Legal Foundations, Structures and Institutions of Autonomy in Comparative Law

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1 Introduction

Autonomies around the world[1] as a form of organization at the sub-national level show a number of common features or dimensions that offer a basis for comparisons. The comparisons, in turn, can be used for the purposes of explaining the legal effects of various forms of autonomy and for outlining the reasons for differences and similarities. What are the key features of autonomy, how could different autonomies be compared with each other and what is the future of autonomy as a form of organization? How could the different autonomies and their relations to each other be illustrated in the visual form, as a chart, so as to make it possible to identify the multitude of different models of autonomy on the basis of their normative features?

For such a comparative exercise to take place, a common framework or platform of comparison should be designed. In other words, a so-called *tertium comparationis* should be developed. For the purposes of our discussion of autonomy, it is proposed that this *tertium comparationis* is created against the background of the right to participation in a broad sense, encompassing both the general right to participation as identified in article 25 of the Covenant on Civil and Political Rights on the one hand and the right to self-determination as a meta-right of participation as pointed at in article 1 of the same Covenant.

2 Participation and Self-Determination

Article 25 of the CCPR deals with participation and covers participation not only at the national level but also at the sub-national and local government level. Also materially speaking, Article 25 is very broad, encompassing not only the traditional forms of par-

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[1] For instance, Maria Ackrén has identified 48 autonomies around the world for the purposes of her analysis of different empirical features of autonomy. See Ackrén (2005, p. 137).

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ticipation through elections and referendum, but enlarging the concept of participation to include also membership in elected assemblies, consultative bodies, and other organisms of decision-making that offer a forum for participation.[2] As such, the reference in Article 25 to the conduct of public affairs does not prescribe any particular public powers for the different organisms of decision-making covered by the provision, but in so far as powers have been granted to the decision-making units, they could be of a law-making kind or of an administrative kind. To the extent that the appointment of the members of bodies that conduct public affairs is carried out by way of elections, the elections should conform with the election elements of sub-section (b) of the provision.[3]

Whenever elections are involved, a dimension of self-government is appearing in the context. Depending on whether or not the population which is the beneficiary of the self-government arrangement can be regarded as a people, Article 1 of the CCPR may come into play and introduce an element of self-determination to the context.[4] The standard interpretation of the right to self-determination is that the people entitled to enjoy self-determination is the total population of a constituted state irrespective of its internal division into different groups of population. The possession of self-determination would imply the possibility to external self-determination, that is, independence,[5] territorial integrity and capacity to make treaties with other subjects of international law (external sovereignty). At the same time, the possession of self-determination would imply internal self-determination, that is, the ability to determine different policies of the independent entity[6] by way of generally

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[2] General Comment 25 of the U.N. Human Rights Committee, (U.N.Doc. CCPR/C/21/Rev. 1/Add. 7(1996)) paras. 5, 6, 7, 9 and 10.

[3] In the case involving Hong Kong before its hand-over to China, the United Kingdom was criticized by the U.N. Human Rights Committee: "The Committee is aware of the reservation made by the United Kingdom that article 25 of the Covenant does not require establishment of an elected executive or legislative council. However, it takes the view that once an elected legislative council is established, its election must conform to article 25. The Committee considers that the electoral system in Hong Kong does not meet the requirements of article 25, or of articles 2, 3 and 26 of the Covenant. It underscores in particular the fact that only 20 of 60 seats in the Legislative Council are subject to direct popular election and that the concept of functional constituencies, which gives undue weight to the views of the business community, discriminates among voters on the basis of property and functions. That clearly constitutes a violation of article 2, paragraph 1 and articles 25 (b) and 26." See Annual Report of the Human Rights Committee, 13/04/97, A/51/40, Paras. 65 and 71. The same observations are still valid today concerning Macau.

[4] Only a people under colonial domination would have a more or less absolute right to become independent, while other peoples would have to look for other options for the exercise of their right to self-determination.

[5] The free determination of the political status of a people could, under the U.N. Friendly Relations Declaration of 1970 (G.A.Res. 2625/XXV), in principle utilize three different options, namely establishment of a sovereign and independent state, free association or integration with an independent state or emergence into any other political status. The last option, emergence into any other political status, would seem to encompass, e.g., autonomy solutions.

[6] According to art. 1 of the CCPR, self-determination translates into the free pursuit of a people of its economic, social and cultural development. Normally, that freedom assumes the form of the legislative decision. However, that freedom should be exercised so that the human rights of individuals established in the two covenants, the Covenant on Civil and Political Rights on the one hand and the Covenant on Economic, Social and Cultural rights, on the other, are realized.

applicable norms binding for everyone. The concrete content of self-determination is thus the possession of the highest lasting power on the territory over the people, which power would be the constitution-making power and, together with that, the legislative power (internal sovereignty). Under articles 1 and 25 of the CCPR, elections shall be organized amongst the entire population by respecting the election elements listed in sub-section (b) of Article 25 so that a government representing the whole population is in place.[7]

Within such a constituted state, it could, however, be possible to identify, for the purposes of the internal organization of the state, distinct groups of individuals that could be regarded as peoples with self-determination. At least in so far as such a group of individuals (in fact, its representative organ) is granted exclusive law-making powers under the constitution of the state, it would be possible to argue that such an entity has received a share of the internal self-determination (and internal sovereignty) of the entire state. From time to time, such sub-national entities have been granted more or less limited competences to act in the international sphere, including treaty-making powers. This is the case, for instance, with Macau (and Hong Kong), which under Chapter VII on External Affairs of the Basic Law of the Macao Special Administrative Region of the People's Republic of China has a certain international competence, although China remains responsible for the international relations.

The situation is somewhat similar in respect of the Faroe Islands and Greenland, two autonomies which have a limited international capacity and a say in the ratification of treaties concluded by Denmark. In 2005, the Danish parliament passed two acts concerning each of the autonomous entities in their ability to conclude agreements under international law.[8] Each autonomous entity can conclude such agreements under international law with foreign states or with international organizations that relate to competencies which have been taken over by the autonomous entities. This treaty-making competence does not, however, include such agreements under international law which deal with defence and security policy or agreements which shall apply to Denmark or agreements which are undergoing negotiation within such an international organisation of which Denmark is a member. International agreements to which any of the autonomous entities is party are concluded *on behalf of the realm* by the government of the Faroe Islands or the government of Greenland under the title "Kingdom of Denmark, as far as the Faroe Islands (or Greenland) is concerned." Both of the acts make the point that the exercise of the treaty-making powers by each of the autonomous entities must take place in close co-operation with the Danish government. It seems that ultimately, the Kingdom of

[7] According to art. 40.1 of the Basic Law, [t]he provisions of International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Macao shall remain in force and shall be implemented through the laws of the Macao Special Administrative Region".

[8] Act concerning the entering into agreements under international law by the government of the Faroe Islands (Act nr 579 of the Danish Parliament of 24 June 2005), Act concerning the entering into agreements under international law by the government of Greenland (Act nr 577 of the Danish Parliament of 24 June 2005).

Denmark as a State is internationally liable for international commitments contracted by the Faroe Islands or Greenland.

