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Associate Statehood: Principles and Prospects

This paper explores the spectrum of status options available to small polities under international law. It focuses on the status of free association, which comprises a range of options between the extremes of full independence and integration into a larger state. It provides an overview of free association arrangements to which the United States is a party, and it suggests how some aspects of these arrangements could serve as useful models for the Faroes. It also indicates some considerations that might enter into a decision to construct a formal free association relationship, and the steps that could be taken to move in this direction.

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Introduction

The story is sometimes told of a traveler who, lost in the back roads of Ireland, stops to ask a farmer how to get to Dublin. The farmer scans the horizon, scratches his head, and replies: „Well, if I were you, I wouldn't start from here."

Any attempt to reconfigure the international political map must take account of its present configuration—accidental, illogical, or unjust as that configuration may be. The widespread affirmation of a right to national self-determination opened a window of opportunity for reshaping the international status quo. That window is still open, despite the caveats and qualifications that have inevitably attached to this revolutionary doctrine. I have been asked to chart for you the range of possible destinations on the other side of that window, to suggest some ways to reach those destinations, and to highlight some relevant considerations in choosing what path to take. The baggage of history is always heavy and, like the traveler in my story, you might wish that you had started from a different point. Nevertheless, through consultations and discussions such as those organized by the Constitutional Committee, you can make a collective decision about what route to take in light of where you've been, where you are, and where you want to go.

I. Status Options Under International Law

It is clear as a matter of international law that all peoples have the right of self-determination. The question is: who can exercise this right, and how? It seems to me beyond dispute at this point that the Faroese are a people with the right to determine their own political destiny, however radical this idea might once have seemed. The more complicated question, which I will attempt to address, is what this right means in concrete terms, and how to go about exercising it.

United Nations General Assembly Resolution 1541 sets out three conditions under which a „Non-Self-Governing Territory can be said to have reached a full measure of self-government":

[2] G.A.Res. 1541 (XV), Principle VI, U.N. GAOR, 15th Sess., Supp. 16, at 29, U.N.Doc.A/4684 (1960).

(a) Emergence as a sovereign independent State;
(b) Free association with an independent State; or
(c) Integration with an independent State.[2]

The idea of a non-self-governing territory is a term of art; the General Assembly created, and continues to maintain, a list of such territories. The original list was composed largely of U.N. trust territories, including territories that had been placed under League of Nations mandates after World War I, territories that had been detached from „enemy states" after World War II, and territories that were voluntarily placed on the list by administering states.[3] Greenland was on the original list of non-self-governing territories, but was removed in 1954.[4] The Faroe Islands have never been on the list.[5]

The right of self-determination has not been restricted to the territories on the General Assembly's list. These territories do, however, receive special international attention, including the requirement that the administering power regularly transmit information to the United Nations on the status of each territory under Article 73(e) of the U.N. Charter. Any people's status as less than fully self-governing is a matter of inclusive international concern, whether or not formal reporting requirements are in place with respect to that people.[6]

The three indicators of full self-government set out in Resolution 1541 can also be viewed as a list of status options for peoples who have not yet exercised their right to self-determination.[7] I will examine each of these options briefly and then explore the free association option in greater detail.

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[3] UN CHARTER, art. 77.

[4] *See Trust and Non-Self-Governing Territories, 1945-1999, at* http://www.un.org/Depts/dpi/decolonization/trust2.htm. For a critique of the process that led to Greenland's removal from the list, see Gudmundur Alfredsson, *Greenland and the Law of Political Decolonization*, 25 GERMAN YEARBOOK OF INTERNATIONAL LAW 290 (1982).

[5] *See Non-Self-Governing Territories Listed by General Assembly in 2002, at* http://www.un.org/Depts/ dpi/decolonization/trust3.htm.

[6] See generally C.I. Keitner & W.M. Reisman, *Free Association: The United States Experience*, 39 TEXAS INT'L L.J. (forthcoming). I am indebted to my work with Professor Reisman for many of the ideas in the current paper, but I take sole responsibility for all opinions expressed herein.

[7] The idea was that a non-self-governing territory would make a choice for independence, free association, or integration. An uncoerced and genuine choice for integration would be considered final. However, because the free association option involves a right of unilateral withdrawal by the associate (as explored below), this idea of a „one-shot" exercise of the right may be inappropriate in some contexts.

A. Independence

Independence is, perhaps, the most familiar and unequivocal form of external self-determination.[8] The Revolutionary Americans famously proclaimed in their Declaration of Independence of July 4, 1776:

> We, therefore, the Representatives of the United States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States, that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.

There are several remarkable aspects of the Declaration. First, it spoke the language of representative democracy (although of course only a small percentage of the population in each colony actually voted for delegates to the Continental Congress, given the restriction of the franchise to propertied white men). Like the subsequent French Revolution, the American Revolution forged a strong link between the ideas of representative democracy and self-determination. The American representatives were self-consciously acting „in the Name, and by Authority of the good People of these Colonies." Their source of authority was neither royal nor divine, but popular.

Second, the Declaration's authors asserted that „these Colonies are, and of Right ought to be Free and Independent States." Independence was a matter of right, not of privilege, nor even negotiation with the administering power. The only difference between this assertion of a right to independence and the idea of an inherent right to national self-determination is the care the Declaration takes to catalogue the injustices of the British Crown as a justification for and

[8] The term „external" self-determination generally refers to a people's choice of international status. The degree of „internal" self-determination depends on the extent to which a people's political institutions are democratic and participatory, as opposed to authoritarian.

source of this right. Non-self-governing territories and overseas colonies do not need to demonstrate abuse in order to claim independence. (The status of the right for non-„salt-water" territories is more ambiguous.[9])

Third, the Declaration dissolves all ties of allegiance and „political connection" between the newly independent states and Britain. It purports to establish a clean break between the Old World and the New.

