from Denmark in 1944, it would not be totally wrong to claim that in the Nordic countries, there is a certain ”tradition” of making independent States by way of breaking loose from a former ”mother-country”. What is interesting is that in all three cases, a fairly firm constitutional structure and tradition has existed before independence. It is perhaps therefore possible to maintain that formally speaking, the old constitutional order simply continued its existence, despite the fact that the ties to the ”mother-country” were cut. The independence was realised when an opportunity for that was offered. At least in the case of Finland and probably also in the case of Iceland, the window of opportunity was offered by events that were external to the legal order.

The organisational changes that had to be effectuated in Finland after the independence went into effect were not very many. The office of the Governor General of the Grand Duke as the chairperson of the Senate or the body of central government in Finland was abolished. Through this, the official link between the government of Finland and the Russian Czar was eliminated. During the era

of autonomy, the Senate had been in charge of not only the governmental matters but also of the judicial matters. The legal department of the Senate had functioned as the supreme court instance of Finland in civil and criminal matters, while the economic department of the Senate had dealt with administrative complaints as the highest instance. With the elimination of the office of the Governor General and with the transfer of the judicial issues to supreme courts, to the Supreme Court in civil and criminal matters and to the Supreme Administrative Court in administrative matters, the central administrative units or "ministries" that had existed under the Senate did not have to undergo any greater changes. The Senate could thus be reformed into a Council of State with minor alterations only. What was done in addition was to increase the independent decision-making authority of the ministers and to transfer or delegate decision-making authority from the Senate to civil servants.

In terms of changes to the ministries, not very many changes were necessary, because most administrative functions had been handled by domestic administrative authorities already during the era of autonomy. The independence of Finland made it necessary to create a Ministry of Defence and a Ministry of External Relations and to add them among the ministries that existed from before. The imminent social problems that had grown during the decades before independence eventually led to the creation of a Ministry of Social Affairs. The changes at the level of central government were recorded in the Form of Government (Constitution) Act of 1919. More or less the same constitutional system is now included in the Constitution of Finland which entered into force on 1 March 2000.

From the perspective of the sub-State discussion, it is interesting to note that after the enactment of the first Act on the Autonomy of the Åland Islands as a so-called act of exception of a special kind in 1920 without any mention of autonomy of this kind in the Form of Government (Constitution) Act, the Council of the League of Nations took up the dispute between Finland and Sweden. In 1921, the so-called Åland Islands Settlement was reached before the Council of the League of Nations, in which the Council decided that the sovereignty over the Åland Islands should belong to Finland. However, the decision was conditional upon the realisation of certain guarantees concerning the Swedish character of the Åland Islands. These guarantees were enacted in 1922 as a complement to the Autonomy Act under the name of the Guaranty Act. At this juncture, the concept of autonomy was by no means alien to the legal order of Finland: the whole country had been an autonomous part of another State for more than a century. Only in 1994 the Form of Government (Constitution) Act was complemented with an explicit provision in Article 52a according to which the Åland Islands have self-government according to special enactments. This has been reiterated in Article 120 of the Constitution of Finland, according to which "the Åland Islands have self-government in accordance with what is specifically stipulated in the Act on the Autonomy of Åland".

3. A Modern Example: the State Union of Serbia and Montenegro

A later example, this time from the field of Yugoslav disintegration, is the conversion of the Federal Republic of Yugoslavia into the State Union of Serbia and Montenegro. This was formally speaking an internal measure, but it was strongly promoted by the European Union, which wanted to prevent the disintegration of the State by facilitating the creation of a relationship of a different kind between the constituent states of the Federal Republic of Yugoslavia. The complete disintegration of the existing State could, it is feared, spark a new conflict in the Balkans and lead to the disintegration of Bosnia and integration of Kosovo into Albania. Respect of the existing State borders would then be disrupted.

The starting point here is that the Federal Republic of Yugoslavia consists of two sub-State entities, the Republic of Serbia and the Republic of Montenegro. In addition, the Republic of Serbia contains two autonomous provinces, Kosovo and Vojvodina, which in this setting constitute sub-sub-State entities of some sort. Three units of public power of relevance for the existence of the Federal Republic of Yugoslavia, that is, the Federal level, Serbia, and Montenegro, have their respective institutions of representation capable of formulating the political opinion of the relevant populations represented by these institutions. On 14 March 2002, these three units agreed on the Proceeding Points for the Restructuring of Relations between Serbia and Montenegro.