This situation in respect of treaty-making powers and international relations of autonomous entities seems to be in conformity with two legal pronouncements concerning autonomous entities, namely the *Lighthouses in Crete and Samos* case[9] and the *Interpretation of the Statute of the Memel Territory* case,[10] both resolved by the Permanent Court of International Justice during the 1930s. Once a territory has been granted a political status as a sub-State entity, for instance, as an autonomy or as a state in a federation, the State to which the sub-State entity belongs is, under international law and according to the *Lighthouses* case, internationally capable for contractual actions to be taken for the territory of that sub-State entity, at least as long as there is a political link of some sort between the State and the sub-State entity. In this case the PCIJ created and used a "political link test" to determine on the basis of the constitutive documents whether or not an autonomous territory has seceded from the mother-country. The PCIJ tried whether, at the time of the conclusion of a disputed contract, "the territories of Crete and Samos were already, in law, territories detached from the Ottoman Empire, in the full meaning of the word 'detached', which in the opinion of the Court connotes the entire disappearance of any political link." The Court did not feel it necessary to inquire in detail into the internal forms that the autonomous government of Crete and Samos but felt that "[t]he wide forms of autonomy conferred on the territories in question could only be taken into consideration for the solution of the present dispute, if they justified the conclusion that the autonomous territories were already, at the date of the contract, detached from the Ottoman Empire to the extent that every political link between them and the Sublime Porte had been severed, so that the Sultan had lost all power to make contracts in regard to them." The PCIJ found that this was not the case.[11]

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[9] *Lighthouses of Crete and Samos*, Judgment of 8 October 1937, PCIJ, Series A./B.—Fasc. No. 71, pp. 103–105.

[10] *Interpretation of the Statute of the Memel Territory*, Judgment of 11 August 1932, PCIJ, Series A./B.—Fasc. No. 50, p. 294.

[11] "The issue, reduced to its essence, may be stated as follows: had every political link between the Ottoman Empire and the islands of Crete and Samos disappeared at the time of the conclusion of the contract in dispute, that is to say, on April 1st/14th, 1913? (…) The Court finds that this has not been shown by the Greek Government. (…) Notwithstanding its autonomy, Crete had not ceased to be a part of the Ottoman Empire. Even though the Sultan had been obliged to accept important restrictions on the exercise of his rights of sovereignty in Crete, that sovereignty had not ceased to belong to him, however it might be qualified from a juridical point of view. That situation persisted until the time when Crete was separated from the Ottoman Empire by treaties, which were treaties of cession, and became a 'detached territory' (…). (…) In opposition to this conclusion, deduced from the international instruments, the Greek Government has argued that Samos, since 1832, and Crete, since 1899 and in any case since 1907, did in fact enjoy a régime of autonomy which was so wide that those islands must be regarded as having been thenceforward detached from the Ottoman Empire. (…) No confirmation of this view is obtained by the examination either of the Cretan Constitutions or of the organic Statute of Samos. The autonomy of Crete was only

The protection of the sovereignty of the State and its territorial integrity was also an issue in the *Memel* case concerning resolved by the PCIJ in 1932. In the case, the President of the Directorate of the Memel Territory, that is, the Head of Government of the autonomous territory created for the Germans and Lithuanians living there, had visited organs of the Republic of Germany, whereupon the Governor of Memel as a representative of the Republic of Lithuania had dismissed the President of the Directorate for violation of the distribution of powers between Memel on the one hand and Lithuania on the other (foreign relations were, under Article 7 of the Statute of Memel, within the exclusive jurisdiction of the Lithuanian Republic), although the Memel Statute did not contain any provision that would have made such a dismissal possible. The PCIJ held that Memel did not have the competence to engage in direct foreign relations with a third country and that the dismissal of the President of the Government was warranted.[12] Hence in the light of this case, the protection of the external sovereignty of a State is a paramount concern, not easily relinquished to its sub-divisions unless explicit provisions to that effect exist. However, internal sovereignty or self-determination, understood here as law-making capacity, is apparently a quality that can be divided between the State and its sub-divisions as they see fit. Against the background of self-determination, it can be said that international law seems to protect the sovereignty and territorial

recognized by the Constitutions of 1899 and 1907 'under the conditions established by the four Great Powers'. These conditions emphasized 'the supreme rights of H.I.M. the Sultan over Crete' (…) and the 'legitimate rights of the Sultan' (…). So far as concerns the island of Samos, the *Hatt* or organic Statute of December 22nd, 1832, definitely proclaimed its dependence on the Sublime Porte. Samos is described herein as forming 'part of the hereditary estates of H.M. the Sultan Mahmoud Khan' (…), and the concessions conferred by the Statute are expressly subordinated by it to the condition that the inhabitants of the island 'should henceforth be faithful subjects of the Ottoman Empire'. The provisions of the Statute, and especially those concerning the appointment and powers of 'the chief of the island' and the homage due to the Sultan, leave no doubt as to the continued political subordination of Samos." See *Lighthouses of Crete and Samos,* Judgment of 8 October 1937, PCIJ, Series A./B.—Fasc. No. 71, pp. 103–105.

[12] "[When, under Article 99 of the Treaty of Versailles,] Lithuania undertook to secure to that Territory autonomy within the limits fixed by the Statute of Memel, it certainly was not the intention of the Parties of the Convention that the sovereignty should be divided between the two bodies which were to exist side by side in the same territory. Their intention was simply to ensure to the transferred territory a wide measure of legislative, judicial and financial decentralization, which should not disturb the unity of the Lithuanian State and should operate within the framework of Lithuanian sovereignty. Whilst Lithuania was to enjoy full sovereignty over the ceded territory, subject to the limitations imposed on its exercise, the autonomy of Memel was only to operate within the limits so fixed and expressly specified. It follows that the sovereign powers of the one and the autonomous powers of the other are of a quite different order in that the exercise of the latter powers necessitates the existence of a legal rule which cannot be inferred from the silence of the instrument from which the autonomy is derived, or from an interpretation designed to extend the autonomy by encroaching upon the operation of the sovereign power. (…) The Court holds that Memel's autonomy only exists within the limits fixed by the Statute and that, in the absence of provisions to the contrary in the Convention or its annexes, the rights ensuing from the sovereignty of Lithuania must apply."

integrity of an existing state at the same time as it does not create much obstacles for the internal organisation of the self-determination of a state and allows, e.g., different forms of devolution inside the state. Devolution can assume the form of, e.g., territorial autonomy and become a mechanism of effective participation of the inhabitants of the area, which may or may not be persons belonging to a minority population under art. 27 of the CCPR or even a people under art. 1 of the CCPR.

3 Distinction Between Spatial and Normative Dimensions

As indicated above, conduct of public affairs can imply different things, such as legislative powers and regulatory or administrative powers that can be exercised either in a territorially delineated jurisdiction or in a manner which is essentially non-territorial. It is, however, often the case that reference is made to territorial autonomy in a way which implies exercise of law-making powers in a territorially delineated jurisdiction without any distinction between the spatial dimension and the normative dimension.

As concerns the spatial dimension, it is possible to conclude that it consists of two different aspects, namely territorially delineated jurisdiction and non-territorial jurisdictions. A territorially delineated jurisdiction exists when territorial boundaries limit the powers of an entity, such as a municipality or a court of first instance. The entity is competent to exercise its public authority only in respect of persons or functions within its jurisdictional area, not outside of it, because some other entity will be competent to exercise its public authority on the other side of the border. Macau is a good example of a territorially delineated jurisdiction, because in art. 1 of the Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macau[13] as well as section 2 of Decision of the National People's Congress on the Establishment of the Macao Special Administrative Region of the People's Republic of China of 31 March 1993[14] identify the territory within which the jurisdiction of Macau is to be exercised. Other territorially delineated jurisdictions of the same kind are, e.g., the Åland Islands, South Tyrol, the Faroe Islands, Greenland, South Tyrol, the Basque Country and Catalonia. A non-territorial jurisdiction exists when independent public authority is exercised in respect of certain individuals throughout the state

[13] "The Government of the People's Republic of China and the Government of the Republic of Portugal declare that the Macau area (including the Macau Peninsula, Taipa Island and Colane Island, hereinafter referred to as Macau) is Chinese territory, and that the Government of People's Republic of China will resume the exercise of sovereignty over Macau with effect from 20 December 1999."