Fourth, the Declaration specifically claims for the newly independent states the status of full and equal members of international society, with „full Power to levy War, conclude Peace contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." The Declaration's authors recognized that the essence of sovereign statehood lies not only in being, but in doing—in the ability to act, and to have those actions recognized by the international community as the actions of a sovereign state.

The Declaration of Independence did not end the American Revolutionary War. A declaration does not in itself create the reality it announces: at the risk of oversimplification, other states, and ultimately the administering power, must recognize this new status and treat the new state as „one of them." Nonetheless, in issuing the Declaration, the American colonists took a monumental step towards the creation of an independent United States.

Integration and free association, the other two forms of self-determination, do not involve a clean break. They accept that a degree of „political connection" to another people might be necessary and even desirable. They acknowledge the reality that, especially for a small polity, a people's material, strategic, and other objectives can often best be achieved in formal alliance with, rather than separately from, a larger state. Integration is the political opposite of independence; free association covers a range of options in-between.

B. Integration

Integration is the trickiest of the three options for self-determination because it is often difficult to determine when a purported choice for

[9] For a recent judicial analysis of this question, see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, *available at* http://www.lexum.umontreal.ca/csc-scc/en/pub/1998/vol2/html/1998scr2_0217.html.

integration is, in fact, a genuine expression of the popular will. Integration would occur if, for example, the people of Puerto Rico decided in a referendum to become a state of the United States.

Resolution 1541 provides:

> The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage.[10]

During the process of decolonization in Africa, certain non-self-governing territories merged with others to form larger independent states. For example, Tanganyika and Zanzibar joined to form what is now Tanzania; Togoland joined the Gold Coast to form Ghana; the Northern Cameroons joined with Nigeria; and the Southern Cameroons joined with Cameroon.[11] These unions were not uniformly unproblematic. For example, Netherlands New Guinea is listed by the United Nations as having joined with Indonesia in 1963; in fact, Indonesia was given a mandate to administer the territory in 1963 with an understanding that a referendum would follow in 1969. The territory's inhabitants call it West Papua, Indonesia persists in calling it Irian Jaya. Delegates from the territory voted unanimously in 1969 to remain administered by Indonesia in an „Act of Free Choice" that was, by some accounts, free only in name.[12] There has been, and continues to be, agitation for self-determination in the territory, even though the U.N. General Assembly approved the integration as the free expression of the population's wishes.

There is nothing intrinsically pathological about the option of integration. That said, it is unlikely to appear very attractive unless it involves significant economic or security benefits. Multicultural societies can and do flourish; but when a territorially distinct people with its own culture, history, and sense of distinct identity is faced with the choice of enshrining that identity in separate international status or merging that identity into that of an existing state, the human desire for recognition strongly suggests that the former option

[10] G.A. Resolution 1541, Principle IX(b).

[11] *See Trust and Non-Self-Governing Territories, 1945-1999, supra* note 3.

[12] *See West Papua, Member of the Unrepresented Nations and Peoples Organisation, at* http://www.unpo.org/member/wpapua/wpapua.html.

will appear preferable. While many forms of federation preserve a large degree of internal autonomy, particularly over cultural affairs, they rarely entail international status for the component units of the federation. As the American Declaration of Independence indicates, one of the things that a people often wants is to be able to do the „Things which Independent States" do. Unlike integration, free association enables a people to do some, if not all, of these things.

II. The Free Association Option

The term „free association" does not refer to a set model, but rather encompasses a range of intermediate arrangements between independence and integration. Professor Hurst Hannum touched briefly on this option in his report on „Possibilities for Increased Faroese Autonomy."[13] As Professor Hannum noted, not all free association arrangements actually use the term „free association" in their constituent documents. Nonetheless, we can identify certain common features of arrangements that fall within this category.

A free association is formed when two states of unequal power form voluntary and durable links.[14] The smaller state, the associate, delegates certain functions to the more powerful state, the principal, while maintaining its own international status. The features of associate statehood include: internal control, international status, and delegation of certain state functions to a principal, with the *power of unilateral revocation* residing in the associate.

First, an associated state will have complete control over its internal constitution. As Resolution 1541 states: „The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people." Of course, this does not preclude outside consultations. The key point is that an associated state retains, at a minimum, exclusive control over its internal affairs.

The definition of what is „external" and what is „internal" is not always self-evident, particularly as states find themselves increasingly intermeshed in regulatory regimes at both the regional and international levels. In general, however, one can expect associated states to have control over such things as education, taxation, and infra-

[13] *See* Hurst Hannum, *Possibilities for Increased Faroese Autonomy*, *at* http://www.fullveldi.fo/uploads/HurstHannum.doc.

[14] *See* Reisman & Keitner, *supra* note 5.

structure. They will generally have their own judicial systems with final authority over matters arising within the territory, but some may retain recourse to the highest judicial instance of the principal. Associated states generally have control over immigration and issue their own travel documents, although some will continue to share citizenship with the principal. Some will have their own currencies; others will share the principal's currency.

The most important feature of an association is not what competencies an associated state delegates or maintains, but the process by which the division of competencies is agreed upon, and the common understandings that underpin that division.

Resolution 1541 indicates that a free association arrangement „retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes."[15] In other words, an associated state (or „territory," in the language of the Resolution) retains the right to modify its status through an act of popular will. As a matter of international law, a principal cannot dictate the future political status of its associate: an associate always has the unilateral right to withdraw from the association. While economic, security, and other practical considerations might constrain an associate in deciding whether to exercise this option, the option is always there as a matter of right under international law.