The Preamble to the Constitutional Charter of the State Union of Serbia and Montenegro opens up by stating that the conversion from the federation to the state union proceeds from the equality of the two member states, the state of Montenegro and the state of Serbia, the latter of which comprises the autonomous provinces of Vojvodina on the one hand and Kosovo and Metohija on the other. (The latter sub-sub-State entity is, according to the Preamble, currently under an international administration on the basis of United Nations Security Council Resolution 1244/1999.) The three-party solution is underlined in Article 61 of the Constitutional Charter, which prescribes that the Constitutional Charter shall be adopted in the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro as an identical text and shall come into force once adopted and proclaimed in the same fashion by the Federal Assembly of Yugoslavia. This took place on 4 February 2003. A Law on the Implementation of the Constitutional Charter of the State Union of Serbia and Montenegro was adopted at the same time as the Constitutional Charter in order to specify the practical operation of the Constitutional Charter and the transition from the Federal Republic of Yugoslavia into the state union of Serbia and Montenegro.

It seems as if the Constitutional Charter were adopted in the manner prescribed by the 1992 Constitution of the Federal Republic of Yugoslavia without any break of the constitutional continuity. The constitutional transition could, in spite of the

evidently complete revision of the constitution, therefore be characterised as a use of the amending powers of the previous constitution (*pouvoir constitué*). In doing so, the people of the Federal Republic of Yugoslavia has freely determined their political status in the meaning of common Article 1 of the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. With a reference to the modes of self-determination identified in the Friendly Relations Declaration, the constitutional transition is neither to be described as a self-determination by way of independence nor as free association or integration with an existing State, but rather as an emergence into any other political status freely determined by a people. The constitutional transition from the Federal Republic of Yugoslavia into Serbia and Montenegro could thus be understood as an exercise of internal self-determination which followed the established constitutional processes.

In Article 1 of the Constitutional Charter, the name of the state union is defined as "Serbia and Montenegro". Further, Article 2 the Constitutional Charter lays down that Serbia and Montenegro shall be based on the equality of the two member states, the state of Serbia and the state of Montenegro. Although the Constitutional Court of Serbia and Montenegro shall have the competence to rule, *inter alia*, on whether the constitutions of the member states are in conformity with the Constitutional Charter, it seems as if the current constitutions of the Republic of Serbia on the one hand and the Republic of Montenegro on the other would remain in force in the form and with the institutions defined in them. As concerns the territory of Serbia and Montenegro, it is said in Article 5 that it shall consist of the territories of the member states of Serbia and Montenegro. In addition, the provision establishes that the external borders of Serbia and Montenegro shall be inviolable, while the boundary between the member states shall be unchangeable, except with mutual consent.

Article 14 of the Constitutional Charter departs from the principle that Serbia and Montenegro is a single subject of international law and a member of such international organisations, global and regional, the membership of which is contingent on international personality. Pursuant to Article 34, however, the member states shall be represented on a parity basis and through rotation in the missions of Serbia and Montenegro to international organisations, such as the UN, OSCE, EU, and the Council of Europe. In addition, the member states are recognised the possibility to be members of such international organisations, global and regional, the membership of which is not contingent on international personality.

A citizen of a member state shall, according to Article 7, also be a citizen of Serbia and Montenegro and shall have the same rights and duties in the other member state as its own citizens. There is, however, one exception: a citizen of one member

state does not have the right to vote in the elections organised in the other member state.