[14] "[T]he area of the Macao Special Administrative Region covers the Macao Peninsula, Taipa Island and Coloane Island. The map of the administrative division of the Macao Special Administrative Region will be published by the State Council separately."

irrespective of the fact that those individuals are residing in such territorial jurisdictions in which the other individuals are subject to similar public authority from territorially delineated jurisdictions.

The non-territorial form of organization is much less frequent than the territorially delineated jurisdiction, but the so-called Millet system of Turkey and the self-government of minorities in Estonia can be presented as examples of this category. The Millet system of Turkey developed since the thirteenth century as a non-territorial form of organization granting public authority to religious groups living as dispersed minorities among the Sunni Moslem population of Turkey (see Eide 1998, p. 261 f). By the end of the nineteenth century, close to 20 Millets existed. They were in charge of, e.g., religious matters, family matters and education. Millet-type forms of organization can at least in some form still today be found in, e.g., Jordan, Lebanon, Israel and Egypt. Under art. 50 of the Constitution of Estonia, ethnic minorities have received a right to establish institutions of self-government in accordance with conditions and procedures established by the Act on Cultural Autonomy for Ethnic Minorities of 26 October 1993. This cultural autonomy, which apparently is a collective right, is a non-territorial form of self-government, modelled against the background of similar arrangements that existed between the two World Wars.[15] According to art. 1 of the Act, national minorities are formed by such citizens of Estonia who reside on the territory of Estonia, who are distinct from Estonians on the basis of their ethnic, cultural, religious, or linguistic characteristics, and who are motivated by a concern to preserve jointly their cultural traditions, their religion, or their language as the basis of their common identity. Article 2 of the Act mentions the so-called traditional minorities, namely the Germans, Russians,[16] Swedes, and Jews, who shall have this right without further requirements. Other minorities, such as the Ukrainians, Belarussians, and Ingrian Finns, shall have at least 3,000 members. The aim of this arrangement is to make it possible for national minorities to provide education in their own language, and to practice their own culture and traditions (Suksi 1999, p. 47f). So far, it seems that only the Swedes of Estonia have used this opportunity to create bodies of self-government, elected by the members of the minority to exercise public powers in the areas mentioned above.

It is possible to distinguish between two different types of public powers exercised within the framework of territorial and also non-territorial forms of organization, namely legislative powers proper and regulatory powers, the latter term including, *inter alia*, by-laws that must conform to the legislative enactments of the state and administrative decisions concerning an individual. Legislative enactments in the formal sense are generally applicable rules either of a national parliament or of a sub-national legislature with exclusive law-making powers of its own. The possession of legislative powers implies thus here the possession of such norm-setting capacity

[15] See Eide (1998, pp. 253–255). Between the World Wars, the fairly scattered German and Jewish minorities of Estonia made successful use of the Act on Cultural Autonomy.

[16] Only in so far as they are citizens of Estonia, which many of them are not.

which in terms of the hierarchy of norms is placed between the constitution on the one hand and decrees of the government on the other. As concerns Macau, this is established in section III of Annex I of the Joint Declaration[17] and art. 17.1 of the Basic Law of Macau,[18] which make the point that the law-making powers exercised by the legislature of Macau are exclusive, not subordinated to the ordinary legislation of mainland China. Such law-making powers proper, exclusive in relation to the law-making powers of the national parliament, are also held, *inter alia*, by the Åland Islands, Faroe Islands, Greenland, Catalonia and the Basque country as well as by constituent states in federations (see also Suksi 1998, pp. 152–155). Exclusive law-making authority in certain substantive areas of law would normally entail full regulatory or administrative competence and budgetary powers in the same areas, supported by at least some measure of tax powers.

Regulatory powers held by a public entity represent the other end of the scale. Such regulatory powers may be of a normative character or imply the exercise of public powers by means of administrative decisions in individual cases. In the former category, the normative powers exercised are not legislative powers proper, that is, exclusive legislative powers that set aside the legislative enactments of the national parliament, but such normative powers which assume the nature of a decree or a by-law and which would have to conform to the legislative enactments of the national parliament. In the latter category, the administrative authority that might be exercised by such an entity may encompass also budgetary powers, sometimes even tax powers. Examples of situations in which sub-national public powers are of a regulatory or administrative kind are, *inter alia*, Corsica in France and Crimea in Ukraine as well as the cultural self-government in Estonia.

The two dimensions, spatial and normative, can in principle be married with each others in the following way (Table 1):

Category No. 1 is the archetype of what is normally called territorial autonomy and would encompass organizational situations such as Macau, Hong Kong, the

Table 1 Spatial and normative dimensions

	Legislative	**Regulatory**
Territorial	1. (Macau, Hong Kong, the Åland Islands, Catalonia)	2. (Corsica, Crimea, Wales)
Non-territorial	3. (Millets of former Turkey)	4. (Cultural self-government of minorities in Estonia)

[17] "The legislative power of the Macau Special Administrative Region shall be vested in the legislature of the Macau Special Administrative Region. The legislature shall be composed of local inhabitants, and the majority of its members shall be elected."

[18] "The Macao Special Administrative Region shall be vested with legislative power." In addition, art. 18.1 of the Basic Law says that "[t]he laws in force in the Macao Special Administrative Region shall be this Law, the laws previously in force in Macao as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region", and art. 18.2 says that "[n]ational laws shall not be applied in the Macao Special Administrative Region except those listed in Annex III to this Law."

Åland Islands, Faroe Islands, Catalonia, the Basque Country, etc. These are territorially delineated jurisdictions with legislative powers proper. Category No. 2, again, would cover such examples as Corsica, Crimea and Wales, which might or might not qualify as territorial autonomy, depending on how the term autonomy is defined. If the term autonomy is defined as the possession of legislative powers proper, these areas would not count as autonomies, in spite of the fact that they are territorially delineated and constituted as special areas.

It may be difficult to find concrete examples for Category No. 3, but in this context, the Millet system especially in the form that existed in Turkey may be presented as an historical example. It seems that the Millets and the persons belonging to Millets were, in some important areas of law influenced by the religion, exempt from the legal rules of the state. Instead, a Millet could have its own exclusive legal rules, applied in concrete cases on individuals who were under the authority of the Millet in question. Due to the religious nature of a Millet, it may be difficult to argue that the religious authorities ruling in a Millet fulfill criteria of self-governing participation of the individuals in the internal law-making. However, it seems possible to place the Millet system in its Turkish fashion in this category of arrangements. As concerns Category No. 4, the cases are a little bit more abundant although not very frequent. The above-mentioned system of cultural self-government of minorities in Estonia can be presented as one example, especially with reference to the powers of the self-governing entity to pass by-laws, tax its members and make administrative decisions in individual cases. Somewhat similar arrangements in respect of indigenous populations exist also in the Russian Federation (see Eide 1998, p. 257), as well as in Hungary and Slovenia in respect of national minorities (see Eide 1998, pp. 257–260).

A conclusion that can be drawn from the discussion in this section is that territorial autonomy is actually not a very good term for describing the combination of spatial and normative features. What the main focus of the discussion seems to be is the exercise of legislative powers proper by territorial jurisdictions so as to make these legislative powers exclusive in relation to the legislative powers of the state.