This right of unilateral withdrawal distinguishes free association from other forms of power-sharing, such as federations. While a federation might include a right of secession as a matter of domestic constitutional law, a free association retains this right for the associate as a matter of international law. The associate delegates certain powers to the principal, but it can reclaim these powers as a matter of right if and when it so chooses. It is highly recommended that this basic principle be enshrined explicitly in a free association agreement to avoid future confusion. The right of unilateral withdrawal by the associate is a legal entitlement, not a matter of negotiation.

As suggested above, free association encompasses a range of relationships between independence and integration. The more competencies that are delegated to the principal, the farther away the

[15] G.A. Resolution 1541, Principle VII(a).

associated state will be from the „independence" end of the spectrum, and vice versa. Professor W. Michael Reisman and I have reported on five free association arrangements involving the United States. Two of these associated polities, Puerto Rico and the Northern Mariana Islands, are not recognized internationally as independent states. The three others, the Federated States of Micronesia, the Republic of the Marshall Islands, and Palau, are U.N. members, but they retain closer links with the United States than are typical of most independent states in the international system. Labels, while important, are not determinative. What matters is the substance of the relationship, and whether the population of the associated state finds that the relationship is conducive to promoting its material and symbolic needs, including the need for dignity and self-respect.

The following tables indicate some possible divisions of competencies, based on the U.S. models. The main conclusion to be drawn from the variety of arrangements is that there is no set formula for free association: it is up to each people to find the configuration that best suits its needs and interests, within the realm of what is feasible given its historical and actual relationship with the principal.

A. The Commonwealth Model

COMMONWEALTH OF PUERTO RICO

Key Legal Documents

– U.S. Public Law 600 (1950): „*Be it enacted by the Senate and House of Representatives* … That, fully recognizing the principle of government by consent, this Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption."[16] Approved in Puerto Rico by referendum. – Constitution of the Commonwealth of Puerto Rico (1952): „The Commonwealth of Puerto Rico is hereby constituted. Its political power emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America." Approved in Puerto Rico by

[16] Act of July 3, 1950, 48 U.S.C. § 731b-731e (1950).

referendum, then submitted to U.S. Congress for approval. Approved by U.S. Congress with three minor changes,[17] then re-approved in Puerto Rico by referendum.

Features of the Association

Competencies Reserved to Puerto Rico

- Elects its own Governor and legislature
- Appoints all judges, all Cabinet officials and all lesser officials in its executive branch
- Sets its own educational policies
- Determines its own budget – Amends its own civil and criminal code
- Legislative assembly has full legislative authority over local matters
- Participates directly in certain international organizations, including Caricom (observer), FAO (associate), IOC, and WHO (associate)
- Not subject to U.S. federal income tax

Competencies Delegated to U.S.

- Inhabitants have U.S. citizenship but do not vote for U.S. President
- U.S. currency is the only legal tender
- Foreign affairs and security delegated to the United States
- Public officials take an oath to support the Constitution of the United States
- U.S. federal law applies where it is not locally inapplicable
- „Fundamental" provisions of the U.S. Constitution apply to Puerto Rico

Areas of Shared Competence / Other Features

- Duty-free customs union with the U.S.
- Non-voting Resident Commissioner from Puerto Rico sits in U.S. Congress
- Amendments to Constitution of Puerto Rico must be consistent with the U.S. Constitution, with the Puerto Rico Federal Relations Act (those legal provisions relating to U.S.-Puerto Rico relations that continued in effect after the passage of Public Law 600), and with Public Law 600

[17] H.R.J. Res. of July 3, 1952, ch. 567, 66 Stat. 327.

Ongoing Issues

– Repeated referenda on the status question which have so fair failed to yield a majority on any of the options presented[18] – Disputes over the activities of the U.S. navy on the island of Vieques – Lack of precision over exactly which provisions in U.S. laws and Constitution are applicable to Puerto Rico – Continued attention by the U.N. Special Committee of 24 to the situation of Puerto Rico

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Key Legal Documents

– Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States (1975), approved in the CNMI by referendum and enacted into law after approval by U.S. Congress.[19] States that the CNMI will be „a self-governing commonwealth … in political union with and under the sovereignty of the United States of America." – Constitution of the Commonwealth of the Northern Mariana Islands (effective 1978), approved by referendum in the CNMI and by U.S. President Carter – U.N. Security Council Resolution 683 (1990) terminating the Trusteeship Agreement and declaring that the CNMI had become fully self-governing

Features of the Association

Competencies Reserved to the NMI

– Locally elected governor, lieutenant governor, and legislature
– Own trial and appeals courts
– Limited involvement in international organizations such as the South Pacific Commission, but no formal state department at this time (unlike Puerto Rico, which does have a state department)

[18] See *infra* note 28 and accompanying text.

[19] Act of March 24, 1976, Pub. L. No. 94-241, 90 Stat. 263, codified at 48 U.S.C. § 1801 (formerly § 1681); the Trusteeship was terminated by Proclamation No. 5564, 51 Fed. Reg. 40,399 (Nov. 4, 1986).

Competencies Delegated to U.S.