This has a bearing on Article 20 of the Constitutional Charter, which prescribes that the parliament of Serbia and Montenegro is unicameral, consisting of 126 members of whom 91 shall come from Serbia and 35 from Montenegro. Each member state seems to function as a constituency for the purposes of the election of the 91 and 35 representatives, respectively. The citizens of each member state only can affect the composition of the respective part of the parliament. The elections to the unicameral parliament shall be direct. However, certain special rules apply for the first elections and the initial period. The unicameral and directly elected nature of the parliament is special for the state union, because these features make a characterisation of the state union as a federation or confederation somewhat problematic. With the reference to our discussion above, some federative features can be discerned in this state union, but unlike the federal arrangements, the directly elected representative institution is not complemented with an upper house or senate which would introduce a more direct link to the constituent states as institutions. Nevertheless, the listing of powers of the parliament of Serbia and Montenegro outlined in Article 19 seems to imply that Serbia and Montenegro are in the possession of enumerated powers, while the member states have residual powers in their possession. This, again, is a federal principle of organisation.

One interesting feature in this context is that Article 60 of the Constitutional Charter formulates procedures for the withdrawal of one member state from the state union of Serbia and Montenegro. The provision can be understood as a regulation of a potentially unilateral secession. The provision says that upon the expiry of a three-year period, a member state shall have the right to initiate the procedure for a change of the state status, that is, for the withdrawal from the state union of Serbia and Montenegro. Such a decision to withdraw (to secede) shall be made after a referendum has been held. The referendum, in turn, is dependent of an Act on Referendum that has been passed by a member state. Hence the member state controls the organisation of the referendum, but under the condition that recognised democratic standards are taken into account.

In the Constitutional Charter, the different state units have thus agreed that one member state in the state union can decide to pull out without taking into consideration the wishes of the other member state. In the event of a unilateral withdrawal of Montenegro, a rule on state succession has been included in the provision establishing that the international documents related to the Federal Republic of Yugoslavia, particularly United Nations Security Council Resolution 1244/1999, shall pertain and apply fully to Serbia as its successor. In addition, the Article provides that the member state that exercises the right of withdrawal shall

not inherit the right to international legal personality and that all outstanding issues shall be regulated separately between the successor state and the state that has become independent. Article 60 is apparently a legal regulation of the further disintegration of the State, but under forms that have been accepted by common decisions and that would lead to a voluntary secession.

4. Concluding remarks

It has been concluded that "a major threat to autonomies is major structural changes in the state system that affect the central government".[6] However, at least in the case of Finland in 1917, the major structural changes in the state system of the Russian Empire were such that opened up a window of opportunity for independence. The constitution-making process of Serbia and Montenegro departs instead from another point of view, from that of constitutional evolution of a federal State through a broad constitutional amendment which reorganises the relationship between the sub-State entities under a common constitutional structure of a federative kind. This latter example is one which tries to bring about or make possible a controlled secession. In case the state union between Serbia and Montenegro is brought to an end by way of the constitutional process outlined above, it would be possible for the international community to maintain that it took place on the basis of the principle of voluntary secession. The secession could thus not be used as a justification of such secessions in the same area which are opposed by the government of the State, such as in the case of Kosovo.

What, if anything, is relevant for the Faroe Islands in the self-determination discourse at this juncture? How should the possible alteration of the constitutional position of the Faroe Islands take place? It has been proposed that Faroe Islands could reshape its relationship with Denmark on the basis of the concept of free association with an independent State.[7] Against the background of this report, this strategy may be coupled with some problems, because Faroe Islands does not seem to be an entity which would automatically be covered by the concept. Free association would seem to imply two situations: 1) that there is an independent State, in this case Denmark, which accepts as an associated territory an area that is seceding from another independent State, or 2) that there is an area which already exists as an independent State and which wants to terminate that independent existence for the benefit of an association with Denmark. In order for the Faroe Islands to use this avenue, it seems as if it should be done in a similar way as in the Bosnian case: the creation of an independent State of the Faroe Islands for at least a short while, and thereafter a free association with Denmark.

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[6] See Kjell-Åke Nordquist, 'Autonomy as a Conflict-Solving Mechanism – An Overview' in Markku Suksi (ed.), *Autonomy – Applications and Implications*. Dordrecht: Kluwer Law International, 1998, p. 73.

[7] *Om vigtige forudsaetninger for etablering af en suveraen faeroesk stat*. Hvidbog. Faeroernes Landsstyres oversatte udgave. Torshavn: Foeroya Landsstyri, 1999.