4 Combination of the Normative Dimension and the Level of Entrenchment Concerning Territorial Autonomy in Europe

Setting aside the fairly rare instances of non-territorial autonomy, our interest can be directed towards an analysis of the territorial autonomy arrangements, that is, entities which are territorially circumscribed and vested with norm-setting powers. On the basis of the above analysis of powers granted or devolved to autonomous areas it is possible to claim that jurisdiction of legislative and administrative character has, in many instances, been delegated to sub-national entities which at least intuitively can be labelled as autonomies.

Under section 120 of the Constitution of Finland "[t]he Åland Islands have self-government in accordance with what is specifically stipulated in the Act on the

Autonomy of the Åland Islands." The current Self-Government (Autonomy) Act was enacted by the Parliament of Finland in 1991 (No. 1144/1991). In addition, according to section 75 of the Constitution, "[t]he legislative procedure for the Act on the Autonomy of the Åland Islands and the Act on the Right to Acquire Real Estate in the Åland Islands is governed by the specific provisions in those Acts. 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 the Åland Islands." Whereas section 75 can be understood as a recognition of the existence on the entire territory of Finland a second legislative power in addition to the Parliament of Finland, namely the Legislative Assembly of the *Åland Islands*, it should be underlined that the legislative competence of the law-maker of the Åland Islands has since 1920 been devolved on the basis of a Self-Government (Autonomy) Act. Currently, the enumeration of the legislative competences of the Åland Islands is established in section 18 of the Self-Government (Autonomy) Act, and the powers granted to the Åland Islands are generally speaking of a public law nature under the continental European understanding of the legal order as being composed of public law and private law. Only those who possess a special regional citizenship are qualified to vote in the election of and stand for election to the Legislative Assembly of the Åland Islands. However, at the same time, the Åland Islands are identified under art. 25 of the Constitution as a special constituency for the purposes of the election of one MP to the Parliament of Finland,[19] an election in which those persons may participate who are citizens of Finland. The Åland Islands do not have any foreign policy powers.

The Self-Government (Autonomy) Act requires for its enactment and amendment that the Parliament enacts it following the procedure prescribed for the enactment and amendment of the Constitution, that is, by a prolonged enactment procedure involving qualified majority of two-thirds in the final vote, with the special requirement under section 69.1 of the Self-Government Act that the Legislative Assembly of the Åland Islands shall make the same decision with a qualified majority. The Åland Islands have had such a special position since 1920/1922, and for the autonomy arrangement created in 1920, an international guarantee in the form of the so-called Åland Islands Settlement was created by agreement between Finland and Sweden before the Council of the League of Nations in 1921.[20] The Settlement did not become a formal treaty under international law, but it is still and

[19] Interestingly, the election of the one MP from this single-member constituency is not designed as a regular First-Past-the-Post election of the British kind, but the election instead purports to preserve the general features of the elections by using open lists in multi-member constituencies in mainland Finland by designing it as a First-*List*-Past-The-Post. From the winning list, the candidate receiving the highest number of votes is elected as MP.

[20] The final solution recommended by the Committee of Rapporteurs to the Council of the League of Nations involved the Autonomy Act of 1920, which the Finnish Parliament had enacted in order to defuse the tension surrounding the Åland Islands question. Apparently, the Commission of Rapporteurs was relatively satisfied with the Autonomy Act itself, which enjoyed an entrenched

despite the collapse of the League of Nation through the Second World War considered a valid obligation for Finland at the level of customary international law.

The Åland Islands is not the only autonomy in the Nordic countries, but it is the oldest and smallest. After World War II, the "Home Rule Model" was developed in Denmark, first applied to the Faroe Islands in 1948[21] and later to Greenland in 1978.[22]

The *Faroe Islands* and *Greenland* are listed as special areas in the Danish Constitution of 1953, in the context of providing specific regulations for them in certain fields, such as for their representation in the Danish Parliament, where each autonomous territory has two seats out of a total of 179 seats. The Constitution does, however, not mention the self-government or autonomy of these areas. The delegation of exclusive law-making powers to these areas has taken place on the basis of ordinary acts of the Danish Parliament. However, it has been maintained the Acts concerning Home Rule on the Faroe Islands and Greenland "are no longer to be classified as pieces of ordinary Danish legislation, but must be regarded as '*Constitutional Laws*' on a level superior to ordinary Parliamentary Acts," whilst at the same time they are at a normative level inferior to the Constitution itself (Harhoff 1993, p. 504). It has, therefore, been suggested that the two Acts could not be unilaterally amended by the Danish legislator, but that such amendments would require negotiations and agreement between the parties involved, followed by a regional referendum confirming the amendment (Harhoff 1993, pp. 490, 493, 512 ff). As a matter of fact, the two Home Rule Acts contain provisions which create a right to be heard for the autonomous territories on the legislative and administrative matters of the central government that affect them. However, this procedure does not form an unconditional requirement of consent, and does not accord the Home Rule Acts a heightened position in the hierarchy of norms. At any rate, there is a certain element of regional entrenchment within the two Home Rule Acts. Three

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position in the legal order of Finland comparable to that of the Constitution. Nonetheless, the Commission recommended certain additions to the Autonomy Act, which aimed especially at the preservation of the Swedish language as the language of schools on the Åland Islands. In addition, the maintenance of real property in the hands of the natives was recommended, and in the area of politics, measures against the premature exercise of the franchise granted to new inhabitants were put forward. The Commission also suggested conditions for the nomination of a governor of the Åland Islands who has the confidence of the population. The Åland Islands Settlement contained these elements, and after the process before the League of Nations was completed, Finland incorporated the guarantees in the so-called Guaranty Act of 1922, enacted by the Parliament in the order prescribed for constitutional enactments.

[21] The Faroese Home Rule Act (Act 137 of the Danish Parliament of 23 March 1948). The Faroe Islands have around 45,000 inhabitants and are located in the Atlantic Ocean, west of Norway and north of Scotland. The Faroe Islands is not a part of the European Community.

[22] The Greenlandic Home Rule Act (Act 577 of the Danish Parliament of 29 November 1978). Greenland has around 60,000 inhabitants, most of whom are indigenous Inuit. Greenland joined the European Community in 1973 together with Denmark, but on the basis of the wishes of the Greenlanders, as indicated by an advisory referendum, Denmark negotiated an amendment to the EC treaty which allowed Greenland to leave the EC in 1983.

pieces of Danish legislation from 2005 confirm the idea of consent and sustain the position of the Faroe Islands and Greenland as two separate units in the Danish Realm by making a reference in the Preamble of each of the Acts to the fact that the Act is based upon an agreement between the government of the relevant autonomous entity on the one hand and the Danish government on the other hand as equal parties.[23] It seems that a federative relationship of some sort between the three parts of the Danish realm (Denmark proper, the Faroe Islands, and Greenland) is emerging.

From a purely formal perspective, the self-government of the Faroe Islands and Greenland may perhaps be viewed as a more or less simple delegation of powers. The autonomy of these areas is thus not entrenched in any particular and explicit way in the constitutional fabric of Denmark, although a regional entrenchment might be discerned in the two arrangements. This feature may perhaps be strengthened by formulations as the one included in the Preamble of the Greenlandic Home Rule Act: "Recognising the exceptional position which Greenland occupies within the Realm nationally, culturally and geographically, the Danish Parliament has in conformity with the decisions of the Greenlandic Provincial Council passed and We [Margarethe the Second] by Our Royal Assent confirmed the following Act about the constitutional position within the Realm." A somewhat similar formulation is included in the Faroese Home Rule Act. Are the two Danish autonomy arrangements thus formally speaking unprotected? From the point of view of the Constitution, the existence and substance of the legislation regulating the position of the two areas are in principle dependent on a simple majority in the Danish Parliament and could simply be understood as a delegation of certain state authority and legislative powers to the autonomous areas. In theory, the same simple majority in the Danish Parliament could be used to amend or even to completely abolish the Home Rule Acts.