- Permanent inhabitants have U.S. citizenship but do not vote for U.S. President
- U.S. currency is the only legal tender
- U.S. District Court with appeal to U.S. Supreme Court on federal law matters
- Complete responsibility and authority with respect to foreign affairs and defense

Areas of Shared Competence / Other Features

- Elected representative serves as non-voting member in U.S. Congress

Ongoing Issues

- 90% of the workforce consists of alien laborers; issues with regulation of working conditions given these demographics – Unclear to what extent the U.S. can enact legislation applicable to the CNMI

B. Compacts of Free Association

THE FREELY ASSOCIATED STATES

Key Legal Documents

Federated States of Micronesia

- Constitution of the FSM (1975)
- Compact of Free Association with the U.S. (1986)
- U.N. Security Council Resolution 703 (1991) terminating the Trusteeship Agreement and recommending that the General Assembly admit the FSM to U.N. membership

Republic of the Marshall Islands

- Constitution of the RMI (1979)
- Compact of Free Association with the U.S. (1986) – U.N. Security Council Resolution 704 (1991) terminating the Trusteeship Agreement and recommending that the General Assembly admit the RMI to U.N. membership

Republic of Palau

- Constitution of Palau (1981)
- Compact of Free Association with the U.S. (1994)
- U.N. Security Council Resolution 956 (1994) terminating

the Trusteeship Agreement, and Resolution 963 (1994) recommending that the General Assembly admit Palau to U.N. membership

Features of the Associations

Competencies Reserved to the FAS

– Responsible for conducting foreign affairs in their own name and right enshrined in the Compact of Free Association, with provisions for mutual consultations with the U.S. where foreign affairs have the potential to overlap with security matters (a major difference between the FAS and the CNMI)
– Exclusive authority over internal affairs; not juridically part of the U.S.
– Maintain own police forces and have the option of establishing a coast guard
– Issue own travel documents
– Participate actively in international organizations

Competencies Delegated to U.S.

– The currency is the U.S dollar
– Exclusive U.S. authority over security and defense matters (the major U.S. interest in the islands is strategic, namely, preventing any other state from establishing a military presence)
– Provision for extending consular assistance to FAS citizens for travel outside the FAS and the U.S.

Areas of Shared Competence / Other Features

– Each compact of free association provides for a fixed term (15 years for the FSM and RMI) of U.S. financial and technical assistance
– Either party can terminate the Compact of Free Association with six months' notice, as long as agreed-upon procedures are followed, but security and defense arrangements in the Compact will persist beyond its termination and can only be terminated by mutual consent (an exception to the idea of a right to unilateral termination by the associate)
– Representatives exchanged between the FAS and the U.S. are accorded ambassadorial rank – FAS citizens may

serve voluntarily in the U.S. armed forces but cannot be drafted

Ongoing Issues

– RMI disputes with U.S. over continued use of Kwajalein Atoll as a missile testing ground, and with reparations for U.S. nuclear testing at Bikini and Enewetak Atolls from 1946 to 1958

III. Application to the Faroes

The Faroes already exhibit many of the features that characterize associated states. In particular, the Faroes have internal self-government and a degree of international personality, reflected most recently in its admission as an associate member of the International Maritime Organization. The Faroes' ability to define its own relationship with the European Union is also noteworthy. In certain aspects of international relations and foreign affairs, the Faroese already speak with their own voice, rather than through Denmark.

That said, it is clear that not all Faroese are satisfied with the current situation. Frederik Harhoff's work has demonstrated that the Home Rule arrangements in Greenland and the Faroe Islands, despite their origins in Danish legislation, will not be, and in fact cannot be, revoked by the Danish Parliament. As he explains in his thesis, the fear that home rule powers could be withdrawn unilaterally by Denmark is based on an understanding of home rule as a delegation of powers „from Danish constitutional authorities to the structurally *inferior* (Greenlandic and Faroese) Home Rule institutions."[20] Two things have happened to make this understanding obsolete: first, the internal evolution of Home Rule structures and decision-making processes within the Danish Realm; and second, the external evolution of international legal concept of the entitlements of peoples to self-determination, particularly where these peoples are territorially and culturally distinct from the administering state.

I indicate several options for reconfiguring the status of the Faroe Islands within, or separate from, the Danish Realm below. The important point at this stage is to note the opposing conceptions of the delegation of powers at play with respect to the Faroese: one

[20] FREDERIK HARHOFF, RIGSFÆLLESSKABET (English Summary) at 502.

model, now obsolete, under which the Danish central authorities delegate certain powers to the Faroese legislature, and another model, not yet explicitly entrenched, whereby the Faroese legislature delegates certain powers to Denmark. The current situation is somewhere in-between: there is a division of powers, and it would be both illegitimate as a matter of Danish constitutional law and, I would submit, illegal as a matter of international law for the Danish authorities to modify this division significantly without the consent of the Faroese people. However, if and to the extent this arrangement becomes unsatisfactory to a majority of the Faroese people, the question arises: How can the Faroese people move towards, and ultimately entrench, an alternative relationship between the Faroes and Denmark? How can you re-imagine the Danish Realm?

A. Consultation

The 1991 Report of the Secretary-General on the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples emphasizes the importance of the free, uncoerced, and well-informed exercise of the right to self-determination, and in particular the right of peoples of Non-Self-Governing Territories to „decide their future political status with complete knowledge and awareness of the full range of political options available to them, including independence."[21] Similarly, Resolution 1541 indicates that the decision to opt for free association must be „the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes."[22] The practical question, of course, becomes: who gets to decide, and how?

Theoretical and practical arguments can be, and have been, made to support a variety of alternatives. At the risk of oversimplification, the general practice seems to be that those residing in a territory are entitled to vote on its political future. This solution, of course, is far from unassailable. Even if borders are uncontested, the phenomenon of population transfers in anticipation of an upcoming referendum is not unknown. The disenfranchisement of those residing outside of the territory can also be problematic. In the case of a potentially seceding territory, should the rest of the existing political unit be consulted? (The answer in the case of a non-self-governing territory

[21] G.A. Res. 46/181, Annex, U.N. GAOR, 46th Sess., U.N. Doc. A/46/634/Rev. 1 (1991).