However, the Danish Home Rule legislation has certain important purposes. It has been suggested that the two Home Rule Acts pertain to two peoples who live on a limited territory and who share common internal characteristics which distinguish them from others. Their different ethnic, linguistic, cultural, and geographic conditions distinguish these areas from the rest of Denmark, and these distinguishing marks have been highlighted in the Preambles to the Home Rule Acts (Zahle 1989, p. 266ff) as well as in the Preambles of the three Acts passed in 2005. Hence the Danish autonomy arrangements contain clear elements that separate them from the regular framework of a unitary state, recognise them as distinct units in the Danish realm and connect them to the concepts of a minority or a people. The latter, at least, could be read as a connection to the concept of self-determination, an issue that has been topical both in relation to the Faroe Islands and Greenland. As concerns the Inuit population in Greenland, which is an indigenous population for the purposes of ILO Indigenous and Tribal Peoples Convention No. 169 of 1989 and

[23] Act concerning the entering into agreements under international law by the government of the Faroe Islands (Act nr 579 of the Danish Parliament of 24 June 2005), Act concerning the entering into agreements under international law by the government of Greenland (Act nr 577 of the Danish Parliament of 24 June 2005), and Act concerning taking over of issues and competences by the authorities of the Faroe Islands (Act nr 578 of the Danish Parliament of 24 June 2005).

which constitutes a clear majority in the territory of Greenland, the institutions of representation in Greenland are probably such that they meet the intentions of Article 6 of the Convention.[24] However, participation in political life, such as in elections to the legislative assemblies of the two autonomies, is not reserved to the original population of the Faroe Islands or the indigenous Inuit population of Greenland only, but applies to all Danish citizens who reside in the two territories. Hence the Danish Home Rule model "grants specific rights and powers to the population living in a specific territory, i.e., it is not based on ethnicity, but is the type of model in which the rights are transferred to the population in a territory."[25] In this respect, the autonomies of Faroe Islands and Greenland can be characterised as inclusive (which especially in Greenland is not entirely without complications), while the Åland Islands would stand out as exclusive in comparison.

Both the Faroe Islands and Greenland are vested with legislative powers exercised by their respective elected legislative assemblies and applied by a politically answerable government, while the judiciary is part of the Danish national court organisation.[26] The law-making powers the two autonomies possess on the basic enumerated list (the so-called A-list) of the respective Home Rule Acts are fairly broad, ranging from organisation of governmental institutions to health and social affairs and fisheries, and including also direct and indirect taxes. As concerns the Faroe Islands, the division of legislative competencies is since the end of July 2005 actually established on the basis of another Act of the parliament of Denmark,[27] which enumerates a core of competencies that can not be transferred to the Faroe Islands,[28] leaving the remaining competencies to be transferred at a time decided by the authorities of the Faroe Islands or at a time agreed to after negotiations between

[24] Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries of 27 June 1989. Denmark ratified the Convention on 22 February 1996.

[25] Lyck (1996, p. 6. 124). See also Mørkøre (1996 p. (6)164): "To be eligible to vote for the Løgting, the main preconditions are Danish citizenship and Faroese residence. This means, for instance, that every Dane who takes up residence in the Faroes automatically becomes Faroese, and, conversely, that a Faroese resident in Denmark enjoys all the rights of a Dane resident in Denmark. On the other hand, the Faroese, i.e. Danish citizens resident in the Faroe Islands, are entitled to elect representatives to both the Løgting and the Danish Folketing." Citizens resident in Denmark would normally not have the right to participate in the elections of the Legislative Assembly of the Faroe Islands, except Faroese students who reside in mainland Denmark because of their studies.

[26] However, on the basis of the Act concerning taking over of issues and competences by the authorities of the Faroe Islands (Act nr 578 of the Danish Parliament of 24 June 2005), the Faroe Islands could create its own court organization, except for the Supreme Court, which shall remain a Danish competence.

[27] Act concerning taking over of issues and competences by the authorities of the Faroe Islands (Act nr 578 of the Danish Parliament of 24 June 2005).

[28] The Constitution, citizenship, the Supreme Court, foreign policy, security policy, defense policy, and currency and financial policy. For instance, as concerns the courts, the Faroe Islands has not, as of 2006, created its own courts, but the local courts are part of the court organization of Denmark.

the authorities of the Faroe Islands and Denmark.[29] As concerns Greenland, there are powers often referred to as "the B-list" (these include the state church, police, underground resources, radio, aviation, import and export control), which in principle are exercised by the Danish authorities, but which particularly affect the interests of the autonomous entity. In such cases, after negotiation with the Greenlandic authorities, the central authorities of Denmark may determine by statute that the Greenlandic authorities shall assume regulating jurisdiction for and administer such fields, and fix subsidies accordingly. The autonomous entities also receive financial contributions from the budget of the state in the form of block grants.[30]

Generally speaking, the two autonomous entities in Denmark, the Faroe Islands and Greenland, exercise enumerated powers, while the central government and the Danish Parliament exercise residual powers (however, from 2005 on, the core of Danish powers in relation to the Faroe Islands are based on an enumeration). From that perspective, Faroe Islands and Greenland may be considered as fairly traditionally organised autonomies. A special feature of the Faroese autonomy is that regarding matters which belong to the central government and which have not been transferred to the Faroe Islands, "Danish legislation is not promulgated in the Faroes until the Faroese authorities have had the opportunity to express their view on it" (Olafsson 1996, p. 106). "If new Danish legislation is not approved by the Faroese authorities, it is habitually not promulgated, and the old Danish law remains in force" (Olafsson 1996, p. 108). In other words, the Legislative Assembly of the Faroe Islands can effectively exercise absolute veto power in relation to Danish legislation.

In the United Kingdom, the constitutional development has resulted in an increasing devolution and regionalisation of the country. The so-called Channel Islands, that is, Guernsey, Jersey and the Isle of Man have historically speaking a unique relationship to the English Crown. The main interest from an autonomy point of view is currently directed towards the three special areas in the U.K., namely, Northern Ireland, Scotland and Wales. A constitutional characterisation of these areas is not very simple because the country does not have any written constitution, but departs from constitutional conventions for the structure of the government. The point of departure seems to be, however, that the legislation that emerges at least in two of the areas (Scotland and Northern Ireland) is understood as delegated or devolved legislation and that the legislation of the Parliament of England takes precedence in case the regional autonomy legislation stands in conflict with an Act enacted by the national Parliament.[31]

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[29] The competencies that can be overtaken at a time agreed upon by the authorities of the Faroe Islands and Denmark are the following: the legal profession, the state church, property and possessions, industrial property, treatment of offenders, aviation, passport, the law governing the individual, the family and inheritance, police and prosecutor and the adjacent criminal law, administration of justice and the institution of courts, criminal law, immigration and border control.

[30] On the economy of the Danish autonomies, see Lyck (1996) and Mørkøre (1996).

[31] See, in particular, point 13 in *Devolution. Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee*. Presented to Parliament by the Deputy Prime Minister by Command of Her Majesty, December 2001/CM 5240. See also Leopold (1998, pp. 223–250), and Himsworth (2007, pp. 31–58).

Northern Ireland had regional self-government through its own legislative assembly, the Stormont, between 1921 and 1974, but this arrangement was suspended because of the unrest that plagued Northern Ireland. The area was thus placed under direct rule of the central government. A new attempt to establish self-government took place against the background of the so-called Good Friday Agreement between the U.K. and Ireland in 1998. The Legislative Assembly started its activities in the end of 1999, but the co-operation between the different groupings was difficult and after an infiltration scandal involving terrorist organisations, the basis of co-operation vanished completely. Northern Ireland was again placed under direct rule of London, and the local legislative work and self-government were suspended until further notice.