[22] *See* GA Resolution 1541, *supra* note 14.

with an established right to self-determination is „no," but the answer in other cases is more ambiguous.) What of those who were born in or have some connection to the territory, but are not currently residing there? Answers to this question may vary. Absentee ballots are possible in a referendum, as they are in any election, as long as procedures for establishing who is qualified to vote and how ballots will be distributed, collected, and counted are confirmed ahead of time. Both under-inclusive and over-inclusive definitions of who can participate in a referendum can generate criticism and challenges to the legitimacy and authoritativeness of the result. General agreement on procedures ahead of time and U.N. supervision of the voting process can provide useful, though not infallible, safeguards.

The Faroe Islands are both a land and a people: territory and culture are intimately connected, and one without the other is difficult to conceive. While international law speaks of the right of „peoples" to self-determination, the labeling of non-self-governing „territories" indicates a practical reality of international politics: political institutions control not just people, but territory. Although different forms of multi-layer governance may coexist in one territory (for example, religious and secular authorities, or local and national governments), the reality is that sovereignty is generally exercised within geographical borders. At the end of the day, only one source of authority is generally recognized as having the last word in a given territory. In our contemporary international system, at least in theory, that 'last word" belongs to the government of the nation-state. The basic idea that individuals residing in a territory are bound by the laws of that territory, and owe their political allegiance to the source of those laws, remains predominant.

As I understand it, the desire for self-determination is the desire to be bound by, and loyal to, institutions that one feels one can truly identify with, and in which one can see oneself reflected. Faroese Home Rule allows this to a certain extent, since the final authority on many matters of central importance is Faroese. Of course, practically speaking, the „final authority" on many questions might depend on social, economic, military and other realities that are beyond the exclusive control of either Faroese or Danish political institutions. But the basic longing to be the author of one's own destiny insofar as possible is understandable, and widely shared.

Full independence is not necessarily the best way to become the

author of one's own destiny, especially in an increasingly interdependent world. Political negotiation is about being able to leverage one's resources; the more resources one has, the more one can use them as leverage. The free association option is one way that smaller polities can leverage the resources of larger entities as part of, rather than in opposition to, their own desire to be maximally self-determining. The balance may be a precarious one and, as Professor Reisman and I have suggested, merits ongoing international scrutiny to ensure that an association remains „free" in substance, and not in name only.[23]

If the Faroese Løgting decides to hold a referendum to determine the wishes of the Faroese people, understood broadly (subject to further specification) as those living within the Faroese territory, how ought it proceed? I know that much thought has already been devoted to this question, and that proponents of the „independence process" have clear ideas about what this should entail. I therefore limit myself to offering a few additional suggestions here.

First, it is important to determine the purpose of the referendum. Is it a general tool to gauge the level of satisfaction with the current political status of the Faroes? A more specific tool to identify which among several possible options the Faroese would prefer? A means of obtaining from the Faroese people a mandate to negotiate even more proactively with Denmark about modifying the current arrangement? All of these purposes are possible, and they are not mutually exclusive. Identifying and prioritizing purposes at the outset, to the extent possible, can facilitate the process of deciding what question to ask. It is also important to remember that there can be successive referenda, for example, a mandate to negotiate for a preferred option, followed by popular approval of the outcome.

Second, it is important to determine ahead of time what will constitute a definitive result. Is there a minimum voter turnout required? Will a simple majority in favor of an option suffice, or is a greater percentage required? There is no „correct" answer to these questions, but resolving them ahead of time will help avoid political disputes down the road about what the results of a particular referendum actually signify, and how binding or authoritative they should be considered.

Third, there is the difficult task of formulating a workable question.

[23] *See* Reisman & Keitner, *supra* note 5.

For each individual voter, making a choice among options might be difficult; but understanding what the options are, and expressing one's chosen preference, should not be difficult. This means that the Faroese authorities must formulate a question that is easily understood, and that is neither too narrow nor too all-encompassing. A balanced and well-planned information campaign ahead of the referendum can be an indispensable tool in creating a well-informed electorate and in facilitating widespread popular participation in the consultation process, strengthening the legitimacy and authoritativeness of the end result.

Below, I indicate a few examples of pitfalls that the Faroe Islands might want to keep in mind in planning its own referendum. The pitfalls include: an unclear question, a question that is too narrow, a question that has too many options despite a high level of public awareness, and a question with too many options and a poor level of public awareness.

Example 1: Unclear question

The province of Québec has had a series of referenda on the question of independence, with the most recent in 1995. Referenda have been held at the instigation of the „sovereigntist" party when it has occupied a majority of the seats in the Québec Parliament (called the „National Assembly"). In the lead-up to the 1995 referendum, there was a great deal of debate about what exactly a „yes" vote would entail, and in particular whether there could be some form of „sovereignty-association" between Québec and Canada, in which Québec would retain certain benefits such as use of the Canadian dollar and membership in the North American Free Trade Agreement. The following question was posed against the backdrop of this ambiguity about what exactly Québec voters were being asked to decide:

> MONTREAL (CNN) — The official translation of the question Quebec voters face on Monday in the separation referendum:
>
> „Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995? Yes/No."
>
> Some elements in the referendum need a little translating of their own:

> The „bill“ on the future of Quebec refers to Bill 1, which proposes a framework for achieving sovereignty and was introduced in the Quebec legislature in September.
>
> The June 12 agreement refers to a declaration by three Quebec parties that support sovereignty: the Parti Quebecois, the Bloc Quebecois and the Action Democratique du Quebec party.[24]

In the end, the vote was 50.5% „no“ and 49.5% „yes“ – the closest margin in any Québec referendum on sovereignty to date. The reactions included a reference to the Supreme Court of Canada to determine whether or not Québec was entitled to secede unilaterally from the Canadian federation (the answer is basically „no“),[25] and the passage by the Canadian Parliament of the so-called „Clarity Act,“[26] which attempts to establish parameters for any subsequent referendum so that its results can more plausibly be characterized as representing, in the words of the Act based on language from the Reference opinion, the „clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada.“

Example 2: Excessively narrow question

There can also be problems with questions that are too narrow, even if they are clear. For example, there has been criticism of the 1959 referendum that led to the admission of Hawaii as a state of the United States. „[A]lthough there were several forms of government available to a territory, the Hawai'i election proposed only one option. The question on the ballot was 'shall Hawai'i immediately be admitted into the Union as a State?'“[27] In this case, one could argue that the failure to indicate the existence of other options was, if not a fatal flaw, at least a serious shortcoming. If self-determination is to be meaningful, choices must be made with an awareness both of what the options are, and of what these options entail.