From 2000 on, the *Scottish* Parliament has legislative powers within internal matters such as education, health care, housing, transportation and criminal law, and a Scottish budget is administered by the Government of Scotland. The British central government has responsibility over national economy, the currency, defence and foreign policy. The tax powers of Scotland imply that an additional tax up to 3% can be imposed on the top of the regular income taxation. The creation of a Scottish parliament implied at the same time that the number of the Scottish MPs in the House of Commons of the Parliament of England was diminished. The delegation of power to *Wales* in 2000 was less comprehensive and does not involve legislative powers proper, only powers of an administrative nature. The Welsh council of self-government is responsible over such areas as education, health care and culture and is in charge of a budget for these purposes.

As concerns France, the constitutional amendments of 2003 created a platform for a further decentralisation of France by identifying in art. 72, *inter alia*, so-called special-status areas among other units of territorial jurisdiction. Under the constitutional provision, these units shall be self-governing through elected councils and have the power to make regulations. This seems to be an important delineation, because *Corsica*, an island in the Mediterranean Sea which since 1982 has enjoyed a special status under a special Act which was replaced in 1991 by a new Act of Self-Government of Corsica and supplemented in 1999 by amendments, thereby can exercise administrative powers, not legislative powers. An attempt to enlarge the powers of the Corsican Assembly was made in 2002, but in a confused political situation, the Corsican voters turned down the proposal with a slim margin in a regional referendum.[32] Currently, the Corsican Assembly has powers in such areas as education, media, training, culture, the environment, regional planning, agriculture, tourism, fiscal matters, housing, transportation and energy (Daftary 2008).

[32] According to Art. 72–1 of the French Constitution, "[w]here there is a proposal to establish a special-status territorial unit or to modify its organisation, a decision may be taken by statute to consult the voters registered in the relevant units. Voters may also be consulted on changes to the boundaries of territorial units in the conditions determined by statute." A regional entrenchment of autonomy arrangements therefore seems to be an option in France.

The Portuguese Constitution identifies two areas, *Azores* and *Madeira*, which are islands in the Atlantic Ocean, as autonomous entities with own legislative competences for each of them. However, this legislative power is to some extent circumscribed by the legislative power of the national parliament.

Among all European constitutions, only the Spanish Constitution seems to create an explicit right to autonomy. At the same time as art. 2 of the Constitution of Spain underlines the indivisible unity of the Spanish nation, it also recognizes and guarantees a right to autonomy for the different nationalities and regions which constitute the Spanish nation. The Spanish understanding of autonomy is very flexible and has resulted in that there exists, in mainland Spain and the *Canary Islands*, two different types of autonomy, that of the so-called traditional communities, such as *Catalonia* and the *Basque Country*, which have a very far-reaching legislative competence and also powers of taxation, and other autonomies, which have a somewhat lower level of competence in relation to the national parliament. In addition, the Spanish Constitution recognizes a certain administrative autonomy without legislative powers proper for the Spanish enclaves of *Ceuta* and *Melilla* on the Northern coast of Africa, bordering to Morocco. Thus the entire Spain consists of autonomous entities which on the basis of their autonomy have the right to exercise both exclusive legislative powers and such legislative powers which are concurring with those of the Spanish parliament.

Formally speaking, Italy is also, according to her Constitution, a unitary state, but it displays strong characteristics of regionalism because the entire country is divided into regions of two different types according to the extent of their legislative competences. In this respect, Italy comes close to Spain. In addition, there is a dimension of international law affecting the autonomy arrangement in Italy, because the autonomy in *Trentino-Alto Adige* includes the German speaking area of *South Tyrol* at the border with Austria. This arrangement has as its basis a treaty under international law, more specifically art. 27 of the Peace Treaty of Saint-Germain-en-Laye of 1919 and appendix IV of the Peace Treaty of 1947 with Italy.[33] A somewhat similar situation exists in the region of *Friuli-Venetia Julia* concerning its Slovenian population on the basis of the Treaty of Osimo in 1975.[34]

There is an interesting arrangement in existence in Moldova, the Constitution of which refers in art. 111 to special autonomy legislation that makes possible the delegation of legislative powers to autonomous entities. The Act concerning special legal status for *Gagauzia* (*Gagauz Yeri*) creates for that entity a legislative competence which seems to be exclusive in relation to the legislative competence of the Moldovan parliament at the same time as the executive power in Gagauzia seems to be very intertwined with the executive power of Moldova.

[33] 49 U.N.T.S. 1950.

[34] Treaty on the delimitation of the boundary line for the part not indicated as such in the Peace Treaty of 10 February 1947. UNTS Registration Number 24848. See also Bartole (1998, p. 193).

Although the former Socialist states of Eastern Europe seem to be relatively careful with the creation of autonomy arrangements within their borders, it is possible to find one in Ukraine, too. Article 136 of the Constitution of Ukraine contains rules concerning the Autonomous Republic of *Crimea*. According to the provision, Crimea is an indivisible and integrated part of Ukraine and exercises decision-making powers within the framework of the Constitution to the extent the Constitution grants decision-making powers to Crimea. The Supreme Council of Crimea has the power within its material competence to adopt norms which are binding inside the territory of Crimea. Because these norms nonetheless, under art. 135.2 of the Ukrainian Constitution, seem to exist at a norm-hierarchical level which is lower than that of the Acts of the Ukrainian parliament, it may be possible to draw the conclusion that the self-government rights of Crimea are more of a regulatory or administrative nature than of a legislative nature.

How does *Macau* (and Hong Kong) compare to its European "relatives"? Article 31 of the Constitution of the People's Republic of China grants the state the possibility to establish special administrative regions when necessary.[35] In addition, the systems to be instituted in special administrative regions (SAR) shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions. The constitutional provision is very open and does not say very much about the powers granted to an SAR, but the reference to "administrative" indicates that the powers to be exercised could be at least regulatory in nature. A necessity to establish such an SAR was evidently deemed to exist in relation to Macau (and Hong Kong) as a means to facilitate transfer of sovereignty from Portugal to China, recorded in the Joint Declaration between the governments of the two countries in 1987. A reference to art. 31 of the Constitution of China was included in art. 2.i of the Joint Declaration, which creates an international commitment for the internal solution. The domestic solution is based on a Basic Law which spells out in detail the contents of the arrangement under art. 31 of the Constitution and creates, *inter alia*, exclusive law-making powers for the legislature of Macau. However, the Basic Law seems to be a regular Act, not subject to any qualified amendment procedure in the Chinese legislature. Nonetheless, the international dimension of a temporal nature may be understood as a feature that at least to some extent elevates or enhances the normative position of the Basic Law in the Chinese legal order so as to make it an organic act of some sort (see, e.g., Cabrita 2002, p. 186 ff).

When comparing the different situations, it becomes apparent that the powers granted to autonomies are not of a similar character in terms of extension or substance. The powers do not deal with same material fields, but vary instead from case

[35] A special administrative region is apparently to be distinguished from such autonomy arrangements which are created on the basis of Art. 4 on minority rights: "Regional autonomy is practiced in areas where people of minority nationalities live in concentrated communities; in these areas organs of self- government are established to exercise the power of autonomy. All national autonomous areas are integral parts of the People's Republic of China."

to case according to the specificities of the aims to be achieved. The creation of the various autonomy arrangements does not, moreover, follow any general pattern and does not display, in all instances, clear features of minority protection. Furthermore, of the national constitutions, it seems that only the Spanish Constitution in its art. 2 formulates autonomy as a constitutional right. The variation in the creation of the autonomies is particularly interesting in respect of the norm-hierarchical level at which any given autonomy is established. The combined variation in the powers of the European autonomies and the norm-hierarchical level of the generic legislation can be illustrated in the following way (see Table 2):

It is possible to conclude on the basis of the chart summarising some key features of European autonomies that legislative powers and regulatory or administrative competence have, in many states, been granted or devolved to so-called sub-national entities.[36] At least a greater part, if not all, of these entities can be identified as autonomies. The competences devolved are, however, not of the same nature and do normally not concern the same substantive areas. Instead, it seems that the competences vary from case to case with a view to the needs that a specific case displays. The creation of individual autonomy arrangements does not follow any general pattern, and each and every autonomy arrangement is not created in order to create a minority protection arrangement. It is also important to note that only the Spanish constitution

Table 2 Various autonomy positions (see Suksi 1998, p. 169)

	Constitution		
	Basque Country Åland Islands Azores Macau and HK	Crimea Chinese Autonomies	
Legislative powers	I	III	*Regulatory powers*
	II	IV	
	Scotland Greenland Faroe Islands	Wales Corsica	
	Ordinary law		

[36] To paraphrase the name of the Conference, in the European Union, it is possible from the point of view of Community law to speak about “one union, two systems, three legal orders”: there is one European Union joining together 27 Member States, there are two political systems that are relevant within this union and to which the European Union pays attention, namely the Union itself and the individual Member State, and there are three legal orders, that of the European Community, that of the Member State, and that of the sub-state entity. From the point of view of the sub-state entities, the problem is that the Union/Community does not pay much attention at all to a sub-state entity, although such an entity is very relevant from the point of subsidiarity and from the point of view of the competences that the membership of the State in the European Union affects.

creates a constitutional right to autonomy for territorial entities. In addition, one should also be aware of the difficulties to characterise the British sub-national entities in this chart (see Table 2). The absence of a written constitution results in the absence of more definitive fixation points of these entities in the chart.

Those self-governmental arrangements that can be placed in Section I of the table can probably be considered autonomies proper. They are organized on the basis of the national constitutions of their respective "mother-countries", and special jurisdictions involving exclusive law-making powers have been created for them against the background of the constitutions. The material fields of activity they possess vary between the different autonomies, but they are entitled to make laws of their own. This brings the European areas clearly within the ambit of Article 3 of the First Protocol to the European Convention on Human Rights, which means that the legislatures must be elected in the manner prescribed in the provision.[37]

Entities in Section II of the table lack the formal constitutional delegation of law-making powers, but they nevertheless make their own laws in the spheres determined for them in ordinary legislation. From a purely formal point of view they are not in the category of autonomies in Section I, but the powers they exercise and the elevation of their status by way of non-statutory constitutional conventions or by way of customary constitutional law make them, for all practical purposes, autonomies.

Although the entities that can be placed in Section III have a certain constitutional basis, their powers are of a non-legislative kind, limited to regulatory or administrative jurisdiction and subordinated to the ordinary legislative powers of the national law-maker of the country in which they exist. Here the use of the term "autonomy" could be misleading, provided that a narrow understanding of the term is used in order to refer to territorially delineated entities with exclusive law-making powers. The powers of the regional ethnic autonomies in China to enact by-laws on the one hand and to exercise a gap-filling power on the other seem to warrant the placing of those autonomous entities in section III of the chart.[38] Section IV represents cases which probably should not be considered autonomies, but rather as regions with self-government of an administrative nature.

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[37] See, e.g., the following cases from the European human rights system: *Moureaux and others v. Belgium*, Eur. Comm. HR, Application 9267/81, D.R. 33, para. 64, and *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Publications of the European Court of Human Rights, Series A, vol. 113.

[38] See the well-argued article of Xia Chunli, "Autonomous Legislative Power in Regional Ethnic Autonomy of the People's Republic of China: the Law and the Reality" in this book. She uses the notion of legislative power, apparently in a broad sense, but arrives at a conclusion which seems to support the placing of the Chinese entities of regional ethnic autonomy (REA) in Section III of the chart because the normative powers exercised by the REA entities are not exclusive legislative powers. Instead, the by-laws and the gap-filling norms passed by the REAs emerge under the influence of the Communist Party and within the framework of a higher approval system.

5 Different Forms of Entrenchment

One of the concerns in the constitutional setting of the autonomies in section II of the above chart is the normative position of the Act concerning autonomy, which at least formally speaking, even if not necessarily *de facto*, would boil down to a possibility that the Act concerning self-government is repealed in the same order it was adopted, in most cases by simple majority in the national parliament. This durability issue may, especially in its internal form, translate itself to the method of entrenchment, which the sub-State arrangement is subject to. In this context, entrenchment means various legal guarantees for the permanency of the arrangement. It is possible to distinguish between at least six forms of entrenchment (Suksi 1998, p. 170 f). 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 *entrenchment under the right of self-determination*, which could protect existing sub-State arrangements against weakening of the arrangement 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. As concerns Macau (and Hong Kong), it is probably possible to at least point at general, special and international forms of entrenchment. As concerns Macau, the international entrenchment is the most visible form of entrenchment, but arguments in favour of general and special entrenchments could also be presented. Hence the entire system of entrenchment concerning a particular autonomy arrangement can contain several layers of entrenchment, effective at the same time.

The position of the Faroe Islands and Greenland in respect of the six categories of entrenchment is interesting: it could be argued that only the sixth form of entrenchment, entrenchment under the right of self-determination and perhaps also the second form, regional entrenchment, would be present. The former would be dependent on the fact that the inhabitants of the Faroe Islands and Greenland may

be regarded as distinct peoples, the latter on an interpretation that the alteration of the Act on self-government might have to be accepted also by the Faroese and Greenlandic assembly. However, from a formal point of view, the weak entrenchment situation leaves the Faroese and Greenlandic arrangement in a somewhat disturbing limbo. The current thinking seems to depart from the fact that a "federacy" arrangement of some kind exists between Denmark and its two "overseas" parts, the Faroe Islands and Greenland on a conventional basis. Thus the situation could be somewhat similar as in the U.K. in respect of Scotland and Wales. Therefore, concerning autonomous territories in Denmark and the U.K., it should probably also be possible to think about entrenchment in the terms of *entrenchment through constitutional conventions*. The specific legal effect of such entrenchment would, however, be somewhat difficult to pinpoint.

6 Concluding Remarks

One conclusion that can be drawn from the above account of autonomous territories is that the entities often referred to as territorial autonomies are not a coherent group of entities. Instead, the cases reviewed here display a great variation, and only a portion of them deserve to be identified as territorial autonomies proper.

Another conclusion that can be drawn is that the classical example of a state, the unitary state, is not anymore the most frequent example of a form of government, at least not in Europe. Counting together those European states which within their areas have autonomous territories of some kind with the federations (Germany, Switzerland, Austria, Russia and Belgium), the ordinary unitary states become a minority among the European states, while the states with sub-national jurisdictions constitute the majority.