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[24] *What's the question?*, October 29, 1995 (from Reuters news service), *available at* http://www.cnn.com/WORLD/9510/canada/10-29/question.html.

[25] *See Reference re Secession of Quebec*, *supra* note 8.

[26] An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference (June 29, 2000), *available at* http://laws.justice.gc.ca/en/C-31.8/32600.html.

[27] Taryn Ranae Tomasa, *Ho'Olahui: The Rebirth of A Nation*, 5 ASIAN L.J. 247, 266 (1998), citing The Admission Act of March 18, 1959, Pub. L. 86-3, 73 Stat. 4 (1959).

Example 3: Too many options; inconclusive result despite high voter turnout

A question that presents too many options can also be problematic. The Puerto Rico political status plebiscite of December 13, 1998 included the following options. The English translation of the ballot is worth citing in full, as it is instructive in both form and content:[28]

> STATEHOOD
>
> „The admission of Puerto Rico into the Union of the United States of America as a sovereign state, with rights, responsibilities and benefits completely equal to those enjoyed by the rest of the states. Retaining, furthermore, the sovereignty of Puerto Rico in those matters which are not delegated by the Constitution of the United States to the Federal Government. The right to the presidential vote and equal representation in the Senate and proportional representation in the House of Representatives, without impairment to the representation of the rest of the states. Also maintaining the present Constitution of Puerto Rico and the same Commonwealth laws; and with permanent United States citizenship guaranteed by the Constitution of the United States of America. The provisions of the Federal law on the use of the English language in the agencies and courts of the Federal Government in the fifty states of the Union shall apply equally in the State of Puerto Rico, as at present."
>
> COMMONWEALTH
>
> „The application of the sovereignty of the Congress over Puerto Rico, which by virtue of Federal Act 600 of July 3, 1950, delegates upon the Island the establishment of a government limited to matters of a strict local order under its own Constitution. Said local government shall be subject to the authority of the Congress, the Constitution and the laws and treaties of the United States. By virtue of the Treaty of Paris and the Territorial Clause of the Federal Constitution, the Congress may treat Puerto Rico differently from the states, provided a rational basis exists for doing so. The United States citizenship of the Puerto Rican people shall be statutory. English shall

[28] For the source of this translation, see *Status Option Definitions*, *at* http://www.puertorico-herald.org/issues/vol2n14/statusopdefs.shtml.

continue to be the official language of the agencies and the courts of the Federal Government which operate in Puerto Rico."

FREE ASSOCIATION

„A Treaty which recognizes the full sovereignty of Puerto Rico to develop its relationship with the United States in a non-colonial, nonterritorial association. The United States shall relinquish all of its powers over Puerto Rico upon entering into the Treaty. Puerto Rico shall retain all powers not expressly delegated to the United States. Puerto Rico shall provide over the Puerto Rican citizenship. Current United States citizens in Puerto Rico shall retain their United States citizenship if they so desire, and may pass it on to their descendants, subject to the provisions of United States laws or the Treaty. It should be construed that, as of the effectiveness of the Treaty, the mere fact of having been born in Puerto Rico shall not constitute the right to United States citizenship. The Treaty to be negotiated shall provide for in matters concerning the market, defense, the use of the dollar, economic assistance, and the protection of personal vested rights. The Treaty shall also recognize the sovereign capacity of Puerto Rico to enter into agreements and other international treaties."

INDEPENDENCE

„The recognition of the fact that Puerto Rico is a sovereign republic with full authority over its territory and its international relationships, with a Constitution that shall be the Supreme Law that provides for a republican government system and the protection of human rights. The residents of Puerto Rico shall owe allegiance to, and shall have the citizenship and nationality of, the Republic of Puerto Rico. Having been born in Puerto Rico or having relatives with statutory United States citizenship by birth, shall no longer be grounds for United States citizenship; except for those persons who had the United States citizenship, who shall have the statutory right to keep that citizenship for the rest of their lives, by right or by choice, as provided by the laws of the Congress of the United States. The benefits of the individuals residing in Puerto

> Rico, acquired because of services or contributions made to the United States, shall be honored by the United States. Puerto Rico and the United States shall develop cooperation treaties, including economic and programmatic assistance for a reasonable period, free commerce and transit, and military force status."
>
> NONE OF THE ABOVE

The voter turnout rate in this referendum was 71.3%. The results were as follows:

> Commonwealth, 993 (0.1%)
> Free Association, 4,536 (0.3%)
> Statehood, 728,157 (46.5%)
> Independence, 39,838 (2.5%)
> None of the above, 787,900 (50.3%)[29]

In other words, the end result was a perpetuation of the status quo, even though virtually no one voted for the „Commonwealth" option, which is the English word currently used to characterize Puerto Rico. (The Spanish expression is „Estado Libre Associado," a difference that itself indicates the imprecision of these categories and the use of terminology surrounding them.)