It is also important to point out that all autonomy arrangements do not have the aim of protecting a certain minority population. In many cases, the creation of autonomy arrangements is connected to a general regionalization and decentralization of the state. However, there exist quite a number of autonomous areas which in one way or the other can be connected with minority protection, such as the Faroe Islands and Greenland in Denmark, the Basque Country and Catalonia in Spain, Trentino-Alto Adige and Valle d'Aosta in Italy and Gagauzia in Moldova. As concerns Macau (and Hong Kong), the autonomy arrangement does not strike an outside observer as having the aim of minority protection. It seems that the inhabitants of Macau are not to be regarded as a people under art. 1 of the CCPR, but as individuals inhabiting a territory which is the object of change of national affiliation from one country (Portugal) to another (China), and it also seems that the inhabitants of Macau are not at least for the moment to be regarded as such a minority under art. 27 of the CCPR which would be based on cultural, religious or linguistic distinction from the population in mainland China. This characterisation is corroborated by the temporal nature of the autonomy arrangement: it will cease to exist in

2049. A genuine autonomy arrangement designed for the protection of a permanent minority would not be expected to cease at a certain future date.

In case the temporal arrangement with the autonomy of Macau (and Hong Kong) were to cease in 2049, the present Chinese constitution offers certain institutional options. At the outset, however, these options seem to entail a lower level of autonomy than currently accorded to Macau. Such a form of autonomy could perhaps be of a regulatory nature, as identified in section III in the chart above. It is also conceivable that the disappearance of the international dimension of the arrangement does not cause any (greater) disruption of the domestic legislation. In such a situation, the position of Macau in the above chart would alter from the border regions between sections I and II to a situation best described by reference to section II. Finally, it should be possible, too, that the Constitution of China is amended so as to explicitly recognize legislative autonomy proper for Macau (and Hong Kong) so as to create a general entrenchment in section I of the chart or that the normative status of the Basic Law is elevated.

It is fairly unusual that the inhabitants of an autonomous territory are granted a particular regional citizenship. Such arrangements seem to be in place only in respect of Macau and Hong Kong as a general citizenship regime and in respect of the Åland Islands as an additional qualification on the top of the regular Finnish citizenship possessed by the inhabitants for the purposes of exercising some exclusive rights granted for the Åland Islanders.[39] From the point of view of the special rights accorded to the population, it can be said that the inhabitants of Macau (and Hong Kong) are singled out as a very special group of persons.

In addition, there exists a number of autonomous areas which in one way or the other are connected to treaty arrangements under international law, as Trentino-Alto Adige (treaty between Italy and Austria), Nakhitshevan in Azerbaidzhan (treaties of Moscow and Kars between the Soviet Union and Turkey), and of course Macau (joint declaration of China and Portugal) and Hong Kong (joint declaration of China and the United Kingdom). The Agreement concerning Aceh between Indonesia and the GAM is not a treaty of international law, but instead an internal agreement, although the international community was involved in the monitoring of its implementation during a limited period of time. The special dimension of the autonomy arrangement of Macau (and Hong Kong) is that the arrangement is only for a limited duration, 50 years, out of which 40 years still remain. The imposition of a time-frame for an arrangement is not altogether alien for territorial arrangements, but certain examples exist, such as concerning the Saar area between Germany and France, where a time-frame for the existence as an international

[39] In addition, under the special circumstances prevailing in New Caledonia, legislation creating prolonged residency requirements for participation in an independence referendum and elections to a local legislature have not resulted in findings of violations of human rights in regard of France. See from the U.N. Human Rights Committee the case of *Marie-Hélène Gillot et al. v. France* (Comm. 932/2000, U.N. Doc. CCPR/C/75/D/932/2000) dealing with the independence referendum and from the European Court of Human Rights the case of *Py v. France* (ECtHR, Judgment of 11 January 2005) dealing with elections to the local assembly.

protectorate has been used twice (at the end of each temporary arrangement, the population of Saar voted in a referendum for unification with Germany), and concerning Kosovo and Southern Sudan.

A temporary solution was considered also at the time when the Åland Islands issue was dealt with by the League of Nations in the beginning of the 1920s. Because the Commission of Rapporteurs employed by the League of Nations could not find evidence of any gross violations of the rights of the Åland Islanders and because the application of the Wilsonian principle of self-determination for deciding on the national affiliation of a population group was not a rule of positive public international law, the Commission did not find any immediate reason to recommend either a decision of secession or a referendum on the Åland Islands to that effect. The Commission also refrained from recommending a transitory arrangement on following grounds:[40] "A transitory expedient has also been thought of, which would consist of leaving matters as they are for a number of years, five or less, at the end of which a plebiscite should take place. This arrangement, in the opinion of its sponsors, would have the advantage of ending the state of tension which exists at present and giving time for matters to calm down and for the inhabitants to reflect more dispassionately over the guarantees which union with Finland would offer for the preservation of their Swedish individuality." Instead, the Committee of Rapporteurs, and, as it seems, also the Åland Islanders and the Finnish government, preferred a final solution.[41] The solution was at the end based on a conditional maintenance of the sovereignty of Finland. In the event that Finland would forfeit the trust placed in her by the Commission by acting against the expectations of the Commission by refusing to grant to the population the guarantees recommended, there would, according to the Commission, exist another possible solution, that is, the one which it explicitly wished to eliminate. "The interest of the Aalanders, the interests of a durable peace in the Baltic, would then force us to advice the separation of the islands from Finland, based on the wishes of the inhabitants which would be freely expressed by means of a plebiscite."[42] Here the issue of the referendum pops up as an ultimate method of resolving the matter, in case Finland would not act according to the expectations, although the Commission had stated earlier that the referendum is not a mechanism of decision-making that could be applied in this particular context.

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[40] *The Aaland Islands Question*. Report submitted to the Council of the League of Nations by the Commission of Rapporteurs. Document du Conseil B7, 21/68/106, of 16 April 1921, p. 32.

[41] The strategy has been different in the case of Kosovo, where, according to UN Security Council Resolution 1244/99, an international administration and substantial autonomy and self-government was instituted, with a view to reaching a final settlement of the issue at some future point of time. The current UNMIK-led administration of Kosovo can therefore be viewed as such a transitory arrangement which the League of Nations wished to avoid in the Åland Islands case. Whether or not this deferral of the final decision on the status of Kosovo was a good or a bad thing is not a question to be answered in this context.

[42] *The Aaland Islands Question*. Report submitted to the Council of the League of Nations by the Commission of Rapporteurs. Document du Conseil B7, 21/68/106, of 16 April 1921, p. 34.

In which direction will autonomy as a form of organisation develop in the future? Against the background of our review and especially with a view to the chart developed above (see Table 2), it seems as if autonomy, especially territorial autonomy, would be become more frequent as an internal organisational solution in the different states of the world. If a situation in which the current 200 or so states of the world undergo a disintegration and cause a fragmentation of the current world order is to be avoided,[43] one way to go in recognising legitimate claims of participation of inhabitants in different sub-state regions and even claims of self-determination is to grant autonomy to the sub-national entity. There exist also other ways of reconciling conflicting demands, such as federalism and such special mechanisms of participation that do not involve devolution of power to sub-national entities. However, in so far as the creation of territorial solutions is the way to go, it seems that section I in the chart illustrating the autonomy positions will be the main target, partly because that position will, from the norm-hierarchical point of view, offer more clarity in regard of the nature of the arrangement, partly because that position will offer most public powers to the entity, stopping short of independence. The specific issue of entrenchment will probably favour arrangements where several forms of entrenchment are effective at the same time.

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[43] At this juncture, it is necessary to make the remark that although international law does not support unilateral secession, voluntary secession is certainly possible, which was the case, e.g., in the dissolution of the State Union of Serbia and Montenegro. On different legal cases dealing with secession, such as the *Katanga*, *Tatarstan*, and *Quebec* cases, see Suksi (2005a, 12:2005, passim). On the *Ogoni* case, see Suksi (2005b, pp. 301–333), *passim*.

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