Interestingly, in 1993, 73.5% of voters turned out and gave the following answers:

> Statehood, 788,296 (46.3%)
> Commonwealth, 826,326 (48.6%)
> Independence, 75,620 (4.4%)
> Blank and void ballots, 10,748 (0.7%)[30]

The end result of that referendum was also the continuation of the status quo (Commonwealth). However, the close split between the options of „Statehood" (becoming a state in the U.S. federal union) and „Commonwealth," the two options that dominate the Puerto

[29] *See 1998 Status Plebiscite Vote Summary at* http://eleccionespuertorico.org/1998/summary.html.

[30] *See 1993 Status Plebiscite Vote Summary at* http://eleccionespuertorico.org/1993/summary.html.

Rican political status debate, produced a more meaningful response than that produced when „None of the above" was included as a formal option. This suggests that a workable question ought to navigate among the ambiguity of the Québec question, the narrowness of the Hawaiian question, and the overbreadth of the Puerto Rican inclusion of „None of the Above."

Example 4: Too many options; inconclusive result because of low voter turnout

The last example I include also presented too many options; in this case, however, this problem was compounded by low voter turnout and a general inadequacy of efforts to educate the public about the choice they were being called on to make. I will dwell for a moment on this example as it involves a territory that once belonged to Denmark and is therefore, I understand, of some interest to the Faroese: the U.S. Virgin Islands, known to you as the West Indies.

Salient historical and demographic facts include the following:[31]

- Denmark chartered the Danish West Indian Company and began colonizing St. Thomas in 1671 and St. John in 1684. Denmark later purchased St. Croix from France in 1733. Except for a brief period of English occupation during the Napoleonic Wars, the Virgin Islands remained under Danish control until 1917.
- As early as 1865, for strategic military reasons, the United States made overtures to acquire the islands. During World War I, fear that Germany might occupy the islands provided the final impetus for the United States to purchase the islands from Denmark, for $25 million on March 31, 1917. The islands were under the jurisdiction of the Department of the Navy until February 27, 1931, when an Executive order placed them under the supervision of the Department of the Interior. In 1927, Virgin Islanders were granted U.S. citizenship.
- Under legislation passed in 1968, the Virgin Islands has had

[31] This historical summary is taken from The U.S. Department of the Interior, Office of Insular Affairs, *USVI Fact Sheet* (1998), *available at* http://www.gov.vi/fastfact.html, and from U.S. Census Bureau, *Brief History of the Island Areas* (2000), http://www.census.gov/population/www/proas/pr_ia_hist.html. *See also 1999 Report on the State of the Islands—U.S. Virgin Islands*, compiled from the OIA Report on the State of the Islands, *available at* http://www.viaccess.net/politics/1999vi.html.

a democratically elected form of government since 1970. Prior to 1970, the Governor of the Virgin Islands was appointed by the President of the United States and reported to the Secretary of the Interior under the territory's 1954 revised organic act.

- The Government of the Virgin Islands is headed by a popularly elected governor and lieutenant governor for four-year terms. The lawmaking body of the Virgin Islands is a 15-member unicameral legislature. Its members are called Senator and are elected by popular vote. The judicial power of the Virgin Islands resides with the Territorial Court and the U.S. District Court.
- Since 1973, the Virgin Islands have been represented in the U.S. House of Representatives by a nonvoting delegate. The Member of Congress from the U.S. Virgin Islands possesses the same powers and privileges as Representatives from the States, with the exception of voting on the House floor.
- The resident population of the Virgin Islands is approximately 106,800, with the majority living on St. Croix and St. Thomas. English is spoken throughout the territory.
- A referendum was held in 1993 with only 10,710 or 31.4 percent of the 39,038 eligible voters participating which was below the 50 percent plus one needed. As a result, the Commission was disbanded on December 31, 1993.

Carlyle Corbin reported on the situation of the U.S. Virgin Islands to the U.N. Special Committee on Decolonization in 2002. He stated that „the 1993 referendum held in the Territory had failed mainly because the population was presented with seven options."[32] Additionally, „the level of public awareness on the process of self-determination had been low even at that time, [and] it had declined further since then."[33] The seven options presented were, as enumerated by Mr. Corbin: „integration; an interim process leading to integration; the status quo; the status quo by another name; a Commonwealth relationship; independence; and a free associated State."[34]

[32] *Special Committee Approves Draft Texts on Tokelau, United States Virgin Islands, Guam*, U.N. Press Release GA/COL/3066, *available at* http://www.un.org/News/Press/docs/2002/gacol3066.doc.htm.

[33] *Id.*

The experience in the U.S. Virgin Islands shows the dual importance of ensuring a sufficient level of public awareness in advance of a referendum, and of avoiding an excessively long list of options, particularly when many of the options overlap. For example, in the USVI, an initial referendum could have presented a choice among the basic options of integration, free association, and independence, and a subsequent referendum could have included more specific choices about the means of implementation. A people should have a genuine choice among a range of options; an uninformed and confusing choice is, in the end, no choice at all.

B. Implementation

It seems inevitable that any change in the political status of the Faroe Islands will involve negotiations with Denmark. Practically speaking, the assertion of a right is only effective if relevant others acknowledge it and modify their behavior accordingly. Maintaining a cooperative relationship with other states, when possible, is always desirable. This is true whether the Faroes retain political ties with Denmark or opt for the more radical independence option.

Whether you choose to call your constitution a Stýrisskipanarlóg (as it is currently called) or a grundlóg (the name used for the Constitution of the Danish Realm), the fact remains that any articulation of a people's constitutive principles has tremendous normative force. Whether these principles operate in conjunction with or to the exclusion of other norms depends on the territory's political structure. For example, each State of the United States has its own constitution; this does not prevent States from deferring to the federal government on matters that fall within federal jurisdiction. Although the basic dividing line between state and federal powers is enshrined in the U.S. Constitution, the precise contours of this boundary are constantly re-negotiated through formal and informal channels. This process of evolution and adaptation is driven by both legislative and judicial action, and occurs in response to and alongside shifts in the priorities and understandings of a dynamic civil society. Political arrangements, no matter how deeply entrenched, are never wholly static.

Given this fluidity, it may be helpful to think of the choice among political status options as a choice among basic frameworks. A wide range of social, economic, and diplomatic considerations will enter

[34] *Id.*

into any political status decision, and will shape the ultimate form that a choice among the frameworks of integration, free association, and independence will take. Some of the possible outcomes include:

1. Revision of the Faroese Constitution to reflect a more assertive and vibrant sense of national identity. Maintenance of the current outlines of Home Rule, with a possibility for expansion of competencies, particularly in the legal and judicial fields. Movement towards formal recognition as an equal partner in the Danish Realm, rather than a subordinate member. (I would not present this as an exercise of the right of self-determination in favor of integration, but rather a decision to continue with the status quo, subject to periodic re-evaluation.)
2. Removal of the Faroe Islands from the Danish Realm as a matter of constitutional law; replacement of constitutional ties with ties based on some form of free association agreement. Allocation of functions and resources according to a mutually acceptable arrangement, with the understanding that the Faroes retain the right of unilateral withdrawal. Development of an autonomous Faroese judiciary. Increased assumption of responsibility for foreign affairs, including diplomatic missions in key countries. Maintenance of Danish currency, citizenship, and travel documents.
3. Declaration of Faroese independence as a matter of international law. Application for U.N. membership. Maintenance of cooperative ties with Denmark insofar as politically possible, particularly in the areas of security, defense, and consular assistance to Faroese nationals abroad.

Elements of these options can also be combined: if there is one lesson to be taken from the experience of other self-determining polities, it is that the main constraints on creativity are logistical (involving resources and infrastructure) rather than legal. There are also important emotional considerations that should not be underestimated in evaluating which framework to choose, and how to go about implementing it. A principal that feels rebuffed or rejected by its would-be associate is unlikely to be very accommodating; an associate that feels an immediate need to assert its self-sufficiency might be tempted to „go it alone“ more than is strategically wise or

economically feasible. As a general matter, and as long as a people's fundamental dignity is protected throughout, an incremental approach to autonomy is preferable to a radical rupture. This is a question of prudence and common sense. Laying the foundations for the ultimate exercise of political sovereignty requires building and strengthening a polity's institutional infrastructure and human resource base, in addition to designing an appropriate legal and political framework. The incentive structures of electoral politics often lead to decisions based on short-term cost-benefit calculations; to the extent possible, self-determination decisions should be made and implemented with a longer-term perspective.

With or without immediate change in the political arrangement between the Faroes and Denmark, a clear emphasis on Faroese self-government as a matter of Faroese right rather than Danish prerogative can go a long way towards altering the tenor of political interactions over time. This can set the stage for the periodic reassessment and, if desired, reconfiguration of the existing relationship in a context of mutual consideration and respect.

Conclusions

This analysis has suggested some options for self-determination that take account of the practical constraints on small polities in international relations. Its purpose is to assist you in choosing a form of self-government that enables you most effectively to achieve your social, cultural, economic, and diplomatic goals. For this reason, I would encourage you to begin by defining your collective priorities, and then to ascertain what division of authority and responsibility will best enable you to realize them, rather than treating a particular status option as an end in itself.

While some might dismiss free association as a polite term for modern colonialism, the fact remains that even larger states are finding benefits in forging durable political links, as illustrated by the deepening of ties within the European Union. In certain respects, an association is like a marriage: dividing up specific tasks is less important than determining what common understandings will underpin the relationship and govern its evolution over time. It would be anomalous, for example, for one of the parties to have exclusive authority, or to be able to dictate the terms of the arrangement irrespective of the other's wishes. That said, any relationship is

fundamentally a matter of compromise. Compromise is worthwhile when both parties benefit in the longer term and are better able to reach their individual and collective goals through a division of labor. It becomes pathological when one of the parties' goals systematically dominate or displace the other's. As Professor Reisman and I have indicated elsewhere, associations are not antithetical to self-determination; to the contrary, they can be an effective means of enjoying greater influence over outcomes as a result of aggregated resources and greater international presence.[35] However, because associations of the type described here involve parties of unequal size and power, they require ongoing international scrutiny to ensure that they remain a means, and not an obstacle, to the associate's social and political goals, and to the basic human dignity of its members.

The internal evolution of Home Rule structures and the shift in international legal understandings of the right to self-determination have made the old conceptual underpinnings of the Faroese-Danish relationship obsolete. The question is how to re-imagine them. Virtually every politically organized society has an understandable desire to be able to do the „Things which Independent States may of right do." However, being able to do these things is not solely a matter of right. Effectively performing the functions of governance requires establishing and maintaining a sustainable political and economic infrastructure. Designing and fortifying this infrastructure is not a legal pre-requisite for increased political independence, but it may be a practical one.

At its core, the right of self-determination is the right to determine one's own political destiny, not a prescription for what form that destiny should take. There is no magic formula or „right" way to do things, but rather a range of possibilities limited primarily by the practical and human considerations alluded to above. Free association encompasses a range of relationships along the spectrum from integration to independence. You now have at your disposal a list of some of the typical „ingredients" of a free association arrangement, but it is up to you to piece together your own recipe in accordance with the needs and desires of your own unique appetite. Even an expert chef can do no more than suggest options: the choice, and the consequences, belong to you.

[35] *See* Reisman & Keitner, *supra* note 5.